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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 243991

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

MICHAEL McKEE

Respondent,

v.

AT&T CORP.

Appellant

**APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY
HONORABLE JOHN E. BRIDGES**

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

On August 30, 2006, this Court stayed proceedings in the present case pending resolution of two cases before the Washington Supreme Court. On July 12, 2007, the Supreme Court issued decisions in those cases: *Scott v. Cingular Wireless LLC*, --- Wn. 2d ----, 161 P.3d 1000 (2007), and *Dix v. ICT Group, Inc.*, 160 Wn. 2d 826, 161 P.3d 1016 (2007). Accordingly, on August 13, 2007, this Court entered a ruling lifting the stay of proceedings and requesting supplemental briefs regarding the application of *Scott* and *Dix*. Pursuant to this ruling, McKee submits this brief to explain why, in the wake of *Scott* and *Dix*, it is clear that the remaining issues in this case must be resolved in favor of McKee.

First, *Scott* and *Dix* conclusively put to rest any doubt as to whether AT&T's class action ban is unconscionable under Washington law. *Scott* makes clear that a class action ban in a consumer contract is unenforceable where, as here, the term "effectively prevents one party to the contract, the consumer, from pursuing valid claims, effectively exculpating the drafter from potential liability for small claims, no matter how widespread." 161 P.3d at 1008. *Dix*, likewise, held that a forum selection clause cannot be enforced where it "precludes class actions for small-value CPA claims and there is no feasible alternative avenue for seeking relief on such claims." 160 Wn. 2d at 840-81. The same factors

relied on by the Supreme Court in *Scott* and *Dix* in reaching these conclusions clearly render AT&T's class action ban exculpatory and unenforceable under Washington law.

Second, *Scott* and *Dix* conclusively resolve the choice-of-law issue in favor of McKee. AT&T has argued at length that this Court should ignore normal principles of Washington State contract law in favor of New York law, which AT&T argues would enforce its ban on class actions. McKee responded with uncontroversial black-letter choice-of-law principles providing that this Court must apply Washington law if the application of New York law would violate a fundamental policy of Washington State. AT&T's only response in its Reply was to confidently assert that there could be no possible violation of a fundamental Washington policy, because Washington law also supposedly favored the enforcement of class action bans in arbitration clauses. *Scott* and *Dix* emphatically put an end to AT&T's assertion on this point, however, and demonstrate conclusively that, to the extent that New York law would permit AT&T to impose its class action ban on its customers, enforcing AT&T's choice-of-law clause would violate fundamental policies of this state.

Third, AT&T argues that this Court may not strike down its ban on class actions, because the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1

et. seq., supposedly preempts any state laws that would limit the terms that a corporation might embed into an arbitration clause. This same argument was vehemently made by Cingular Wireless in the *Scott* case, however, and was completely rejected by the Washington Supreme Court. As *Scott* recognizes, nothing in the FAA overrides normal principles of Washington contract law that bar the enforcement of exculpatory contractual terms such as AT&T's class action ban. Furthermore, the fact that the court in *Dix* struck down a ban on class actions in a case having *nothing to do with arbitration* makes clear that Washington's rule against enforcing exculpatory class action bans is a rule of general applicability, and thus that the rule cannot be preempted by the FAA.

Fourth, the *Scott* decision strongly supports McKee's position that the Federal Communications Act ("FCA"), 47 U.S.C. § 201 and 47 U.S.C. § 202, does not preempt Washington contract law. While AT&T repeatedly stresses the federal law components of the FCA's scheme, at least three different provisions of the FCA rely upon state laws (including, explicitly, state "consumer protection" laws) to safeguard the rights of telecommunications consumers. As noted above, however, under the *Scott* decision, AT&T's class action ban would effectively gut Washington's consumer protection laws in many settings. Accordingly, *Scott* supports McKee's core point that AT&T's preemption argument would render the

FCA internally incoherent-the Act cannot simultaneously rely upon state consumer protection laws as a central element of its provisions, but prohibit state contract laws that are necessary to preserve those state consumer protection laws from contract terms that would gut them.

ARGUMENT

I. LIKE THE COURT IN *SCOTT*, THIS COURT SHOULD DECIDE THE VALIDITY OF THE CLASS ACTION BAN IN AT&T'S ARBITRATION CLAUSE.

It is black-letter law that challenges to the enforceability of an arbitration clause must be decided by the court, not an arbitrator. Here, McKee's unconscionability challenge relates to AT&T's arbitration clause, and is not directed at the contract as a whole. Accordingly, the enforceability of the arbitration clause and provisions therein are issues for this Court, and not an arbitrator, to decide.

The U.S. Supreme Court has held that challenges to a contract as a whole, and "not specifically to the arbitration clause," are for an arbitrator to decide. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 499 (2006). However, the Court made clear that its holding was based on the fact that the plaintiffs in that case, in response to the motion to compel arbitration, had "challenge[d] the Agreement, but *not specifically its arbitration provisions.*" *Id.* at 446 (emphasis added). In opposing AT&T's motion to compel individual arbitration, McKee, in contrast, does

not argue that arbitration is inappropriate because the enterprise of providing long distance service is illegal.¹ Rather, his challenge here applies very specifically to a provision in AT&T's arbitration clause—the class action ban—that purports to limit how the arbitrator can operate.

The terms of AT&T's own contract make clear that AT&T's class action ban is a fundamental feature of and limitation on the arbitration system that AT&T has created.² In AT&T's Opening Brief ("AOB"), it explained that section 7 of its Customer Service Agreement ("CSA") provided for decision by "arbitration . . . instead of in a . . . class action." AOB at 8-9. It went on to explain that the same section of the CSA provided both that the arbitration would be required to take place under the rules of the American Arbitration Association ("AAA") and that the arbitration could not proceed on a class action basis. AOB at 9. Thus, McKee's opposition to arbitration is not a broad attack upon the CSA as a whole, but is directed at a central element of the arbitration clause specifically. Given this, under *Buckeye*, the enforceability of AT&T's class action ban is a question for the court, not an arbitrator.

Likewise, AT&T's statement that the trial court invalidated AT&T's entire CSA, Reply at 3, misreads the court's decision. *See* RP 1 at 8 (noting that the question before the court was "whether or not the Consumer Services Agreement should be disregarded with regard to the mandatory arbitration clause"); *id.* at 9 (noting that the "third question is whether or not the dispute resolution provision, arbitration clause, in other words, is substantively unconscionable").

² Of course, as explained in part IV of this brief, *infra*, class action bans are in no way inherent to arbitration *per se*.

Thus, the New Jersey Supreme Court recently held that the validity of a class action ban is for the court to decide. In *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006), the defendant argued that the enforceability of a ban on class actions that would limit the ability of the arbitrator to conduct the case is a question for the arbitrator and not the court. The court flatly rejected that argument, and held that because the "class-arbitration waivers . . . are part of the arbitration agreements, and not part of the contracts as a whole," the court was "empowered to address this challenge." *Id.* at 96. The court then struck the class action ban under New Jersey law. *Id.* at 100-01.³

The *Muhammad* case is only one of a large number of decisions in which courts, rather than arbitrators, have determined the validity of class action bans and other terms in arbitration clauses. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir. 2006) (noting that "[b]ecause the denial of class arbitration in the pursuit of antitrust claims has the potential to prevent Plaintiffs from vindicating their statutory rights,

³ At any rate, AT&T has not argued that the enforceability of the *class action ban* in its arbitration clause is for the arbitrator to decide. Rather, AT&T's argument appears to be that, because McKee challenged unconscionable provisions of the CSA in addition to the class action ban, this somehow constituted a challenge to the entire CSA. While it is true that McKee originally challenged several other unconscionable provisions in the CSA that AT&T submitted in support of its motion to compel arbitration (a term shortening the statute of limitations, a confidentiality clause, and a limitation on liability), MOB at 4-5, 32 n. 10, each of these unconscionable terms was either embedded in the arbitration clause, expressly limited the power of the arbitrator to award relief, or both. CP 1118-19. Thus, the trial court properly considered them when deciding the enforceability of AT&T's arbitration clause. RP 1 at 10-11.

Plaintiffs present a question of arbitrability" for a court to decide, and striking class action ban on grounds that consumer antitrust plaintiffs could not vindicate their rights absent a class action); *Cooper v. QC Financial Services, Inc.*, --- F. Supp. 2d ----, 2007 WL 974100, *8, *15-19 (D. Ariz. Mar. 30, 2007) (explaining that "the Court has jurisdiction to address Plaintiff's claims directed solely to the arbitration provision," and striking the class action ban in the defendant's arbitration clause); *Skirchak v. Dynamics Research Corp., Inc.*, 432 F. Supp. 2d 175 (D. Mass. 2006) (striking employer's class action ban in arbitration clause under Massachusetts law); *Wong v. T-Mobile U.S.A.*, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (class action ban in arbitration clause unenforceable under Michigan law); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006) (class action ban in arbitration clause invalid under Illinois law); *Vasquez-Lopez v. Beneficial Oregon*, 152 P.3d 940, 947-48, 949-51 (Or. Ct. App. 2007) (affirming that challenge to arbitration clause was for court to decide, and holding class action ban unconscionable under Oregon law); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (class action ban in arbitration clause unconscionable under Pennsylvania law).

Even where an arbitration clause is challenged on grounds that are *also* applicable to the contract as a whole-such as procedural

unconscionability-this does not alter the rule that challenges to the validity of the arbitration clause must be decided by a court. *See, e.g., Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1268-77 (9th Cir. 2006); *Coady v. Cross County Bank*, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007).

Therefore, this Court, and not an arbitrator, must decide whether the class action ban in AT&T's arbitration clause is enforceable.

II. SCOTT AND DIX DEMONSTRATE THAT AT&T'S CLASS ACTION BAN IS UNENFORCEABLE UNDER WASHINGTON LAW.

A. Scott Conclusively Resolves in McKee's Favor All Issues Relating to the Substantive Unconscionability of AT&T's Class Action Ban.

AT&T argued that the ban on class actions is not unconscionable, AT&T's Opening Brief ("AOB") at 45-46, and that "Washington upholds class action waiver clauses, even when they are contained in arbitration provisions." AOB at 46, n. 22. In AT&T's Reply, it characterized the position that class action bans in arbitration clauses are enforceable as "nearly unanimous" among courts. Reply at 14. McKee disputed these propositions at length. McKee's Opening Brief ("MOB") at 32-38, citing to Washington and other authorities establishing that a ban on class actions is unconscionable where it would act as an exculpatory clause preventing consumers with individually small dollar value claims (such as

those at issue here) from holding the corporate drafter liable under state consumer protection laws.

The *Scott* court conclusively and firmly rejected AT&T's position and embraced that taken by McKee here. The court stated its conclusion and holding at the outset of its opinion:

[T]he class action waiver is unconscionable because it effectively denies large numbers of consumers the protection of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW, and because it effectively exculpates Cingular from liability for a whole class of wrongful conduct. It is, therefore, unenforceable.

Scott, 161 P.3d at 1003.

In response to McKee's argument that AT&T's class action ban, while nominally mutual, was effectively one-sided, AT&T argued that "there is no rule" invalidating contract terms that benefit only one side. AOB at 20. The *Scott* court directly refuted this argument, holding that "[a] clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law." *Scott*, 161 P.3d at 1008.

AT&T further asserted, at length, that its customers could readily obtain a remedy for any wrongs they had suffered, notwithstanding the small magnitude of their individual claims. Reply at 17-19. AT&T argued that, for example, that "there is no basis for McKee's argument . . . that contractual bans on class actions serve as exculpatory clauses"

Reply at 15. AT&T insisted, "The Agreement does *not* immunize AT&T from liability." *Id.* at 2. The Supreme Court, in *Scott*, refuted similar claims at length: -----

Of course, on its face, the class action waiver does not exculpate Cingular from anything; it merely channels dispute resolution into individual arbitration proceedings or small claims court. But in effect, this exculpates Cingular from legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery. As the ever inimitable Judge Posner has aptly noted, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30." *Carnegie [v. Household Intern., Inc.]*, 376 F.3d 656, 661 (7th Cir. 2004)].

In such cases, the ability to proceed as a class transforms a merely theoretically possible remedy into a real one. *Gilman v. Wheat, First Securities, Inc.*, 345 Md. 361, 381, 692 A.2d 454 (1997) (class actions have a "penumbral remedial aspect" in that they "may make relief that otherwise might only be potentially available to a plaintiff actually available"). It is often the only meaningful type of redress available for small but widespread injuries. *See, e.g., Discover Bank [v. Superior Court]*, 36 Cal.4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 [2005]; *Gilman*, 345 Md. at 378, 692 A.2d 454. Without it, many consumers may not even realize that they have a claim. *Accord Abels v. JBC Legal Group, P. C.*, 227 F.R.D. 541, 547 (N.D. Cal. 2005) (quoting *Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill. 1998)). The class action provides a mechanism to alert them to this fact. Second, again, claims as small as those in this case are impracticable to pursue on an individual basis even in small claims court, and particularly in arbitration. Shifting the cost of arbitration to Cingular does not seem likely to make it worth the time, energy, and stress to pursue such individually small claims. . . .

While technically the plaintiffs are not prevented from hiring an attorney, practically, attorneys are generally unwilling to take on individual arbitrations to recover trivial amounts of money. This

is, of course, precisely why class actions were created in the first place. As Judge Seinfeld of the Court of Appeals rightly noted:

Washington courts favor a liberal interpretation of CR 23 as the rules avoids multiplicity of litigation, "saves members of the class the cost and trouble of filing individual suits[,] and ... also frees the defendant from the harassment of identical future litigation." "[A] primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significance size and importance if taken as a group." As a federal court has stated, "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action." *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 318-19, 54 P.3d 665 (2002) (alteration in original) (quoting *Brown v. Brown*, 6 Wash. App. 249, 256-57, 253, 492 P.2d 581 (1971) and *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968)).

We agree and conclude that since this clause bars any class action, in arbitration or without, it functions to exculpate the drafter from liability for a broad range of undefined wrongful conduct, including potentially intentional wrongful conduct, and that such exculpation clauses are substantively unconscionable. *Cf. Luna [v. Household Finance Corp. III]*, 236 F.Supp.2d 1166, 1177-79 (W.D. Wash. 2002)] (finding under Washington law that class action waiver in an arbitration rider was substantively unconscionable).

Like the arbitration clause found unconscionable in *Zuver*, this class action waiver effectively prevents one party to the contract, the consumer, from pursuing valid claims, effectively exculpating the drafter from potential liability for small claims, no matter how widespread. *See Zuver [v. Airtouch Communications, Inc.]*, 153 Wn. 2d 293, 317-18, 103 P.3d 753 (2004)]; *accord Muhammad*, 189 N.J. at 20-21, 912 A.2d 88 (striking class action waiver that functioned as an exculpation clause). A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law for denying any meaningful

remedy. *Zuver*, 153 Wash. 2d at 318, 103 P.3d 753; *see also Adler [v. Fred Lind Manor*, 153 Wn. 2d 331, 357-58, 103 P.3d 773 (2004)]; *cf. Riensche v. Cingular Wireless L.L.C.*, No. C06-1325Z, 2006 WL3827477, *13, 2007 U.S. Dist. LEXIS 93747, at *40-41 (W.D. Wash. Dec. 27, 2006) (finding Cingular's class action ban substantively unconscionable under Washington law).

Scott, 161 P.3d at 1007-08.

The *Scott* court's reasoning applies in spades to AT&T's class action ban. First, there is nothing about AT&T's arbitration clause that could render it more enforceable than Cingular's under Washington law. Both clauses expressly ban customers from bringing or participating in class actions. *Compare* AOB at 36 (quoting AT&T clause) *with Scott*, 161 P.3d at 1003 (quoting Cingular clause). Both class action bans are nominally mutual, but effectively one-sided. *Compare* MOB at 34 (explaining that "AT&T's ban on class actions is a one-sided term that strips its customers of a remedy that many would invoke over time, but strips no remedy from AT&T that it would ever wish to pursue") *with Scott*, 161 P.3d at 1008 (recognizing that Cingular's class action ban "effectively prevents one party to the contract, the consumer, from pursuing valid claims" and "severely limits the remedies of only one side"). Both arbitration clauses permit consumers to bring cases in small claims court. *Compare* CP 136 (providing that AT&T customers "have the right to take any dispute that qualifies to small claims court rather than

arbitration") *with Scott*, 161 P.3d at 1007 (holding that the availability of small claims court to Cingular customers made no difference to the court's finding of unconscionability, since "claims as small as those in this case are impracticable to pursue on an individual basis even in small claims court").

In addition, the Cingular arbitration clause struck down in *Scott*, unlike AT&T's clause, provides that Cingular will pay arbitration fees as well as attorneys' fees. *Compare* CP 137 (provision in AT&T's clause providing that "You must pay the applicable AAA filing fee when you submit your written request for arbitration to AAA" and that "each party will pay its own expenses to participate in the arbitration, including attorneys' fees") *with Scott*, 161 P.3d at 1007 (noting that Cingular's offer to pay "all AAA filing, administrative, and arbitrator fees unless the arbitrator finds the claim frivolous, and . . . attorneys fees under certain circumstances" did not change its determination that the class action ban rendered the clause unconscionable). Likewise, the Cingular clause struck down in *Scott* did not require confidentiality, reduce the time within which a consumer could bring a claim, or limit Cingular's liability. The fact that the Washington Supreme Court held Cingular's class action ban unconscionable despite these other "consumer friendly" terms makes clear that AT&T's class action ban alone is exculpatory and unenforceable,

regardless of which version of the CSA this Court considers. *See* MOB at 32 n. 10.

Moreover, just as in *Scott*, AT&T has allegedly cheated a large number of customers out of individually small sums of money. *Compare* CP 838-39 (alleging that plaintiffs have been charged utility tax surcharges and late fees of approximately 1.5% of their phone bills per month) *with* *Scott*, 161 P.3d at 1002 (plaintiffs alleged that "Cingular had overcharged consumers between \$1 a month and around \$45 a month by unlawfully adding roaming and hidden charges").

Finally, just as in *Scott*, the uncontradicted factual record in this case shows that if AT&T is able to bar its customers from participating in a class action, few if any of them will have any remedy for this wrong no matter how valid their claims are. *Compare* *Scott*, 161 P. 3d at 1003-04, 1007 (describing declarations submitted by plaintiffs' experts, who testified that private lawsuits were essential to enforcement of consumer protection laws and that the plaintiffs' claims were so small and complex that it would not be cost-effective to litigate them individually) *with* MOB at 5-6, 36 (summarizing similar testimony by plaintiffs' experts in this case).

In sum, just as in *Scott*, AT&T seeks to prohibit its customers from bringing "the only meaningful type of redress available for small but

widespread injuries." 161 P.3d at 1007. Thus, *Scott's* holding and reasoning resolves without any doubt that AT&T's exculpatory class action ban is unenforceable under Washington law.

B. *Scott* Conclusively Resolves in McKee's Favor That AT&T's Class Action Ban is Unenforceable Regardless of Whether the Arbitration Clause is Procedurally Unconscionable.

The trial court held that AT&T's arbitration clause was promulgated in a procedurally unconscionable manner. MOB at 7. The court's finding on this point was supported by substantial evidence, MOB at 39-42, and deserves great deference from this Court. Nonetheless, as McKee has pointed out, Washington law does not require a showing of procedural unconscionability for this Court to strike down AT&T's ban on class actions. MOB at 33, n.11.

AT&T has argued extensively throughout this appeal that its arbitration clause was not procedurally unconscionable. It argued, among other things, that its disclosures were prominent (AOB at 9), that the arbitration clause was supposedly optional (AOB at 10), and that the plaintiff supposedly had a choice of many carriers (AOB at 11). *See also* AT&T's Reply at 12 n. 4. AT&T further relied upon its procedural unconscionability arguments to attempt to distinguish *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003), a case relied upon

by McKee, and to argue for the supposed superiority of an unpublished district court decision, *Rivera v. AT&T Corp.*, No. 05-60970-CIV (S.D. Fla. Feb. 23, 2006). Reply at 14.

While McKee continues to urge this Court to affirm the trial court's well-supported holding with respect to procedural unconscionability, and to consider that factor as an additional one supporting the overall conclusion that AT&T's class action ban is unenforceable, the *Scott* case confirmed that it is not necessary for plaintiffs to prevail on this point: "Because we find the class action waiver substantively unconscionable, we find it unnecessary to address plaintiffs' claims of procedural unconscionability." *Scott*, 161 P.3d at 1006.

III. SCOTT AND DIX STRONGLY SUPPORT McKEE'S POSITION THAT WASHINGTON LAW, NOT NEW YORK LAW, GOVERNS THE QUESTION OF WHETHER AT&T'S CLASS ACTION BAN IS ENFORCEABLE.

McKee has consistently argued that AT&T cannot avoid Washington unconscionability law by designating New York law in its contract. McKee Opening Br. ("MOB") at 42-49; AT&T Opening Br. ("AOB") at 2, 31-32. The reason is simple: to the extent New York law would permit AT&T to ban its customers from bringing this class action, application of New York law would violate Washington's fundamental

public policy against exculpatory class action bans. MOB at 42-49, citing *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn. 2d 680, 685, 586 P.2d 830 (1978) and Restatement (Second) Conflict of Laws, § 187.

AT&T did not deny that Washington law would trump New York law if applying New York law violated a fundamental Washington public policy, but instead merely argued that applying New York law would not violate any fundamental policy because "Washington, like New York, upholds class action bars in arbitration clauses." AT&T Reply at 13.

Scott and *Dix* put to rest any remaining doubt as to the fallacy of AT&T's position on Washington law. Furthermore, these cases strengthen McKee's argument that application of New York law in this case would violate Washington public policy.

A. *Scott* and *Dix* Make Clear That Fundamental Washington Public Policy Prohibits Enforcement of Exculpatory Class Action Bans.

In *Scott*, the Supreme Court not only made clear that Washington law does not uphold class action bans in circumstances such as those involved here, but the court further made clear how fundamental the Washington public policy involved in this dispute is:

An agreement that has a tendency " `to be against the public good, or to be injurious to the public' " violates public policy. *King v. Riveland*, 125 Wash. 2d 500, 511, 886 P.2d 160 (1994) (quoting *Marshall v. Higginson*, 62 Wash. App. 212, 216, 813 P.2d 1275 (1991)). An agreement that violates public policy may be void and

unenforceable. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). Washington's CR 23 authorizes class actions and demonstrates a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice. *See, e.g., Darling v. Champion Home Builders Co.*, 96 Wash. 2d 701, 706, 638 P.2d 1249 (1982) ("Class actions ... establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits. Accordingly, they improve access to the courts") (citing 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1754, at 543 (1972) and *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L.Ed.2d 427 (1980)). As we have noted before, when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights. E.g., *Darling*, 96 Wash. 2d at 706, 638 P.2d 1249. Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a whole... .

We turn to whether this class action waiver is unconscionable because it undermines Washington's CPA to the extent that it is "injurious to the public." *See King*, 125 Wash. 2d at 511, 886 P.2d 160. The CPA is designed to protect consumers from unfair and deceptive acts and practices in commerce. RCW 19.86.020. To achieve this purpose, the legislature requires that the CPA "be liberally construed that its beneficial purposes may be served." RCW 19.86.920.

Private enforcement of the CPA was not possible until 1971, when the legislature created the private right of action to encourage it. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 783-84, 719 P.2d 531 (1986). Private actions by private citizens are now an integral part of CPA enforcement. *See* RCW 19.86.090. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 335-36, 544 P.2d 88 (1976). Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own

private interests. *Hangman Ridge*, 105 Wash. 2d at 790, 719 P.2d 531; *Hockley v. Hargitt*, 82 Wash. 2d 337, 349-50, 510 P.2d 1123 (1973).

Courts have previously held that class actions are a critical piece of the enforcement of consumer protection law. The reason is clear. Without class actions, many meritorious claims would never be brought. *Vasquez [v. Superior Court*, 4 Cal.3d 800, 808,] 94 Cal. Rptr. 796, 484 P.2d 964 [Cal. 1971]; *see also Eagle v. Fred Martin Motor Co.*, 157 Ohio App. 3d 150, 178, 2004-Ohio-829, 809 N.E.2d 1161 ("by expressly eliminating a consumer's right to proceed through a class action or as a private attorney general in arbitration, the arbitration clause directly hinders the consumer protection purposes of the [Ohio CPA]"). Class actions are vital where the damage to any individual consumer is nominal, and that vital piece is exactly what the plaintiffs claim the class action waiver before us seeks to eviscerate.

Thus, we conclude that without class actions, consumers would have far less ability to vindicate the CPA. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Again, the CPA contemplates that individual consumers will act as "private attorneys general," harnessing individual interests in order to promote the public good. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 313, 858 P.2d 1054 (1993). But by mandating that claims be pursued only on an individual basis, the class arbitration waiver undermines the legislature's intent that individual consumers act as private attorneys general by dramatically decreasing the possibility that they will be able to bring meritorious suits.

Without class action suits the public's ability to perform this function is drastically diminished. We agree with plaintiffs and the Washington attorney general and conclude the class action waiver clause before us is an unconscionable violation of this State's policy to "protect the public and foster fair and honest competition," RCW 19.86.920, because it drastically forestalls attempts to vindicate consumer rights.

We turn now to whether this class action waiver is unconscionable for effectively exculpating its drafter from liability for a large class

of wrongful conduct. Contract provisions that exculpate the author for wrongdoing, especially intentional wrongdoing, undermine the public good. *Adler v. Fred Lind Manor*, 153 Wash. 2d 331, 357, 103 P.3d 773 (2004) (provision violates Washington law because it "could be interpreted to insulate the employer from potential liability for violative behavior"). Exculpation from any potential liability for unfair or deceptive acts or practices in commerce clearly violates public policy. RCW 19.86.920; *cf. Discover Bank*, 36 Cal. 4th at 162-63, 30 Cal.Rptr.3d 76, 113 P.3d 1100. As our sister court said, "[a] company which wrongfully extracts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation." *Discover Bank*, 36 Cal. 4th at 156, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (quoting *Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 387, 134 Cal. Rptr. 393, 556 P.2d 755 (1976) (Tobriner, J., concurring)).

Scott, 161 P.3d at 1005-06. This discussion leaves no doubt as to the fundamental character of Washington policy, and why, under the law set forth in *O'Brien* and Section 187 of the Restatement, New York law may not be applied to the extent that it would enforce AT&T's exculpatory class action ban.

In *Dix*, the court once again made abundantly clear that Washington public policy prohibits corporations from banning their customers from bringing class actions under the CPA:

The individual consumer action to enforce RCW 19.86.020 and vindicate the public interest is thus a significant aspect of a dual enforcement scheme under the CPA, which provides for individual private actions in addition to enforcement actions brought by the attorney general. But in some circumstances, the costs and inconvenience of suit may be too great for individual actions, even in small claims court. We agree, therefore, that class suits are an important tool for carrying out the dual enforcement scheme of the

CPA. Individual claims may be so small that it otherwise would be impracticable to bring them; a class action may be the only means that the public interest may be vindicated.

Given the importance of the private right of action to enforce the CPA for the protection of all the citizens of the state, we conclude that a forum selection clause that seriously impairs a plaintiff's ability to bring suit to enforce the CPA violates the public policy of this state. It follows, therefore, that a forum selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value by eliminating class suits in circumstances where there is no feasible alternative for seeking relief violates public policy and is unenforceable.

Dix, 160 Wn. 2d at 837. While the clause struck down in *Dix* was technically a forum selection clause rather than a choice-of-law clause, it was the fact that the term would effectively ban class actions that drove the court's decision:

[Washington P]ublic policy is violated when a citizen's ability to assert a private right of action is significantly impaired by ***a forum selection clause that precludes class actions*** in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small-value claims... .

Because AOL 'sforum selection clause precludes class actions for small-value CPA claims and there is no feasible alternative avenue for seeking relief for such claims, the forum selection clause is invalid and unenforceable

Dix, 160 Wn. 2d at 840-41 (emphasis added).⁴ Thus, *Scott* and *Dix* establish beyond any doubt that Washington public policy does not permit

⁴ In Washington, forum selection clauses and choice-of-law clauses are subject to the same analysis. *See, e.g., Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. 143, 152, 135 P.3d 547 (2006) (applying Restatement § 187 and holding that a forum selection clause is invalid if "(a) a conflict exists between the laws of the chosen state and those of

corporations to impose exculpatory class action bans on Washington consumers.

Corporations Cannot Avoid the Public Policy Mandates of *Scott* and *Dix* by Designating the Law of a Different State.

The only remaining question is whether the public policy concerns articulated in *Scott* and *Dix* require invalidating a choice-of-law provision that would effectively be an end-run around those holdings. The answer is plainly yes.

While no Washington court has yet faced the issue, courts in other states have had little difficulty concluding that, if (a) an established state-law rule invalidates exculpatory class action bans, and (b) a choice-of-law clause conflicts with that state-law rule, the choice-of-law clause is unenforceable.

For example, in *Discover Bank v. Superior Court (Boehr)*, 113 P.3d 1100 (Cal. 2005), the California Supreme Court held that a class action ban cannot be enforced where it would serve as an exculpatory clause, such as in a case involving small-dollar consumer claims. *See* MOB at 38-39. In the wake of *Discover*, a California court of appeals was faced with a similar class action ban in a lender's consumer contract that specified Delaware law. *Klussman v. Cross Country Bank*, 134 Cal.

another state; (b) the other state has a greater interest in deciding the issue; and (c) application of the forum selection clause would be contrary to that state's public policy").

App. 4th 1283, 36 Cal. Rptr. 3d 728 (Ct. App. 2005). Assuming that Delaware law would permit the class action ban to be enforced, the court applied the test established by Restatement § 187. *See* 134 Cal. App. 4th at 1288.

Critically, the *Klussman* court recognized that *Discover Bank* "establishes the fundamental nature of California's concern with protecting consumers from unscrupulous practices, particularly when only small individual amounts are at issue." *Id.* at 1300. Given the "fundamental nature of the policy favoring class actions" in such circumstances, *id.* at 1297, the court concluded that "Delaware's approval of class action waivers, especially in the context of a 'take it or leave it' arbitration clause is contrary to fundamental public policy of California."⁵ *Id.* at 1298; *see also Tamayo v. Brainstorm USA*, 154 Fed. Appx. 564, 566, 2005 WL 2293493, *1 (9th Cir. 2005) (after *Discover Bank*, holding that "[t]o the extent that Ohio law would enforce the class-action waiver at issue . . . it would be contrary to California public policy and thus not applicable").

⁵ The *Klussman* court also held that "California's interest in providing effective protection for California consumers when they are overcharged, defrauded, abused and harassed . . . is materially greater than Delaware's interest in uniformity among its corporate citizens." *Id.* at 1299. As explained in McKee's Opening Brief, Washington's interest in protecting its consumers, likewise, is certainly greater than any interest New York could have in this case. MOB at 42-46.

Likewise, in *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005), the Missouri court of appeals held, as in *Scott*, that a wireless company's arbitration clause that prohibited class actions was substantively unconscionable because it would effectively strip consumers with small claims of remedies and insulate the corporation from liability. 173 S.W.3d at 313-14. Then, in a subsequent case, a corporate defendant attempted to argue that the class action ban in its consumer contract was enforceable despite *Whitney*, because the contract contained a New York choice-of-law clause. *Doerhoff v. General Growth Properties, Inc.*, 2006 WL 3210502 (W.D. Mo. Nov. 6, 2006). -The court found that, while the class action ban would likely be enforceable under New York law, it could not be enforced under Missouri law:

The Court believes that this case is similar to *Whitney*, in that "[by] itself, such a claim would not be economically feasible to prosecute. However, when all of the customers are added together, large sums of money are at stake. Prohibiting class treatment of these claims would leave customers with relatively small claims without a practical remedy, and without a procedure (class actions) expressly provided for under [Missouri law]...."

The Agreement forces customers to individually arbitrate claims that only amount to a few dollars and pay the accompanying fees. Few plaintiffs would likely undertake such a scheme if not allowed to join in a class action.

Id. at *6 (internal citations omitted). Analyzing the defendant's choice-of-law provision under Restatement § 187, the court concluded that

"application of New York law in this case would be contrary to a fundamental policy of Missouri." *Id;* *cf.* *Coady*, 729 N.W.2d at 737-41 (refusing to enforce Delaware choice-of-law provision in lending contract because it would bar consumers from asserting claims under the Wisconsin Consumer Protection Act, and striking down class action ban as unconscionable under Wisconsin law).

The reasoning of *Klussman* and *Doerhoff* applies with equal force here. Given the Supreme Court's holdings in *Scott* and *Dix*, Washington law clearly does not permit AT&T to impose an exculpatory class action ban on its Washington consumers. AT&T's claim that Washington law would permit it unilaterally opt out of Washington consumer protection laws after allegedly defrauding customers in this state by claiming the protection of a different state's law is nothing more than an attempted end-run around *Scott* and *Dix*, and the Court should reject it.

IV. SCOTT AND DIX CONCLUSIVELY RESOLVE IN MCKEE'S FAVOR THAT THE FEDERAL ARBITRATION ACT DOES NOT PREEMPT WASHINGTON STATE LAW PROVIDING THAT EXCULPATORY CONTRACT TERMS ARE NOT ENFORCEABLE.

AT&T has vigorously argued that the Federal Arbitration Act ("FAA") bars this Court from considering the unconscionability of its class action ban, and that the FAA preempts any state laws that would in

any way limit provisions embedded in arbitration clauses. See AT&T Opening Br. ("AOB") at 2, 17-18, 28-29; AT&T Reply at 22-25.

The Supreme Court, in *Scott*, gave a precise and effective refutation of Cingular's identical argument:

Congress simply requires us to put arbitration clauses on the same footing as other contracts, not make them the special favorites of the law. See 9 U.S.C. § 2. As we held above, contracts that effectively exculpate their drafter from liability under the CPA for broad categories of liability are not enforceable in Washington, even if they are embedded in an arbitration clause. The arbitration clause is irrelevant to the unconscionability.

Class action waivers have very little to do with arbitration. Clauses that eliminate causes of action, eliminate categories of damages, or otherwise strip away a party's right to vindicate a wrong do not change their character merely because they are found within a clause labeled "Arbitration." At least based on the briefing before us, we see no reason why the purposes of favoring individual arbitration would not equally favor class-wide arbitration. Cf. *Kinkel*, 223 Ill.2d at 19, 306 Ill. Dec. 157, 857 N.E.2d 250 ("Cingular cites many sources demonstrating that encouraging arbitration is, indeed, a strong federal objective, but offers no authority for the claim that individual arbitration, rather than class arbitration, is favored.").

The FAA favors arbitration, not exculpation. As the United States Supreme Court has noted, arbitration can be a perfectly appropriate place for individuals to vindicate legislative policy, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985). But this clause prevents the use of arbitration to vindicate a broad range of statutory CPA rights. We join those courts that have found that striking a class action waiver in an arbitration clause does not violate the FAA. E.g., *Discover Bank*, 36 Cal. 4th at 165-66, 30 Cal. Rptr. 3d 76, 113 P.3d 1100; *Kinkel*, 223 Ill. 2d at 19, 306 Ill. Dec. 157, 857 N.E.2d 250.

Scott, 161 P.3d at 1008. The reasoning of the Washington Supreme Court conclusively forecloses the expansive and incorrect ruling sought by AT&T on this issue.

In particular, *Scott* made clear that, while Cingular could, within the bounds of Washington law, require its customers to arbitrate their claims, it could not impose arbitration on its customers in an unfair or abusive way. *See id.* Here, likewise-and in numerous cases in which courts have struck down terms in arbitration clauses-AT&T has tacked on a feature that is not intrinsic to arbitration, but which renders its arbitration clause exculpatory and unfair.

As proof that a ban on class actions is not inherent to arbitration, the U.S. Supreme Court has held that class actions may take place in arbitration. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Indeed, arbitrators handle many cases on a class action basis. Shortly after the Supreme Court issued its decision in *Bazzle*, the American Arbitration Association ("AAA") adopted a new set of rules for handling class actions in arbitration. *See* Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301, 333 (2004) ("The AAA promulgated the first set of classwide arbitration rules in October 2003,

following the *Bazze* decision."). As of this writing, AAA lists over 100 cases being heard under its "Supplementary Rules for Class Arbitrations." See American Arbitration Association, "Class Arbitration Case Docket," available at www.adr.org/Classarbitrationpolicy.

The final nail in the coffin of AT&T's preemption argument is the Washington Supreme Court's decision in *Dix v. ICT*, 160 Wn. 2d 826, 161 P.3d 1016 (2007). In *Dix*, the court unanimously struck down a class action ban (patterned as a forum selection clause) in a contract that did *not* contain an arbitration clause and had nothing whatsoever to do with arbitration:

If a forum selection clause precludes class actions and thereby significantly impairs Washington citizens' ability to seek relief under the CPA for small-value claims, the clause violates the public policy underlying the CPA's dual enforcement scheme expressed in the attorney general and private rights of action under the act.

Dix, 160 Wn. 2d at 842. It is harder to imagine a stronger signal from the Washington Supreme Court that Washington's public policy prohibiting the enforcement of exculpatory class action bans is a rule of general applicability that does not distinguish between arbitration clauses and other contract terms. As such, Washington law providing that exculpatory class action bans are unenforceable is not preempted by the FAA.

V. **SCOTT STRONGLY SUPPORTS MCKEE'S POSITION THAT THE FEDERAL COMMUNICATIONS ACT DOES NOT PREEMPT WASHINGTON STATE LAW PROVIDING THAT EXCULPATORY CONTRACT TERMS ARE NOT ENFORCEABLE.**

A. **Scott's Emphasis on Consumer Protection Laws Supports McKee's Interpretation of the FCA.**

AT&T never comes to grips with the fact that the 1996 Amendments to the FCA repeatedly embrace state consumer protection laws as a central feature of the Act's scheme for the regulation of telecommunications service. While AT&T repeatedly trumpets the supposedly exclusive role of the FCC in regulating all aspects of telecommunications service, at least three different provisions of the FCA specifically reference and preserve a role for state laws. See MOB at 25-26 (citing and quoting from 47 U.S.C. §§ 253, 254, and 261(c)). The FCA thus explicitly and repeatedly incorporates state laws, including specifically state "consumer protection" laws (47 U.S.C. § 253), as playing an important role in the Act's overall operations.

As Part II.A of this brief explains, *Scott* held that class action bans such as AT&T's effectively function as exculpatory clauses by depriving citizens of the protections of state consumer protection laws. Accordingly, the Supreme Court's decision in *Scott* strongly and directly supports McKee's argument that AT&T's interpretation of the FCA is untenable.

In essence, AT&T would read the FCA to be at war with itself. If AT&T is correct about the preemptive scope of §§ 201 and 202, then the protections of the other provisions of the FCA-which reference and rely upon state laws to protect important interests-are simply wiped away.⁶ It is black-letter law that a statute should not be interpreted in a way that would render some of its provisions superfluous. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, pp. 181-86 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"); *In re Detention of Ambers*, 160 Wn. 2d 543, 552, 158 P.3d 1144 (2007) ("We must interpret statutes in such a way as to give effect to all language used, rendering no part superfluous."); *cf. Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir.

⁶ With respect to the presumption against preemption, AT&T cites *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 157 (2006). AOB at 11. AT&T misses an important point made in *Kroske*, however: courts will not find that state laws are preempted where the state laws are consistent with other provisions included in federal law. *Kroske*, 432 F.3d at 976. Several other courts have agreed with this point. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448 (2005) ("a state cause of action that seeks to enforce a federal requirement `does not impose a requirement that is "different from, or in addition to," requirements under federal law") (citation omitted); *Smith v. Wells Fargo Bank, N. A.*, 135 Cal. App. 4th 1463, 1482, 38 Cal. Rptr. 3d 653 (Ct. App. 2005); *Wash. Mutual Bank v. Superior Court*, 75 Cal. App. 4th 773, 782, 89 Cal. Rptr. 2d 560 (Ct. App. 1999). In this case, as has just been established, the FCA could not reasonably be interpreted as preempting Washington principles of contract law that bar AT&T from eviscerating the state's consumer protection laws, because three other provisions of the FCA depend upon (and thus require the effectiveness of) state consumer protection laws. Accordingly, AT&T's position about the application of FCA preemption to this case is flatly contradicted by a central holding of the *Kroske* case that AT&T itself cites prominently.

1996) (noting court's "reluctance to interpret a contract as being at war with itself").

Second, courts must seek to harmonize apparent conflicts within and among statutes. *See Tommy P. v. Board of County Comm 'rs of Spokane County*, 97 Wn. 2d 385, 391, 645 P.2d 697 (1982) ("[A]ll of the provisions of the Act must be considered in their relation to each other, and, if possible, harmonized to insure proper construction of each provision."); *id.* at 391-92 ("[I]t is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used.").⁷ AT&T's proposed interpretation of the FCA would create conflict within the statute, and thus should be rejected.

McKee earlier pointed out that "Under AT&T's position, federal law would insist that it was `just' or `reasonable' to allow long-distance carriers to strip consumers of their ability to effectively vindicate their rights under state consumer protection laws." MOB at 26, n.8. The

Furthermore, under generally accepted canons of statutory interpretation, specific provisions of the FCA should control over more general provisions on reasonableness and nondiscrimination in rates and terms. *See Jones v. Sisters of Providence in Washington, Inc.*, 140 Wn. 2d 112, 117, 994 P.2d 838 (2000) (specific controls over general in context of conflicting statutory provisions) (*citing Morris v. Blaker*, 118 Wn. 2d 133, 143-44, 821 P.2d 482 (1992)). Likewise, a provision later in the statute controls over a prior provision. *State ex rel. Graham v. San Juan County*, 102 Wn. 2d 311, 320, 686 P.2d 1073 (1984) ("[A]s between two conflicting parts of a statute, that part latest in order of position will prevail, where the first part is not more clear and explicit than the last part.").

Supreme Court's decision in *Scott* conclusively resolves in McKee's favor that AT&T's ban on class actions would have precisely the effect of barring consumers from "effectively vindicating" their rights under these laws.

B. AT&T's Argument that Washington's Consumer Protection Law is Preempted, Which (if Successful) Might Render the *Scott* Opinion Irrelevant in this Case, is Unpersuasive.

AT&T has repeatedly denied that Washington consumer protection law applies to its Customer Service Agreement, but it has dramatically shifted the reasons it has given for this conclusion. In AT&T's Opening Brief, it took the position that residential long distance consumer contracts must be uniform, AOB at 19, and it relied upon a case, *Boomer v. AT&T*, 309 F.3d 404, 418 (7th Cir. 2002), that is based upon that assumption.⁸ McKee responded by pointing out that the idea of uniformity in the terms of long distance service for different customers was based upon the old tariff system embodied in Section 203 of the FCA (MOB at 9-11), where the tariffs themselves had the force of law, MOB at 10-11, but that there had subsequently been a sea-change with detariffing.⁹ McKee then

⁸ The *Boomer* court explained that its first "reason" for "agree[ing]" with AT&T's preemption position was that "the Communications Act . . . demonstrate[s] a congressional intent that customers of individual long-distance carriers receive uniform terms and conditions of service. . . ." 309 F.3d at 418.

⁹ *E.g.*, *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("[T]he current system bears . . . little resemblance to the paradigm that existed prior to" deregulation); *Ting*, 319 F.3d at 1143 (deregulation represents "a dramatic break with the past"); 141 Cong. Rec. S8188-04,

pointed out that after detariffing, the FCC itself had not only abandoned the idea of uniformity, it had actually gone so far as to hold that it was "just" and "reasonable" under Sections 201 and 202 of the FCA to permit carriers to "haggle" for different terms with each individual customer. *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003).

Faced with the FCC's demonstrable abandonment of the notion of uniformity, reflected in various statements that telecommunications regulation is fundamentally different today than it was at the time when the doctrines relied upon by AT&T were developed, AT&T's Reply shifts ground. Now, according to AT&T, all state laws that would regulate in any way the terms of any long distance service contract are preempted *not* because the terms of all those contracts must be uniform, but instead because the FCC-and only the FCC-has exclusive authority to evaluate any challenge to any such term. E.g., Reply at 1.

Unfortunately for AT&T, its new position places it on ground that is every bit as shaky as that set forth in its Opening Brief. AT&T's position is unsustainable because (a) it is contradicted by the statements of the FCC itself; and (b) there is no rational explanation for why the FCC must supposedly be the exclusive and sole source of law on this topic.

S8197 (1995) (statement of Sen. Larry Pressler) ("[t]his is the most comprehensive deregulation of the telecommunications industry in history"). Cf. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 502-03 n. 20 (2002) ("the Act was `deregulatory,' in the intended sense of departing from traditional `regulatory' ways that coddled monopolies").

1. AT&T's Preemption Theory Is Inconsistent With the FCC's Own Statements.

AT&T has located several places in various regulations, orders and public pronouncements where the FCC has said that it would continue to enforce sections 201 and 202 of the FCA. E.g., Reply at 2. From these innocuous and uncontroversial statements (after all, no one has ever suggested that if a consumer took to the FCC a complaint that a long distance carrier had an "unjust or unreasonable" contract term, that the FCC would no longer consider such a complaint), AT&T derives the very different principle that the FCC is really saying, in effect, that it is the only body that can ever regulate any element of a long distance carrier's contract. What is striking is that all the key exclusivity language in AT&T's brief never once appears in any language actually used by the agency. AT&T says that the terms of contracts are to be "judged exclusively by the FCC." Reply at 6. But where is there any language or citation to the FCC itself using the word "exclusive," or any other word like "exclusive"? AT&T similarly declares that the "FCC alone has authority over the terms and conditions of long-distance agreements...." Reply at 1. Again, where is the citation to the FCC using the word "alone," or any word like it?

Not only is AT&T unable to identify language where the FCC embraced its position, the converse is true. The FCC has repeatedly disclaimed any intention to claim exclusive control. In its final order implementing deregulation, the FCC did not say that its exclusive regulation of the terms of contracts overrides state consumer protection laws (as AT&T would have it); it said that consumers will "**also** be able to pursue remedies under state consumer protection and contract laws." *Interstate, Interexchange Marketplace, Second Report and Order*, 11 F.C.C.R. 20,730, at 20,753 (1996) (emphasis added).¹⁰ The FCC did not use words like "exclusive" or "sole" to describe its authority, but instead used the word "also" to characterize the availability of state consumer protection remedies.

Similarly, the FCC promised on its official website that consumers "**are protected by the full range of state laws, including those governing . . . consumer protection, and deceptive practices.**" *Ting v. AT&T*, 182 F. Supp. 2d 902, 909 (N.D. Cal. 2002), *aff'd with respect to*

¹⁰ In taking this position, the FCC was following the direct instructions of Congress. E.g., 141 Cong. Rec. S8206-02, S8212 (1995) (Statement of Sen. Slade Gorton) (the 1996 amendments allow "States to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, which are, of course, the precise goals of this Federal statute itself").

unconscionability, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003) (quoting FCC web site) (emphasis added).¹¹

The FCC's website went further to explicitly make the point that agency enforcement was one of several options, but certainly not the only option for consumers:

Where do I file a complaint if I have problems with my interstate long distance service company? You may contact your state consumer protection agency, Better Business Bureau, or State Attorney General Office to learn about the protections and remedies available under your state contract and consumer protection laws. You may also file a complaint with the FCC if an interstate long distance company has violated FCC rules.

Ting, 182 F. Supp. 2d at 909 (quoting FCC web site) (bold in original).

The FCC thus continues to recognize a role for itself, but the word it used for this role was "also," not "only."

AT&T's response to this kind of statement is to accept that there is *some* role for state laws, but to assert that their role is limited only to regulating the nature of assent to form a contract in the first instance. *See* Reply at 8. Once assent has been manifested under state law, according to AT&T, then state law is otherwise barred.

This explanation is hard to credit. State consumer protection laws are hardly limited to governing the creation of contractual obligations.

¹¹ AT&T mystifyingly asserts that McKee's quotation was "incorrect" and unsupported by any citation. Reply at 11. In fact, as the MOB states at 14, this precise language was cited by the federal court in *Ting*, 182 F. Supp. 2d at 909.

Instead, a central element of state consumer protection law is the prevention of unfair business practices (many of which are embodied in the fine print of consumer contracts). To support AT&T's theory, the FCC would have had to have said that state *contract* law would continue to apply to long distance carriers, but that state *consumer protection* laws would not. The FCC's actual language is very different, though: the FCC said that "consumers may have remedies under state consumer protection and contract laws as to issues regarding the *legal relationship* between the carrier and customer in a detariffed regime." *Order on Reconsideration*, 12 F.C.C.R. 15,014, 15,057 (1997) (emphasis added). The FCC did not just speak of contract formation, it spoke of the entire legal relationship between the parties. By repeatedly emphasizing that state consumer protection laws (and not merely contract laws) were preserved in the new regime, the FCC has taken a position that flatly forecloses AT&T's preemption argument.

2. AT&T's Preemption Theory Lacks a Principled Rationale.

In AT&T's Reply, it essentially acknowledged that the uniformity principle is no longer valid. Reply at 7. As McKee's Opening Brief and the foregoing discussion establishes, this acknowledgment is mandated by the statute itself, Congress's intent, the FCC's own language, and

essentially every authority except for Judge Manion's stubborn insistence upon a continued regime of uniformity in the *Boomer* case. Once the uniformity rationale is abandoned, there is simply no coherent rationale for AT&T's preemption theory, because there is no reason for the FCC to have exclusive jurisdiction over a non-uniform body of contracts.

AT&T suggests that the rationale is that there must be a "uniform standard" for judging the fairness of contracts, and that this requires the FCC to have exclusive authority. Reply at 6. This suggestion is at odds with the way that the FCC itself is exercising its authority, however. Given that the FCC has held that it is "just and reasonable" under Sections 201 and 202 of the FCA for AT&T to negotiate separate contracts with each of its customers based upon their individual bargaining situations and the negotiating skills of individual sales people, *Orloff*, 352 F.3d at 417, it could not conceivably be "unjust and unreasonable" to say that those contracts have to comply with the same normal state consumer protection laws that apply to every other type of business in the United States economy. In sum, when the thread of uniformity is pulled from AT&T's argument, the entire sweater of "FCC exclusive power" unravels.

RELIEF REQUESTED

McKee respectfully requests that the Court affirm the trial court's holding that the class action ban in AT&T's arbitration clause is unconscionable under Washington law. " When faced with unconscionable terms, such as class action bans, that pervade or are central to the arbitration clause, some courts have held that it would be improper to sever them and enforce a version of the arbitration clause that is entirely different from the original clause. These courts strike the whole arbitration clause. *See Ting*, 182 F. Supp. 2d at 935-36. Other courts sever offending terms and enforce the remainder of the terms in the clause. *See, e.g., Muhammad*, 912 A.2d at 103. McKee respectfully submits that, if the Court holds that AT&T's class action ban is unenforceable, the Court may request that AT&T, as the drafter of the clause, decide whether it would prefer to go forward with this case on a classwide basis in court or in arbitration. *See, e.g., Keating v. Superior Court*, 31 Cal. 3d 584, 613-14, 183 Cal. Rptr. 360 (1982), *rev 'd on other grounds sub nom., Southland Corp. v. Keating* (1984) 465 U.S. 1 ("Whether classwide

¹² Every version of the arbitration clause in AT&T's CSA contains a ban on class actions. In addition, while the CSA submitted by AT&T in support of its motion to compel arbitration contained several provisions that are clearly unconscionable under Washington law, AT&T has since argued for application of a more recent CSA from which some of these terms have been removed. However, to the extent putative class members might be bound by versions of AT&T's arbitration clause that contain these objectionable terms, McKee respectfully requests that these terms be struck as well. See MOB at 32 n. 10.

proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court rather than submitting to classwide arbitration.").

CONCLUSION

This Court should affirm the superior court's order denying AT&T's motion to compel arbitration.

Respectfully submitted this 12th September, 2007.

A handwritten signature in black ink, appearing to read "Scott M. Kane", is written over a horizontal line.

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