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COURT OF APPEALS  
DIVISION 111  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 243991

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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MICHAEL McKEE

Respondent,

v.

AT&T CORP.

Appellant

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APPELLANT AT&T CORP.'S SUPPLEMENTAL BRIEF

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## I. INTRODUCTION

The Court has requested supplemental briefing on the impact that two recently decided Washington Supreme Court opinions may have on this appeal. The two cases are Dix v. ICT Group, Inc., 161 P.3d 1016 (2007), and Scott v. Cingular Wireless, 161 P.3d 1000 (2007). Neither opinion precludes this Court from reversing the trial court's decision, as AT&T has requested, for the following reasons.

*First*, if this Court determines that the FCA does not preempt McKee's claim that the class action waiver in section 7 of AT&T's CSA is substantively unconscionable, Scott has no bearing on anything other than the enforceability of the "no class" clause. It does not permit this Court to uphold the trial court's decision to deny AT&T's Motion to Compel Arbitration or to find other provisions of the CSA procedurally or substantively unconscionable. 161 P.3d at 1009 n.7. Accordingly, if this Court finds no preemption, then the arbitrator, not this or any other Court, must decide whether the terms and conditions in AT&T's CSA are substantively unconscionable, in addition to deciding the merits of McKee's claims against AT&T.<sup>1</sup> This result is entirely consistent with Scott and harmonizes Scott with Zuver v. Airtouch Communications, Inc.,

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<sup>1</sup> As AT&T has argued in its briefing, the arbitrator should decide whether sections 4, 7, and 8(f) of the CSA contain "unlawful or unconscionable clauses" as McKee suggests. CP 430.

153 Wn.2d 293, 103 P.3d 753 (2004) (Court may sever unconscionable terms and preserve the essential term of arbitration).

*Second*, the Federal Communications Act, 47 U.S.C. § 151 *et seq.* ("*FCA* ") preempts McKee's state law claims based upon the terms and conditions in AT&T's Consumer Services Agreement ("*CSA*"), including his challenge to section 7 of the CSA that contains the arbitration agreement at issue in this appeal. The Washington Supreme Court did not consider preemption in either case. Accordingly, the FCC's decisions and the key cases on point still require the FCC, not this Court, to determine whether the terms and conditions of AT&T's CSA are substantively unconscionable. This is particularly true where, as here, AT&T's CSA contains a governing law provision under which the terms and conditions of the CSA are governed by the FCA or, alternatively, New York state law. CP 138.

*Third*, AT&T's CSA provides McKee "feasible avenue[s] for seeking relief." These avenues include individual arbitrations, small claims court, and adjudication by the FCC. Thus, this case is not analogous to the facts presented in *Dix*, where America Online's Terms of Service Agreement had included a forum selection clause that effectively barred plaintiffs from any "feasible avenue for seeking relief." 161 P.3d at 1024.

## II. ARGUMENT

### A. **If the FCA Does Not Preempt McKee's State Law Claims, this Court Should Sever the Class Action Waiver Under Scott v. Cingular and Compel Arbitration.**

If this Court finds that the FCA does not preempt McKee's challenges to AT&T's CSA, Scott only permits the Court to strike the "no class" clause in the arbitration provision of the CSA if it deems the provision unconscionable; it does not permit this Court to uphold the trial court's decision to deny AT&T's Motion to Compel Arbitration or to find provisions located elsewhere in the CSA procedurally and substantively unconscionable.

In Scott, the Washington Supreme Court decided whether an arbitration clause containing a provision prohibiting class action litigation or arbitration was substantively unconscionable under Washington law. 161 P.3d at 1005. The plaintiffs had purchased cellular telephones and calling plans from Cingular, and agreed to a preprinted services agreement that contained a clause requiring mandatory arbitration. *Id.* at 1003. The plaintiffs sued Cingular, alleging that they were improperly billed for long distance and/or out-of-network roaming calls. *Id.* Cingular's arbitration provision provided that each party may "bring claims only in its individual capacity, and not as a plaintiff or class member in any purported class or

representative proceeding." Brf. of Resp. Cingular Wireless, 2005 WL 3981922, \*2. Furthermore, Cingular's arbitration provision provided that "if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void." 161 P.3d at 1003.

"[N]o party argue[d] for severability [of the arbitration clause]" in Cingular's wireless services agreement, so the court enforced "the language of the agreement between the parties and conclude [d] that the entirety of the arbitration clause [was] null and void." Id. at 1009. The court also noted: "Nothing in this opinion should be taken to prevent the parties from agreeing to submit their disputes to class wide arbitration." Id. at 1009 n.6. The Scott court concluded only that "class action waivers that prevent vindication of rights secured by the CPA are invalid." Id. at 1009 n.7. It follows that if a class action waiver does not prevent vindication of rights secured by the CPA, it is not invalid. The court stated that "whether any particular class action waiver is unenforceable will turn on the facts of the particular case." Id. For example, one dispositive fact in Scott was that "no claims from Washington consumers have been brought to arbitration against Cingular in the past six years." Id. at 1007. However, unlike Cingular, AT&T presented evidence that consumers filed 439 cases against AT&T in small claims court, CP 128, and that the consumer prevailed in 272 of those cases. Id. The total

amount of damages sought in those matters was \$789,859.95, and of that amount, AT&T paid \$432,920.28 in small claims judgments. Id.

Moreover, section 7 of AT&T's CSA does not contain language that renders the entirety of its arbitration agreement "null and void" if a specific proviso is found to be unenforceable. In fact, section 7 explicitly provides to the contrary: "If any portion of this Dispute Resolution Section is determined to be unenforceable, then the remainder shall be given full force and effect." CP 136-37; 698. The Washington Supreme Court made it clear in Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 320, 103 P.3d 753 (2004), that "when the parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration." Section 7 of AT&T's CSA contains such a severability clause, and if this Court finds that the FCA does not preempt McKee's substantive unconscionability challenges to AT&T's CSA - particularly with respect to section 7 - the Scott decision only permits it to strike the class action waiver in section 7, not section 7 in its entirety. This Court should then permit an arbitrator to decide whether the remaining provisions of AT&T's CSA are procedurally or substantively unconscionable on a class-wide basis.

**B. The FCA Preempts McKee's State Law Claims.**

In Scott, the Washington Supreme Court did not consider the question of whether the FCA preempted plaintiffs' challenges to Cingular Wireless's standard preprinted services agreements. 161P.3d at 1003. As AT&T argued in its opening brief and in reply, the FCC, not Washington state courts, should determine whether certain terms or conditions of AT&T's CSA are substantively unconscionable or otherwise violate the substantive standards of the FCA. See, e.g., AT&T's Opening Brief at 18-27; AT&T's Reply Brief at 9-10; 12 FCC Rcd. at 15,057 (distinguishing between FCC determinations regarding the "lawfulness of rates, terms, and conditions" from "other issues, such as contract formation and breach"). The terms and conditions of long-distance agreements like the CSA are governed by federal law set out in the FCA. The choice of law clause in AT&T's CSA expressly states that the FCA governs the CSA "to the full extent applicable." CP 138. Section 7 of the CSA, the arbitration provisions, are "also [but not exclusively] governed by the Federal Arbitration Act." CP 138. The trial court erred when it held that Washington state law governed the entire CSA, including the arbitration provisions in section 7. As AT&T argued in its previous briefing, Boomer v. AT&T Corp. was the first case that held that the FCA preempts unconscionability challenges to the terms of long-distance agreements.

309 F.3d 404 (7th Cir. 2002). Boomer has since been followed by other courts and was recently reaffirmed by a New York court in World-Link, Inc. v. Mezun.com, Inc., 14 Misc.3d 745, 827 N.Y.S.2d 642 (N.Y. Sup. Ct. 2006). In that case, World-Link moved "for partial summary judgment as to liability in connection with the provision of telecommunications services to defendant Mezun.com" based upon a Carrier Service Agreement ("Agreement") under which Mezun failed to credit World-Link "for payments made by Mezun's customers." Mezun argued, in part, that World-Link's "action to recover charges [was] time-barred, based upon a provision of the Agreement which state[d] that if any billing dispute is `not resolved within 120 days of the date the dispute is submitted, the disputing party must initiate legal proceedings ....'" Id. at 750. Moreover, if New York law, and not the FCA, governed the Agreement based upon a choice of law clause, World-Link argued that "Mezun [would receive] lower charges for service than World-Link's other customers, which impliedly conflicts with the congressional objective of ensuring that carriers charge nondiscriminatory and uniform rates." Id. at 749.

The court first considered how the 1996 amendments to the FCA affected the "carriers' obligations to prohibit discrimination and the charging of unreasonable rates." Id. at 754. The court compared the

decisions in Boomer and Ting and concluded that "[c]ontrary to Ting's holding, I am persuaded that the congressional objective of ensuring nondiscrimination and equality of rates, embodied in sections 201 and 202, is ineluctably linked with, and achieved by, enforcing uniformity of *rates, terms, and conditions of service*, contained in customer-carrier service agreements." Id. at 755 (emphasis added).

In the present case, the trial court held that numerous provisions of AT&T's CSA, including the arbitration provision, were substantively unconscionable. However, this decision "invalidat[es] [the] obligations in the [CSA] [and] undoubtedly conflicts with the congressional objective that nondiscrimination and equality be achieved by enforcing uniform rates, terms and conditions of service set forth in long distance service contracts." Id. at 757. Thus, this Court should find, as the World-Link court recently did, that the FCA preempts McKee's state law challenges to AT&T's CSA. Any other result would grant McKee and other Washington residents "preferential treatment," where AT&T's "other, similarly situated customers are still bound by the rates, teems, and conditions of service set forth in their respective agreements." Id. McKee and other Washington residents should not be entitled "to receive different rates, terms, and conditions of service" from AT&T's other customers. See id. This is true both with respect to the terms and conditions

contained in the CSA apart from section 7, and the arbitration provisions of section 7 themselves.

**C. McKee Has Feasible Avenues for Seeking Relief.**

The forum selection clause at issue in Dix provided that Virginia state law governed the agreement and, importantly, Virginia state law "does not allow class actions for suits like plaintiffs' suit." 161 P.3d at 1017-18. In Dix, the plaintiffs alleged that America Online, Inc. ("AOL") "unilaterally and wrongfully created and charged them for secondary membership accounts." Id. at 1017. The plaintiffs brought a class action lawsuit, alleging, among other causes of action, violations of Washington's Consumer Protection Act ("CPA"). Id. AOL's Terms of Service Agreement ("TOS"), however, contained "an agreement between the plaintiffs and AOL" that included a forum selection clause, selecting Virginia as the sole forum for bringing any suit based upon the TOS agreement. Id. While the court stated that "the forum selection clause in the AOL contract at issue is unenforceable on public policy grounds," the court noted that a forum selection clause is unenforceable only to the extent that "the lack of a class action procedure leaves the plaintiff with *no feasible avenue* for seeking relief for violations of the CPA" (emphasis added). Id. at 1024. The court further confirmed that "where the value of an individual claim is significant or the absence of a class action would

not, when viewed objectively, be likely to deter an individual action, public policy does not defeat a forum selection clause." Id.

Unlike the forum selection clause in Dix, AT&T's CSA is unlikely to deter McKee's (or any other consumer's) individual action. As AT&T argued in its reply brief, McKee (or any other consumer) has numerous "feasible avenue[s]" for seeking relief from AT&T under its CSA for any alleged violations of Washington's CPA, including:

- **Small Claims Court.** The Agreement provides that consumers may bring small claims court actions. CP 136. Small claims court is recognized as often a better option than a class action for resolving small claims because "certification of ... a class can promote complicated lengthy legal embattlement," while small claims court allows parties to resolve disputes "expeditiously and with minimum costs and fees." See Pulver v. 1" Lake Props., Inc., 681 So.2d 965, 970 (La. Ct. App. 1996). AT&T submitted evidence showing that from August 2001 to March 2005, consumers filed 439 cases against AT&T in small claims court, CP 128, and that the consumer prevailed in 272 of those cases. Id. The total amount of damages sought in those matters was \$789,859.95, and of that amount, AT&T paid \$432,920.28 in small claims judgments. Id.
- **FCC Complaints.** The Agreement provides that consumers may file complaints with the FCC. CP 136. Other courts have found that such options mitigate strongly against a finding of unconscionability. See, e.g., Rivera v. AT&T Corp., 420 F.Supp.2d 1312 (S.D. Fla. 2006) ("Federal law provides a third option: an individual may file a complaint with the Federal Communications Commission, which shall investigate the matter to determine any wrongdoing.").
- **Arbitration.** Of the 30 arbitrated matters, the consumer was successful in receiving compensation from AT&T in 21 matters. CP 128-29. Arbitration only requires payment of a \$20 filing fee

for any "desk" arbitration or telephonic arbitration with a claim of less than \$10,000. CP 130. AT&T pays all other administrative fees under the terms of the CSA. CP 130. For as little as \$20, a consumer like McKee can resolve his claims against AT&T and can ultimately recover that fee if he prevails.

These avenues were not mentioned as being available to the plaintiffs in Dix and the unavailability of these "feasible avenues of relief" was the touchstone of the court's decision. *Id.* at 1024. Conversely, the CSA simply does not preclude McKee (or any other allegedly aggrieved consumer) from seeking relief against AT&T under Washington's CPA. McKee (or any other consumer) can file his claim in small claims court or with the FCC or participate in an arbitration. Unlike the effect of AT&T's governing law clause, which provides that the FCA and New York law govern the CSA, AOL's TOS agreement precluded "class actions in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small value claims." *Id.* Here, McKee has several economically feasible options to bring his small value claim. He has presented no persuasive evidence that small claims court, an FCC complaint, or an arbitration will otherwise deter him from doing so.

### **III. CONCLUSION**

For the reasons stated herein, AT&T asks this Court to reverse the trial court's decision denying AT&T's motion to compel arbitration.

RESPECTFULLY SUBMITTED this 13th day of September 2007.

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