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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER,

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

AT&T CORP.,)	
)	
Defendant/Petitioner,)	No. 81006-1
v.)	
)	AT&T CORP.'S RESPONSE
MICHAEL McKEE,)	TO AMICUS BRIEFS
)	
Plaintiff/Respondent.)	

The amicus briefs rest on the incorrect assumption that neither the FCA nor FAA preemption applies in this case. We have argued extensively that FCA preemption applies, and we highlight these arguments again here, but this brief focuses largely on the appropriateness of FAA preemption. It is impermissible to ignore the issue of federal preemption under the FAA (like WSTLA does in its amicus brief), as several fairly recent cases have concluded. A court faced with a contract governed by the FAA that contains an arbitration provision may not consider a challenge to the validity of a contract as a whole, but must refer that issue to an arbitrator. In addition, WSTLA's amicus brief incorrectly

argues that the New York choice of law provision in AT&T's Consumer Services Agreement should be invalidated.

A. The Court Should Not Follow *Ting* and Should Find Washington's CPA and Contract Laws Are Preempted By the FCA.

Despite amicus' suggestions to the contrary, the FCC's detariffing orders provide that the FCC, not state courts, retained authority to enforce Sections 201 and 202 of the FCA, and to ensure that rates, terms, and conditions remain uniform and non-discriminatory. *Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2003), is distinguishable from this case for several reasons. First, *Ting* which was brought prior to the effective date of detariffing, erroneously held that detariffing ended preemption based on its finding that preemption rested on the tariff requirement. Numerous Supreme Court cases, however, hold otherwise, and illustrate that preemption existed even when no tariffs were required. *See, e.g., Western Union Tel. Co. v. Esteve Bros & Co.*, 256 U.S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921) (holding that the preemptive effect of the FCA flows not from the filing of tariffs but "from the requirement of equality and uniformity of rates" required by what is now Section 202 of the Act). Moreover, courts that have addressed the issue subsequent to detariffing have held that the FCA continues to preempt state law, at least with respect to substantive unconscionability challenges. *See Boomer v. AT&T*

Corp., 309 F.3d 404, 418 (7th Cir. 2002); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1118 (D. Kan. 2003) (“*In re USF*”); *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 674 (7th Cir. 2005) (reaffirming *Boomer*’s preemption holding).; *Ramette v. AT&T Corp.*, 351 Ill. App. 3d 73, 83, 812 N.E.2d 504, 285 Ill. Dec. 684 (Ill. App. Ct. 2004) (following *Boomer* and rejecting *Ting*); *Ragan v. AT&T Corp.*, 355 Ill. App. 3d 1143, 1155, 824 N.E.2d 1183, 291 Ill. Dec. 933 (Ill. App. Ct. 2005). Two additional jurisdictions have followed *Boomer* in unpublished decisions. See *Kisala v. AT&T Corp.*, No. 02-CV-10752-MEL (D. Mass. 2003); *Field v. AT&T Corp.*, 2004 WL 615686, *2 (Conn. Super. Ct., Mar. 12, 2004) (following *Boomer* as “more persuasive concerning the federal preemption arguments” and rejecting *Ting*).

Second, the *Ting* court ignored the FCC's order in which it stated that it would continue enforcing the FCA, and that states only were allowed to govern "contract formation." 319 F.3d at 1146-47. Contrary to the reasoning of the court in *Ting*, the FCC's detariffing orders provide that the FCC retained the authority to enforce Sections 201 and 202 of the FCA. See, e.g., 11 FCC Rcd. 20,730, 20,743 (Paragraph 21); 12 FCC Rcd. 15,014, 15057 (Paragraph 77) (detariffing decision "will not affect our [the FCC's] enforcement of carriers' obligations under sections 201 and 202....").

Moreover, the facts at issue in *Ting* are distinguishable from the facts at issue in this case. *Ting* involved AT&T customers who were caught in the transition from the tariff-governed terms and conditions to contracts with carriers. The *Ting* court focused on AT&T's method of mailing to its CSA to its existing customers and providing notice to its customers of the change from the tariff to the CSA. The *Ting* court found that AT&T did not provide adequate notice of the new contracts and terms to its customers. 182 F. Supp. 2d 902 (N.D. Cal. 2002). Most importantly, the CSA at issue in *Ting* is different than the CSA that applies to McKee in several key ways. For example, the CSA at issue in *Ting* contained a confidentiality clause and statute of limitations provision that did not apply to McKee. The "surprise" factor in *Ting* with respect to the arbitration agreement also is simply not at issue here. *Compare Ting*, 182 F.Supp.2d at 929-30 (describing factors that led court to conclude that AT&T perceived detariffing as a "non-event" and therefore did not highlight the existence of the arbitration clause in its 2001 mass mailing to its customers), *with Rivera v. AT&T Corp.*, 420 F.Supp.2d 1312 (S.D. Fla. 2006) (enforcing November 2002 Agreement, which is the same version that binds McKee).

B. Under the FAA, the Trial Court Should Have Compelled Arbitration of McKee's Claim That the Entire Agreement Was Unconscionable.

McKee's Complaint alleged that the entire Agreement was usurious and unconscionable. CP 1270 (Complaint), CP 1155 (Amended Complaint), CP 1072, CP 430. In support of his argument, McKee relied on several clauses that were not a part of the arbitration clause, including the choice of law provision, CP 1064 and the damages provision, CP 1065. The trial court agreed with McKee's arguments and expressly stated that he was ruling on the unconscionability of the Agreement in its entirety. RP 1, p.7, 11-12. The trial court's consideration of clauses within the Agreement other than the arbitration clause in determining the enforceability of the Agreement was reversible error.

A trial court is limited, under Supreme Court precedent, to considering challenges only to the enforceability of an arbitration clause in isolation. *See Buckeye Check Cashing, Inc. v. Cardengna*, 546 U.S. 440 (2006). In *Buckeye*, the Court identified two types of challenges to the validity of an arbitration agreement: "[o]ne type challenges specifically the validity of the agreement to arbitrate . . . [t]he other challenges the contract as a whole, either on a ground that directly affect the entire contract (*e.g.*, the agreement was fraudulently induced) or on the ground that the illegality of one of the contract's provisions renders the whole

contract invalid.” *Id.* at 444 (internal citation omitted). The first type of challenge is for a trial court, but the second type of challenge must be sent to the arbitrator because “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” *Id.* at 445-46. Here, McKee’s challenges alleged “illegality of . . . the contract’s provisions” separate from the arbitration agreement and in toto made the Agreement as a whole unconscionable. As such, the challenge was one for the arbitrator. *Id.* at 444.

Although McKee has attempted to reform his challenge in the current briefing – he still does not *specifically and exclusively* target the arbitration clause in his challenge to the Agreement’s enforceability. As expressed in his appellate brief, McKee argues that the contract is unconscionable because as a whole, it is a contract of adhesion. Brief at 40. Additionally, he argues that contract is unconscionable because the form of the mailing of the Agreement “predictably ensured only a fraction of its consumers would read it.” *Id.* at 41. These challenges run to the validity of the entire Agreement that McKee and are to be considered exclusively by the arbitrator.

As found by the trial court, McKee argued then, and argues now, that the Agreement is unconscionable under “the totality of the circumstances” of the making of the Agreement. RP 1, p. 9-10. The

enforceability of a contract under the “totality of the circumstances,” however, is a question for the arbitrator. Likewise questions of enforceability that apply to both the contract as a whole and the arbitration clause, are issues that must be referred to the arbitrator. *See, e.g.*, Brief at 40 (“AT&T’s contract provides that its customers automatically consent to the arbitration clause *and other terms*”). In *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 87 (11th Cir. 2005), the Eleventh Circuit directly addressed the question whether a Court may consider all aspects of the contract in determining whether the arbitration clause is enforceable. The Court held that the totality of the circumstances could not be considered and that “the FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive.” *Id.* Specifically, “claims of adhesion, unconscionability, . . . and lack of mutuality of obligation pertain to the contract as a whole, and not to the arbitration provision alone, then these issues should be resolved in arbitration.” *Id.* (quoting *Benoay v. PrudentialBache, Secs., Inc.*, 805 F.2d 137, 1441 (11th Cir. 1986)). The Second Circuit reached a similar result in *JLM Industries, Inc. v. Stolt-Neilsen SA*, 387 F.3d 163, 170 (2d Cir. 2004), when it refused to consider a contract-of-adhesion claim that did not apply to “the arbitration clause alone” but encompassed all aspects of the contract at issue.

Similarly, the Sixth Circuit in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 493 (6th Cir. 2001), specifically rejected plaintiffs' claims that the arbitration agreement was unenforceable because it was contained in a contract of adhesion; such a claim could not be considered because it did not "attack the arbitration clause, *separate from* the underlying loan agreements." *Id.* at 492 n.3 (emphasis added). The Court stated "[w]hen determining the enforceability of an arbitration agreement, a court 'can investigate the existence of such grounds as exist at law or in equity for the revocation of any contract . . . [h]owever, the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole.'" *Id.* at 492-93 (quoting *Hooters of Am. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). *See also Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996) (finding claim that contract was unconscionable contract of adhesion to be a question for the arbitrator because it is "an attack on the formation of the contract generally, not an attack on the arbitration clause itself"); *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997, 1000 (8th Cir. 2004) (claims must be referred to the arbitrator when the "arguments of unconscionability 'cannot fairly be limited to the making of the arbitration clause.'" (quoting *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 695 (8th Cir. 1994)). In *Houlihan*, the Court rejected an attempt to target an arbitration

clause on grounds that applied to the entire contract, reasoning that the plaintiff had not presented “any rationale for concluding that the alleged misrepresentations *relate[d] only* to the arbitration clause.” 31 F.3d at 695 (emphasis added).

Each of these cases applied the FAA to claims that an arbitration clause was unenforceable and each concluded that that precise question had to be referred to the arbitrator. For similar reasons, the Court should conclude that McKee’s claims of unconscionability must be determined by the arbitrator. Specifically, McKee’s claims of unconscionability should be referred to the arbitrator for two reasons: (1) they are based on arguments related to the illegality of clauses other than the arbitration clause, *see Buckeye*, 546 U.S. at 444, and (2) they apply generally to the contract as a whole and are not specifically limited to the arbitration clause. *See, e.g., Jenkins*, 400 F.3d at 87.

The Washington Courts have not had occasion to adequately recognize *Buckeye* or *Preston*. In *Nelson v. Westport Shipyard, Inc.*, 140 Wn.App. 102 (2007), for example, the plaintiff sought to nullify a Shareholders Agreement that contained an arbitration clause claiming duress, coercion, and misrepresentation. *Id.* at 105. The Court concluded that *Buckeye* did not preclude the court from determining the enforceability of the contract rather than referring the issue to arbitration.

In so holding, the Court relied upon specific facts that distinguished the contract at issue from that at issue in *Buckeye*. The Court found that the fact that the contract at issue did not concern interstate commerce, was not governed by the FAA, and did not represent the entire relationship between the two parties, made it factually distinct from *Buckeye* allowing for a determination of enforceability by the Court. *Id.* at 113-15. Each of these facts is distinguishable from the Agreement now before this Court. Here, the Agreement does concern interstate commerce, explicitly refers to the applicability of the FAA, and represents the entire relationship of the parties. CP 133-139. As such, the Court should follow Nelson's initial read – that the “broad *Buckeye* language . . . control[s] here,” because there are no facts that distinguish this case from *Buckeye*. *Id.* at 113; *see also Kamayo Co., Ltd. v. Am. Property Consultants, Ltd.*, 91 Wn.App. 703 (1998) (applying holding of *Prima Paint* to require arbitration of fraud-in-the-inducement claim).

C. The Trial Court Should Have Applied the New York Choice of Law Provision.

Under Washington law, the enforcement of contractual choice-of-law provisions is governed by Section 187 of the Restatement (Second) Conflict of Laws. *See Erwin v. Cotter Health Centers*, 161 Wn.2d 676,

694 (2007). Under Section 187, the choice-of-law provision “will be applied” unless either:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) Conflict of Laws § 187 (2) (1971).

AT&T easily meets the requirements of Section 187(2)(a). AT&T has a substantial relationship to New York because that is its state of incorporation, AT&T is domiciled in New York, and additionally has a significant interest in uniform application of law to its consumer contracts. There is no challenge to these points. *See* Amicus Brief at 12 (arguing only that AT&T cannot meet test under Section 187(2)(b)).

Under Section 187(2)(b), in order to override the contractual choice-of-law provision, the Court must conclude that (1) application of New York law would be contrary to a fundamental policy of Washington, (2) Washington has a materially greater interest than New York in the determination of the particular issue, and (3) Washington has the most significant relationship to the transaction and the parties. None of these elements are met in this case.

In *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 686 (1979), the Court set down the test for determining whether something constitutes a fundamental policy as contemplated by Section 187. In *O'Brien*, the plaintiff brought claims of usury and the defendant sought to compel application of New York law under the parties' contractual choice-of-law provision which allowed for a higher interest rate. *Id.* at 684-86. Reviewing the statutory provisions on allowable interest rates, the Court concluded that "[t]his is a clear and unequivocal statement by the people of Washington through their elected representatives, and we hold it to be the declaration of the type of fundamental policy contemplated by § 187." *Id.* at 686.; see also *Rutter v. BX of Tri-Cities*, 60 Wn.App. 743, 747-48 (1991) (finding FIPA statute expressly voiding any contract provision purporting to waive compliance with the act to reflect a fundamental policy); Section 187, Comment g, (suggesting that a fundamental policy is on that is "embodied in a *statute* which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power") (emphasis added).

There is no like "clear and unequivocal" statutory prohibition against class action waivers. This Court in *Scott v. Cingular Wireless*, 160 Wn.2d 843 (2007), was exceedingly careful to clearly articulate that class action waivers were not contrary to the Washington CPA in all instances

or that the CPA created a statutory prohibition against class action waivers. Instead, the Court acknowledged that “whether any particular class action waiver is unenforceable will turn on the facts of the particular case . . . [and] [w]e can certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable.” *Scott*, 160 Wn.2d at 860 n.7. *Scott*, therefore, did not establish a *fundamental policy* against class action waivers, but instead found that a particular waiver under a particular set of circumstances was unenforceable. *Id.* Thus, this Court has already determined that the CPA does not set forth a fundamental policy against class action waivers as contemplated by Section 187.

It is important to note that McKee and other similarly situated AT&T customers already have an alternative framework for to vindicating their rights. In *Allen v. AT&T*, No. CJ-99-2168 (Okla. District Court for Muskogee County), a virtually identical claim was brought prior to the effective date of the CSA. The matter was settled and a class was certified that included Washington State residents. Under the *Allen* agreement, prospective injunctive relief was created to both notify AT&T customers of the misbilled tax issue and to create a structure for customers to submit claims. Although potential claimants have the right to opt out of this

protocol and to pursue individual claims, the most efficient mechanism to do so would be through individual arbitrations rather than a repetitive class action.

McKee's attempt to rely on the Court's ruling in *Dix v. ITC Group, Inc.*, 160 Wn.2d 826 (2007), to find a fundamental policy is equally unavailing. In *Dix*, the Court held that "a contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 836 (quoting *The Bremen v. Azapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). As this language makes clear, the test for enforcing forum selection clauses is significantly different from Section 187. It requires only a showing of a "strong" public policy and allows for determination of that policy by "judicial decision." *Id.* In contrast, Section 187 requires enforcement of a contractual choice-of-law provision unless it is contrary to a *fundamental public policy* as set forth in an exceedingly clear manner by *statute*. See *O'Brien*, 90 Wn.2d at 686.

Additionally, Washington does not have a materially greater interest in application of its laws to the claims brought by McKee than New York. New York is the state of incorporation for AT&T and has a strong interest in policing and controlling such a defendant. As AT&T's

domicile, New York has a specific regulatory interest in applying its own laws and policies, uniformly and exclusively to AT&T's operations. New York has an interest in protecting its domiciliaries from the conflicting laws of 49 other states and having its law create uniformity in the interpretation of a nationwide contract. *See, e.g., Rutter*, 60 Wn.App. at 748 (1991) (finding Washington to have a materially greater interest because Defendant was a Washington corporation that did business in Washington); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577 (1976) (applying Washington law because Washington was state of incorporation and Washington had interest in policing its domiciliaries despite the fact that plaintiff was from Kansas and injury occurred in Kansas). While McKee's Complaint asserts claims under Washington law, CP 1077-1089, he does not and cannot argue that the New York choice of law provision would not apply to his substantive claims. Thus, McKee's claims for negligence, breach of contract, and even the consumer protection act claim would necessarily be litigated under New York law. *See Restatement (Second) Conflict of Laws* § 187 (1971). Additionally, McKee brings his claims based on a contract used nationwide on behalf of a potentially nationwide class; some class members would be New York residents. CP 1077-1089 (Second Amended Complaint at ¶ 2.2, not limiting class definition to Washington residents).

While Washington has a strong interest in protecting its consumers, it has no greater interest than New York in protecting other states' consumers. Thus, New York's interest is greater than Washington's because (a) New York is home to the sole defendants, not just (like Washington) home to some portion of the putative class and (b) New York law will apply to McKee's substantive claims. *See, e.g., Discover Bank v. Superior Court*, 134 Cal.App.4th 886, 894-95 (Cal.App.2 Dist., 2005) (review denied March 29, 2006) ("we fail to see how California has a greater interest in [plaintiff's] lawsuit – or in determination of the class action waiver issue – than any other state, including Delaware").¹ In fact, a finding that Washington has a materially greater interest could *negatively* impact Washington's judicial resources and its ability to protect its own consumers by becoming a magnet state for all nationwide consumer class action litigation by "invoking its own liberal anti-waiver rule in derogation of contrary law chosen by the

¹ In *Discover Bank*, after remand from the California Supreme Court, the appellate court was tasked with determining whether the parties' choice-of-law provision requiring application of Delaware law (which precluded class action waivers) was enforceable under Section 187. *Id.* at 890. After determining that Delaware had a materially greater interest in determination of the issue than California, the Court, applying Delaware law, directed the trial court to reinstate its original order granting the motion to compel arbitration and requiring the plaintiff to arbitrate on an individual basis. *Id.* at 898.

parties.” *Discover Bank v. Superior Court*, 113 P.3d 1100, 1122 (2005) (Baxter, J. concurring and dissenting in part).

Plaintiff relies on *O’Brien* to argue that Washington has a materially greater interest, but *O’Brien* is entirely distinguishable. First, in *O’Brien* the Court has already certified a class consisting solely of Washington residents. *O’Brien*, 90 Wn.2d at 682. Second, the plaintiff’s challenge was to application of New York law to his substantive claims – not to an arbitration provision or class action waiver. *Id.* at 684-85. Thus, in the absence of the choice-of-law provision, the Court would be applying Washington law – as compared to the law of another jurisdiction – to determine the merits of the claims. *Id.* This is a far cry from McKee’s argument that the Court should apply Washington law so that he can move forward with a nationwide class bringing claims under New York law in a Washington court.

Finally, it is far from certain that Washington law would apply in the absence of the express choice-of-law provision. McKee brings his claims on behalf of a nationwide class and has failed to make any showing under conflict-of-law rules that Washington law would apply to all members of the putative class. When a plaintiff seeks a nationwide class, “choice of law constraints are constitutionally mandated because a party has a right to have her claims governed by the state law applicable to her

particular case.” *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 562 (E.D. Ark. 2005). *See also Pickett v. Holland America Line*, 145 Wn.2d 178, 198 (2001) (citing *Phillips Petroleum v. Shutts*, 472 U. S. 797, 821-22 (1985)); *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 728 (9th Cir. 2007) (finding that predominance prong of Rule 23(b) test was not met because conflict of law rules would require application of laws of fifty states to determine enforceability of arbitration provision in contract).

Even if McKee’s class were limited to Washington residents, under Section 188(2)(e), AT&T’s incorporation and domicile in New York would weigh heavily in favor of application of New York law.² AT&T has an strong interest in having a uniform set of laws apply to its consumer transactions and interpretation of its consumer contracts. Thus, its state of incorporation weighs more strongly in favor of applying New York law than the residence of a single consumer. The additional factors also either weigh in favor of New York law or are neutral in application. Factors (a) and (b) weigh in favor of application of New York law. The contract was drafted and created in New York by AT&T – no contracting or negotiating took place in Washington. Factors (c) and (d) do not weigh in favor of

² Section 188 provides that the list of factors to be considered are not to be weighed equally, but are to be “evaluated according to their relative importance with respect to the particular issue.”

Washington law. AT&T provides services under this exact contract across the United States. Therefore, the place of performance and the location of the subject matter of the contract is not limited to Washington and every state has an equal interest in interpretation of its terms. Thus, under Section 188, Washington would not necessarily be the state of applicable law and the Court should defer to the parties' contractual choice-of-law provision. *See Restatement (Second) Conflict of Laws* § 187(b).

DATED this 6th day of March, 2008.

Respectfully submitted,

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2008 MAR -6 ~~CERTIFICATE~~ CERTIFICATE OF SERVICE

BY ~~RONALD R. CARPENTER~~
Denise Ratti, the undersigned, hereby certify and declare under

penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years, not a party to the within cause and am employed by the law firm of Davis Wright Tremaine. My business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

2. On the 6th day of March, 2008, I caused to be served a copy of the document to which this is attached, titled AT&T Corp.'s Response to Amicus Briefs, by electronic and U.S. mail to the following:

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Executed at Seattle, Washington this 6th day of March, 2008.

s/Denise Ratti
Denise Ratti

**FILED AS ATTACHMENT
TO E-MAIL**