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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

DARCY TING, individually and on behalf of all others similarly situated, and CONSUMER ACTION, a non-profit membership organization, both as private attorneys general, Plaintiffs, vs. AT&T, a New York corporation, Defendant.	Case No. C 012969 BZ ADR **CLASS ACTION** **PLAINTIFFS' POST-TRIAL BRIEF REPLY** Trial Date: November 13, 2001 The Honorable Bernard Zimmerman

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INTRODUCTION

As we have established in previous briefing, the Federal Communications Act ("FCA"), 47 U.S.C. § 201, *et seq.*, contains an explicit Savings Clause, and Note C to section 152 of the FCA explicitly bars claims of implied preemption. According to AT&T, this Court may not form its own judgments of these provisions, because it is "required" to follow the FCC's statements (or at least AT&T's interpretation of those statements) about the preemptive effect of the FCA. (AT&T Post-Trial Brief ("APTB") at 4)

By its terms, section 4 of the CSA limits punitive and other statutorily-provided damages not for negligence, but for "any other claim," and provides that these limitations "apply whether the claim is based on contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory." According to AT&T, this Court should not read that language to mean what it says, but should defer to AT&T's purported good intentions and Professor Priest's reading of these words.

By its terms, the confidentiality provision in section 4 of the CSA provides that consumers may not "disclose the existence, content, or results of any arbitration or award, except as may be required by law. . . ." According to AT&T, this Court should not read this language, because AT&T's witness, Mr. Delery, testified that two years ago a non-lawyer (Mr. McEldowney) failed to tell AT&T of its significance, because another non-lawyer (Mr. Delery himself) says he didn't mean anything unreasonable by it, and because another non-lawyer (Mr. Pines) says he doesn't read such provisions literally.

On these points and several others, AT&T misunderstands and understates the role and responsibilities of this Court. It is this Court's obligation to decide the meaning and legal effect of the words of the FCA, the Consumer Legal Remedies Act ("CLRA"), the Unfair Competition Law ("UCL") and the CSA, however uncomfortable those meanings are for AT&T. The plain language of these statutes and the CSA establish that California state law of unconscionability governs this case, and that sections 4 and 7 of the CSA are illegal and unenforceable under that law.

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ARGUMENT

I. THE FCA DOES NOT PREEMPT PLAINTIFFS' CLAIMS

A. There is No "Conflict" Preemption Under the FCA.

AT&T points out that in addition to express preemption (which it apparently concedes does not exist here), state laws may be preempted when they "conflict" with the purpose of a federal statute. (APTB at 3) AT&T apparently misunderstands, however, that "conflict preemption" is used interchangeably in the precedents with the phrase "implied preemption,"[1] and that Note C to section 152 of the FCA provides that the Act has no preemptive effect as to state law unless *expressly* stated in the Act.

In its statement of the purposes of the FCA, AT&T also leaves out the fact that in adopting the 1996 Amendments to the FCA, Congress was deeply concerned with principles of federalism, and added a Savings Clause for state law and Note C to section 152. Accordingly, one of Congress's central purposes in passing the 1996 amendments was to preserve state law from preemption. (*See* Plaintiffs' Post-Trial Brief at 14)

B. The FCC's Statements Do Not Require This Court to Find Preemption.

AT&T's reading of the FCC's statements would require this Court to ignore much of the FCC's language. While AT&T would have it that state law only plays a role with respect to whether the parties agreed to a contract (without respect to whether that contract is valid under state law), the FCC repeatedly states that carriers are subject to state "consumer protection laws." State consumer protection laws generally do not play a role with respect to whether parties agree to a contract, however, but apply instead to the legality and validity of business arrangements. AT&T effectively reads the phrase "consumer protection laws" out of numerous FCC statements.[2]

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[1] *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 1919 (2000) (referring to a "possibility of implied [conflict] pre-emption") (brackets in original, quoting from *Freightline Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). The opinion again equates the two terms at 120 S.Ct. at 1921.

[2] In its post-trial brief, AT&T does not even adhere to its previous argument that state laws relating to contract formation are saved from FCA preemption. According to AT&T, "even if" California law barred the formation of contracts with unconscionable terms, that law would be preempted. (APTB at 5) AT&T cites to no authority for this position, and no such authority exists.

AT&T claims that this Court is not free to reach its own judgment as to the meaning of the FCA's preemption provisions, because it is "required" to adopt the FCC's position (as AT&T reads that position). (APTB at 5) AT&T's statement of law was squarely rejected by the Supreme Court in a case involving the FCC in language that directly applies to AT&T's theory here:

> [A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow depreciation practices for intrastate rate-making purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 374 (1986) (emphasis added).[3] Even if the FCC had said what AT&T claims it said, let there be no more talk about how this Court is "required" not to look at the statute because of such statements. Courts have jurisdiction and do sometimes find that federal statutes do not preempt state law even where the Government argues in support of preemption.[4]

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[3] *See also Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress"). Courts only look to the views of an agency where Congress has not unambiguously expressed its intent. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 1300 (2000). In the *FDA* case, the Supreme Court further explained that resolving that the question of whether Congress had expressed its intent required the Court to look at the context of the Food and Drug Act, the statutory scheme as a whole, subsequent enactments of the Congress, and "common sense." After undertaking such an analysis, the Court rejected the agency's determination of the scope of its own jurisdiction. According to AT&T's approach, the Supreme Court was "required" to reach the opposite result by *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). (APTB at 4-5)

[4] *E.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257-58 (1984) (rejecting position of the United States because it conflicted with Congress's intent); *U.S. v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1239 (3rd Cir. 1986) ("Because the regulations on which FmHA relies do not have the force of a congressional directive and because there is no indication that Congress intended an agency regulation to supersede long-standing uniform state law in this area, we decline to accept the government's position that the regulations control.")

C. There is No Field Preemption Here.

"Field preemption" is "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." *Fireman's Fund Ins. Co. v. City of Lodi*, 2001 WL 1416545 *14 (9th Cir. Oct. 30, 2001). It is flatly impossible to claim that the FCA preempts the field, when even AT&T acknowledges that state regulation of contract formation is preserved. Moreover, given the presence of the Savings Clause in § 253 of the FCA, field preemption is foreclosed. In the *Lodi* case, for example, the Ninth Circuit noted that there is no "field preemption" with CERCLA because there are "savings clauses to preserve the ability of states to regulate in the field. . . ." *Id*. at *16.

D. AT&T's Position Contradicts Its Own Approach in Other Cases.

Attached to Plaintiffs' Request for Judicial Notice, Exhibit 1 thereto, is the Recommended Ruling on Defendants' Motions in *AT&T v. Southern New England Telephone Co./MCI Telecommunications Corp. v. Southern New England Telephone Company,* Civil Nos. 3:97 CV01056 and 00810 (AHN) (D. Conn.) of United States Magistrate Judge Garfinkel, dated December 8, 1997. Plaintiffs request that this Court take judicial notice of this opinion, pursuant to FRE 201. In that case, as the Recommended Ruling makes clear, AT&T sued Southern New England Telephone ("SNET") for alleged violations of the Connecticut Unfair Trade Practices Act, and brought no claims under the FCA. Recommended Ruling at 6, n.3. The lengthy opinion traces the reasons why SNET's arguments of FCA preemption did not defeat AT&T's claim under that state consumer protection statute, and in adopting AT&T's position in the case pursued an analysis that is very similar to plaintiffs' approach here, focusing heavily upon the FCA's Savings Clauses for state law claims. To put it mildly, there is enormous tension between the position taken by AT&T in the *SNET* case and its position here.

E. It Is of No Consequence that the FCC Has Not Prohibited Limitations on Liability.

Since the FCA does not preempt state consumer protection laws, and therefore recognizes the possibility that states may provide greater protections than does federal law, it does not matter whether the CSA would pass muster under the FCA. Thus, AT&T's citation to cases indicating

that courts have upheld limitations on liability under the filed rate doctrine (APTB at 21-22) are irrelevant as to whether such limitations are conscionable under California law.

F. It is Of No Consequence that an Individual's Right to Participate in a Class Action May Be Waived Under Some Federal Statutes.

AT&T cites to several cases holding that the Truth in Lending Act does not prohibit contracts containing arbitration provisions that foreclose class actions.[5] (APTB at 8) This case is not about the proper interpretation of the provisions or the legislative intent underlying TILA, however, and the California Supreme Court has conclusively determined that arbitration clauses that prohibit class actions fall outside of the reasonable expectations of AT&T's customers. Several other jurisdictions have reached similar conclusions with respect to state law conscionability challenges. *See Powertel v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999) (arbitration clause's prohibition on class actions one factor in finding it to be unconscionable); *In re Knepp*, 229 B.R. 821, 827 (N.D. Ala. 1999) (same).

II. AT&T IMPROPERLY ASKS THIS COURT TO RE-WRITE SECTION 4 OF THE CSA

Plaintiffs will not re-hash what has already been said about this issue, except to note that AT&T's post-trial brief proposes, for the first time, a bizarre new reading of the last sentence of the second paragraph of the CSA. AT&T asks this Court to ignore the broad language of this sentence, which sweeps in nearly every conceivable cause of action, and instead to pretend that this sentence is dealing with negligence. The actual sentence reads: "THESE LIMITATIONS APPLY. . . WHETHER THE CLAIM IS BASED ON CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE THEORY." Faced with the fact that this statement is illegal under California law, AT&T asks this Court to rewrite this sentence as follows: "THESE LIMITATIONS APPLY **ONLY TO NEGLIGENCE CLAIMS, IF THOSE CLAIMS ARE 'STYLED' AS A CLAIM** BASED ON CONTRACT,

[5] AT&T does not mention other case law disagreeing with its position on this point. *See Lozada v. Dale Baker Oldsmobile*, 91 F. Supp.2d 1087 (W.D. Mich. 2000) (finding that TILA does prohibit contracts that waive the right to proceed on a class action basis).

TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE THEORY." This reading bears no relation to the actual language.

III. THE CONFIDENTIALITY REQUIREMENT IN AT&T'S CSA IS SUBSTANTIVELY UNCONSCIONABLE

The confidentiality provision in the CSA is substantively unconscionable. Contrary to testimony prior to and during trial, the confidentiality provision is not supported by any provision in the FCA or in the Due Process Protocol. First, Mr. Delery testified in his Declaration in Opposition to the Motion for Preliminary Injunction that the source of the confidentiality provision section 22 of the FCA, 47 U.S.C. § 222.[6] Section 222(c) bars only AT&T, not any consumer, from disclosing personal information about the consumer absent "approval" from the consumer.

Section 4b of the CSA provides as follows:

> Any arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content, or results of any arbitration or award, except as may be required by law, or to confirm and enforce an award.

At the trial, Mr. Delery confirmed this prior testimony, testifying that by including the confidential provision in the CSA, AT&T "[was] putting in language that had some basis from the past." (Trial Transcript at 325:12 (November 30, 2001)) The only thing he could have been referring to was section 222(c) of the FCA. In its Post-Trial Brief, AT&T contends that the language of the confidentiality provision is consistent with the Due Process Protocol. (APTB at 23:21-24) AAA's Due Process Protocol (JE 17, comment 34) provides as follows with respect to "Confidentiality and Arbitration":

> Consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues.[7]

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[6] Delery Declaration, filed on August 16, 2001, at 15, ¶ 40.

[7] The Reporter's Comments to the confidentiality provision in the Protocol notes "the dilemma opposed by the tension between the desire for confidentiality in arbitration and the need to provide Consumers access to information regarding arbitrators and sponsoring independent ADR institutions, (continued...)

The provision in the Protocol is consistent with common practice in private contractual arbitration - namely, that there is an expectation of privacy in the "hearing" itself and that the arbitrator can make "evidentiary rulings" concerning issues of privilege. The Protocol is consistent with the limited confidentiality of the "hearing" itself and the AAA Commercial Dispute Resolution Procedures Arbitration. (JE 16 at 13, R-25 "Attendance at Hearings"; *see also* Plaintiffs' Brief in Support of Motion for Preliminary Injunction at 20 n. 9, and Exhibit 9 to the Declaration of James C. Sturdevant filed therewith on August 9, 2001)

In sharp contrast, the confidentiality provision in the CSA can only be described as a gag rule intended to prohibit the consumer from disclosing to anyone even the existence of the dispute which results in arbitration. It cannot be squared with any provision in the FCA or the Due Process Protocol or the Commercial Dispute Resolution Procedures.

IV. THE FCC CONSENT DECREES PROFFERED BY AT&T ARE ENTIRELY CONSISTENT WITH PLAINTIFFS' ALLEGATIONS

AT&T argues that the FCC has been an effective advocate for consumers. Whatever the merit of that assertion, as the FCA and the FCC's own statements make clear, consumers have the right to pursue state law causes of action as well as remedies through the FCC. Moreover, plaintiffs contend that the FCC has not been effective at recovering monetary relief for large numbers of consumers.[8] Mr. McEldowney testified that the FCC has generally been ineffective in advocating for consumers. Nonetheless, he noted that after 17 years of inaction it was finally prodded by direct Congressional action into taking some actions to deal with slamming in the last few years. (Trial Transcript at 196:7-11 (Nov. 12, 2001)) The vast majority of the consent decrees proffered by AT&T fit into this mold – AT&T's post-trial Exhibits D (involving Bell Atlantic), F (involving MCI), G (Excel), H (Sprint), J (All American Telephone), L (America's

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[7] (...continued)
including case statistics, data on recent arbitrations and other pertinent information." (citations omitted) The Advisory Committee recommended that that matter be the focus of "serious study" in the future. (JE 17 at 34-35)

[8] AT&T apparently concedes this point. (APTB at 8-9, *citing Krauss v. MCI*, 14 FCC Rcd 2770, 2775-76 (¶ 10)(1999))

Tele-Network), M (Business Discount Plan), and N (Coleman Enterprises) are all slamming cases from last year in which all the money recovered (if any) was to go to the Treasury. These exhibits do nothing more than confirm Mr. McEldowney's testimony – after Congress specifically reacted to nearly 17 years of the FCC's inaction, in the year 2000 the FCC finally began to do something in the one area of slamming.

V. AT&T MAY NOT BE EXCUSED FROM COMPLYING WITH CALIFORNIA'S CONSUMER PROTECTION LAWS ON THE GROUNDS THAT THEY IMPOSE "UNNECESSARY COSTS"

AT&T argues that "avoiding unnecessary costs, including litigation costs, is essential to keeping prices low in a highly competitive market." (APTB at 20) The avoidance of litigation costs will not justify overriding a state's consumer protection laws. As another court recently noted in rejecting this rationale for compulsory arbitration, "although the . . . Defendants characterize defending themselves in federal court as 'unnecessary expenses,' undoubtedly every defendant before every tribunal harbors a similar sentiment. Just because defending oneself in court takes money and time does not substantiate a motion to stay [the civil action pending resolution of the arbitration]." *Baychar, Inc. v. Frisby Technologies*, 2001 WL 856626 at *10 (D. Me. July 26, 2001).

VI. AT&T'S ARGUMENTS WITH RESPECT TO "SURPRISE" LACK MERIT

Faced with the evidence from its own internal quantitative marketing study that 90% of its customers would not read the CSA's arbitration provision (JE 10 at 23) and evidence from one of the best known pollsters in the U.S. that only 13% of AT&T's customers remember receiving the CSA and only 6% think they agreed to its provisions, AT&T now argues that it does not matter whether consumers know about the CSA's limitations on constitutional and statutory rights because the word "surprise" is a legal construct unrelated to a consumer's actual understanding or perceptions. Instead, according to AT&T, surprise exists only if a consumer who actually reads an entire document of reasonable length would have understood it.

AT&T's version of the law of unconscionability turns the doctrine on its head, and guts the consumer protection value of the doctrine. There is an objective component to the law of

surprise – a consumer may not sign her or his name immediately under a bold, clearly written provision and later claim to have been surprised by it. Nonetheless, the key point is that where consumers *reasonably* did not learn of a provision, that constitutes surprise that enhances a finding of procedural unconscionability. Thus, California law is clear that where the design and placement of information ensures that consumers are unlikely to read it (as, in the examples in AT&T's brief, where something is hidden in the back of a long document), then this is likely to lead to consumer surprise and is an *additional* factor supporting a showing of unconscionability.

In this case, AT&T's Quantitative Study and Ms. Lake's testimony provide direct confirmation of what AT&T's Qualitative Study predicted and what Mr. Hilsee said: when AT&T told its customers in the detariffing cover letter in bold letters the "reassuring" information that they didn't need to do anything, the vast majority of them read no further and discarded the information. The fact that the overwhelming majority of AT&T's customers did not read the CSA after being told that they did not need to do so shows that this surprise was reasonable and even predictable. This is a far more concrete evidentiary showing of "surprise" than having a court guess or presume that consumers are not likely to have read something towards the end of a long document, and greatly enhances the showing of procedural unconscionability beyond the minimum necessary for plaintiffs to prevail under California law.

AT&T points out that Ms. Ting read the arbitration provision of the CSA.[9] Ms. Ting is a professional who works for a consumer group, and she is thus one of the 13% in the Lake Snell Perry poll. AT&T points out that Ms. Lake readily found the arbitration in the CSA. Ms. Lake received the CSA after she had received a phone call from counsel telling her that we wished her to survey AT&T consumers about an arbitration clause, and she received it with a letter from counsel setting out the issues and a copy of the complaint. Under these circumstances, she would naturally be one of the 10% of customers whom the Quantitative Study found would read section 7 of the CSA. Finally, AT&T claims that Mr. Hilsee agreed that the CSA's text was

[9] The fact that the four named individual plaintiffs in *Badie v. Bank of America*, 67 Cal.App.4th 779, 79 Cal.Rptr.2d 273, 290 n. 11 (1998) read the ADR provision in the bill stuffer came as "no surprise" to the appellate court since they were the ones who challenged the ADR provisions. In addition, in this case AT&T stipulated to certification of the plaintiff class.

adequate to inform consumers about the arbitration clause. (APTB at 16) In fact, after making plain that he believed the design of the CSA mailing would prevent nearly all consumers from finding these clauses, he merely agreed with counsel's circular question that "[i]f they had read it, they would have read that, I guess. Is that what you're asking?" (Tr. 158, ll. 11-12)

VII. AT&T'S ANSWERS TO THE HYPOTHETICALS ARE INCOMPLETE

While space does not permit a detailed response to AT&T's hypothetical answers, a few key points are in order. First, AT&T argues that it "automatically" will give customers a "one-time credit" for small changes to their phone bills. However admirable this purported customer service policy may be, it is merely a discretionary policy that could change at any time. (*See* CSA § 9 ("We may change this Agreement, including the incorporated AT&T Service Guides, from time to time.")) California's consumer protection *laws* – a set of statutory requirements that give rise to enforceable *rights* which may not be waived – may not be disregarded because a company pledges voluntarily to pay off any sums it owes to its consumers. This case is about consumers' legal, constitutional and statutory *rights*, not preferences as expressed in focus groups.

Second, AT&T says that it will pay nearly all of the arbitrators' fees in claims involving less than $1,000, and that it "heavily subsidizes" the arbitration fees, ignoring the fact that it is entitled under the plain language of the CSA to recover them whenever it prevails. Although AT&T claims that it is not likely to exercise this right, California's consumer protection laws cannot rest upon the purported good will of a company, particularly one that has imposed such unconscionable terms on consumers in the first place.[10]

DATED: December 3, 2001

Respectfully submitted,

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[10] AT&T also speaks about the possibility of pro bono arbitrators, ignoring the testimony of AAA's official representatives that show what an insignificant point this is. (*See* text and citations at Plaintiffs' Trial Brief at 20, n.18)

Attorneys for Plaintiffs ::ODMA\MHODMA\TLPJ_DC;56384;1