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Telephone Consumers Ask Supreme Court to Deny AT&T Petition

The plaintiffs who convinced two federal courts that a consumer services agreement developed by AT&T was unlawful are asking the U.S. Supreme Court not to intervene and to deny AT&T's petition for review. *AT&T Corp. v. Ting et al.*, No. 02-1521, brief in opposition filed (U.S., 5/30/2003); See previous story in Telecommunications Industry LR, June 3, 2003, P. 4.

When the Federal Communications Commission ended the practice of requiring rates and terms of conditions of long-distance telephone service to be set according to filed tariffs, in its place it required carriers to establish contracts with their long-distance telephone customers. After delaying the effective date twice, the FCC required that the contracts be in place by July 31, 2001.

AT&T responded to the new mandate by developing a standardized "consumer services agreement." The agreement included legal remedies provisions that limited causes of action, attempted to narrow the scope of AT&T's liability, and provided for mandatory binding arbitration before the American

Arbitration Association.

AT&T sent notice of the new agreement to some of its customers as an enclosure with billing statements, and to others via a special mailing, even though AT&T's own research indicated that a small percentage of customers would pay any attention to the documents. In any event, the messages sent to customers assured them that they would not have to do anything, and that their service or billing would not change under the new agreement.

California resident Darcy Ting and Consumer Action, a California consumer rights organization, filed a class action suit challenging the agreement's legality.

Following a trial, Judge Bernard Zimmerman of the U.S. District Court for the Northern District of California declared that the limitations on customers' rights that AT&T's agreement sought to impose violated California law and public policy. He characterized the agreement as an attempt by AT&T to shield itself from liability in a manner that was illegal, unconscionable and in violation of California law.

AT&T appealed to the U.S.

Court of Appeals for the 9th Circuit, arguing that the lawfulness of the rates, terms and conditions under which it provides long-distance services is governed exclusively by, and is preempted by, Sections 201 and 202 of the federal Communications Act.

The appeals court rejected AT&T's preemption argument, saying it was contrary to both the text and structure of the Communications Act. It particularly noted that the FCC's detariffing orders indicated that Congress intended to replace the filing of tariffs with a market-based mechanism that expressly encompassed state law. The court found no conflict between California's unconscionability law and federal law, because it did not interfere with Congress' method for effectuating the purpose of the Communications Act.

The 9th Circuit agreed with the District Court's conclusion that the consumer services agreement was procedurally unconscionable because AT&T imposed it on its customers without opportunity for negotiation, modification or waiver.

The appeals court said the agreement was sent to customers

in such a way that few customers realized they were receiving a contract, which was offered on a take-it-or-leave-it basis.

The 9th Circuit also affirmed the District Court's declaration that the agreement was substantively unconscionable because of its bar on class actions, an arbitration fee-splitting provision and a confidentiality provision. It said the ban on class actions was unconscionable because it was manifestly one-sided.

The fee-splitting provision violated California law because it imposed prohibitive costs, effectively deterring consumers from vindicating their statutory rights.

The confidentiality provision in AT&T's agreement required that any arbitration decision was to remain confidential. The flaw in the provision, the 9th Circuit said, was that it placed AT&T in a far superior legal position by ensuring that potential opponents did not have access to precedent, while allowing AT&T to accumulate a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. The provision also had the likely effect of preventing potential plaintiffs from obtaining information they might need to build their cases.

AT&T petitioned the U.S. Supreme Court to review the 9th Circuit's ruling because of the conflict that AT&T said was now being created among the circuits.

It cited the decision in *Boomer v. AT&T*, 309 F.3d 404 (7th Cir. 2002), in which the 7th Circuit held that Sections 201 and 202 of the Communications Act continue to preempt state law challenges to arbitration provisions, even after detariffing.

AT&T also argued that the 9th Circuit's decision conflicts with several previous decisions of the Supreme Court that have consistently held that Sections 201 and 203 preempt state law challenges to the rates, terms and conditions of service, whether or not a carrier is subject to the tariffing requirements of Section 203.

It asked the court to reverse the 9th Circuit's ruling, lest the ruling subvert the FCC's regulation of the long-distance industry. In particular, it noted that as a matter of practice all long-distance carriers include agreements similar to AT&T's, and all of these provisions are subject to challenge under the 9th Circuit's decision.

In the brief in opposition to AT&T's petition, Ting takes issue with each of AT&T's assertions. Ting argues that whatever divergences there may be between this case and the 7th Circuit's decision in *Boomer*, they do not justify the high court's intervention.

First, Ting argues that each of the cases involved different contracts, because different agreements were in effect. Ting also claims that since the Commun-

ications Act now has provisions that explicitly save and rely upon state consumer protection statutes, this case raises legal issues that are unlikely to surface in many other cases, and should not be the basis for making broad pronouncements of law by the Supreme Court.

The court should not intervene for the additional reason that it would be premature to do so, Ting argues. Since this case and *Boomer* are the only decisions by federal courts of appeal addressing the extent of preemption since detariffing, the law on the question should be allowed to develop, Ting says.

Ting also rebuts AT&T's assertion that the decision below will adversely affect the long-distance industry and subvert the FCC's regulation of it.

"Nothing could be further from the truth," Ting argues. "The 9th Circuit's decision simply prevents AT&T from eliminating its customers' rights under state law - rights that the FCC has said those customers may enforce to protect [themselves]."

For all of these reasons, Ting asks the court to deny AT&T's petition.

Ting is represented by F. Paul Bland Jr. and Michael J. Quirk of Trial Lawyers for Public Justice in Washington, D.C.; Arthur H. Bryant and Kate Gordon of TLPJ in Oakland, Calif.; and James C. Sturdevant and Karen L. Hindin of the Sturdevant Law Firm in San

Francisco.

AT&T is represented by Mark C. Rosenblum, Edward R. Barillari and Howard Spierer of AT&T Corp. in Bedminster, N.J., and by David W. Carpenter, Paul J. Zidlicky, Mark E. Haddad and Jennifer A. Ratner of Sidley Austin Brown & Wood's Chicago and Los Angeles offices.