

NO. 243991

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

MICHAEL McKEE
Respondent

V.

AT & T CORPORATION
Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

The sole issue raised in this appeal is whether the trial court improperly denied AT&T's motion to enforce an express contractual mandate that McKee arbitrate his claims against AT&T. Under McKee's long-distance telephone services agreement (the "Agreement") with AT&T, McKee agreed to arbitrate all disputes "arising out of or related to the Agreement." When McKee sued AT&T for allegedly improper charges, AT&T moved to compel arbitration, and McKee sought to avoid arbitration on the grounds that the mandatory arbitration clause was unconscionable and unenforceable. The trial court agreed with McKee, found the Agreement unconscionable, and refused to compel arbitration.

The Agreement provided that it was governed by the Federal Communications Act "to the full extent applicable," by the Federal Arbitration Act, and by New York law. Instead of applying these laws, the trial court disregarded the federal statutes and applied Washington law. The trial court's decision should be reversed for at least three reasons:

First, McKee's state law claim of unconscionability is preempted by federal law. The terms of long-distance agreements like AT&T's are governed by federal law set out in the Federal Communications Act ("FCA"). The Agreement's choice of law clause expressly stated that the FCA governed. Under the FCA, the Federal Communications Commission - not state courts - has sole authority to determine whether the rates, terms, and conditions of agreements such as AT&T's comply

with the FCA's substantive standards. Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002). Boomer and its progeny hold that state law claims, such as unconscionability, are therefore preempted by the FCA because they would interfere with the FCC's determination of the lawfulness of rates, terms, and conditions. *Id.*

Second, the trial court should have applied the Federal Arbitration Act's ("FAA") two-part test for determining whether to compel arbitration. McKee admits that the FAA governs the Agreement, as provided in the Agreement's choice of law clause, but the trial court did not follow the FAA's dictates. Under the FAA, the trial court should have examined just two issues: (1) does an arbitration agreement exist between the parties that was validly offered and accepted; and (2) does the arbitration clause cover McKee's claims? The answer to both questions is unequivocally "yes" and McKee failed to offer evidence to the contrary.

Third, the Agreement requires application of New York law, and under New York law (as under Washington law) there was no basis for finding that the Agreement was either procedurally or substantively unconscionable. The trial court analyzed the wrong version of the Agreement, created an improper "fairness" test for invalidating arbitration clauses, and erroneously considered state constitutional claims in evaluating the arbitration clause. Any argument about unconscionability of other terms is separable from the validity of the arbitration provision itself, which must be enforced.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to enforce the Agreement's choice of law clause. RP 1, p. 8.
2. The trial court erred when it failed to find that the Federal Communications Act ("FCA") preempts unconscionability challenges under Washington law to the terms and conditions of the Agreement.¹ RP 1, p. 15.²
3. The trial court erred when it refused to compel arbitration under the Federal Arbitration Act. CP 48-49.
4. The trial court erred when it concluded that the Agreement was procedurally unconscionable. RP 1, p. 11.
5. The trial court erred when it found that the Agreement was substantively unconscionable. RP 1, p. 11.
6. The trial court erred when it analyzed an inapplicable prior version of AT&T's Agreement. RP 2, p. 32.³
7. The trial court erred by creating and applying a "fairness" standard for assessing substantive unconscionability and by considering state constitutional issues. RP 1, p. 11-13.
8. The trial court erred when it refused to sever any purportedly unconscionable provisions in the Agreement from the arbitration provision. RP 1, p. 12.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Washington residents can challenge the terms and conditions of telephone service contracts under state law when the terms and conditions of such contracts are governed by federal law under the FCA and all but one court has found such claims preempted by the FCA.
2. Whether the trial court erred in failing to compel arbitration under the FAA's standards.
3. Whether the trial court erred in applying Washington law when the Agreement contains a New York choice of law provision that should be upheld under the FAA.

¹ In conformity with RAP 10.4(c), AT&T has attached the trial court's Order as Appendix A to this brief.

² "RP 1" refers to the Report of Proceedings for the hearing dated June 18, 2004.

"RP 2" refers to the Report of Proceedings for the hearing dated June 16, 2005.

4. Whether the Agreement is procedurally unconscionable when the dispute resolution clause is 1.5 pages long, when the important terms are highlighted and when McKee could easily have opted out of the Agreement using meaningful alternatives that were listed in the Agreement.
5. Whether the Agreement is substantively unconscionable when its terms have been upheld by prior courts and when two of the provisions considered by the trial court are not found in the relevant version of the Agreement.
6. Whether the trial court erroneously refused to sever any purportedly unconscionable provisions of the Agreement even though courts must enforce agreements to arbitrate whenever possible.

IV. STATEMENT OF THE CASE

A. McKee's Claims

McKee asserted four claims against AT&T in his Complaint:

(1) negligence, (2) breach of contract, (3) violation of Washington's usury statute, and (4) violation of Washington's Consumer Protection Act. CP 838-52, 1149-63, 1281-97. All of these claims related to taxes or late fees AT&T allegedly charged McKee. *Id.* The parties have not yet reached the merits of McKee's claims because the sole issue litigated to date is whether the claims must be arbitrated before the American Arbitration Association.

B. The Regulatory Environment

Before July 31, 2001, AT&T provided residential long-distance telephone service to millions of customers pursuant to the terms of standardized tariffs filed with the Federal Communications Commission

("FCC"). CP 126-31. The FCC investigated the rates, terms, and conditions contained in the tariffs to ensure they complied with the substantive requirements of the FCA and rejected those that did not. See, e.g., Am. Broad. Co., Inc. v. F.C.C., 643 F.2d 818, 822 (D.C. Cir. 1980) (the FCC may, sua sponte or upon complaint, conduct a hearing into the lawfulness of the tariff).

In 1996, Congress amended the FCA to give the FCC authority to relieve carriers from filing tariffs in all circumstances. Effective August 1, 2001, instead of filing tariffs, the FCC required carriers such as AT&T to enter into contracts with its customers, contracts which the FCC anticipated "could, for example, [be] short, standard contracts that contain their basic rates, terms, and conditions for service." CP 126-31. As a result of the FCC's orders, AT&T developed a short contract to replace the voluminous tariffs. CP 127, 706-15. The first Agreement that AT&T drafted was effective August 1, 2001. CP 127, 706-15. This Agreement contained a dispute resolution clause that set forth the protocol for the resolution of customer disputes. CP 713-14. The clause advised customers of three different options they could pursue: initiate a claim in small claims court; submit the dispute to binding arbitration before the American Arbitration Association ("AAA"); or seek relief from the appropriate Federal or State regulatory agency. CP 713-14.

AT&T developed the arbitration provision to ensure that it complied with the AAA Consumer Due Process Protocol. CP 578-79,

672-81. This meant that the Agreement contained clauses that were consistent with the AAA Consumer Due Process Protocol standards, such as providing consumers with adequate notice of the arbitration provision and its consequences, reasonable access to information, notice of the option to alternatively bring a claim in small claims court, and a clear statement of how a consumer, like McKee, could exercise the option to use one of a number of forms of arbitration. CP 677.⁴ AT&T amended its Agreement several times, as discussed below.

Even after contracts were established, the FCC made clear that, pursuant to the non-discrimination provisions of the FCA, it would continue to hear complaints relating to the rates, terms, and conditions of long-distance service agreements. 11 FCC Rcd. 20,730, 20,743 (¶ 21) (1996). The FCC also stated that it would continue to enforce carriers' obligations under the FCA and adjudicate the lawfulness of those rates, terms, and conditions. 12 FCC Rcd. 15,014, 15,057 (¶ 77) (1997). AT&T's Agreement expressly recognized that customers could file FCC complaints by stating "you continue to have certain rights to obtain relief from a federal or state regulatory agency." CP 136, 698, 713.

C. McKee Selects AT&T for His Long-Distance Service

McKee signed up for AT&T's residential long-distance telephone service in November 2002, after AT&T had established its contract for

⁴ CP 672-81 consists of the Declaration of J. Clark Kelso, a Professor of Law and former member of the National Consumer Disputes Advisory Committee. His declaration describes how the Agreement balances consumer and business interests and concludes that the Agreement comports with the AAA Consumer Protocol. CP 672-81.

services. CP 1114, 1126. He selected AT&T from a list of options (such as Verizon) provided by his local telephone service provider. CP 780-837.

D. McKee Receives the Fulfillment Package Including the Agreement and Explanatory Materials

AT&T sent McKee a packet of documents called a "Fulfillment Package" within 8-10 business days from the date that McKee placed his order for AT&T long-distance service. CP 690-700, 1114-25. AT&T sent these documents in a separate envelope that prominently stated on the outside: "**ATTENTION: IMPORTANT INFORMATION CONCERNING YOUR AT&T SERVICE ENCLOSED.**" CP 690-92.

The Package included a cover letter, a list of Frequently Asked Questions (FAQs) with answers, and the seven-page Agreement itself, as amended on March 1, 2002. CP 690-700, 1114-25. The cover letter and FAQs highlighted the mandatory arbitration clause of the Agreement, as discussed more fully below. CP 690-700, 1114-25.

McKee admitted that he received "several papers" from AT&T, but he claims that he was not aware of the Agreement or its terms because he did not read these documents. CP 1040. In spite of his claim that he was unaware of the Agreement, in his Complaint filed February 3, 2003, he alleged the existence of a contract with AT&T and that AT&T breached that contract. CP 1292-93.

Dispute Resolution Provision: The Agreement sent to McKee with the Fulfillment Package contained a dispute resolution provision in Section 7. CP 698-99. The clause provided that, with the exception of

cases filed in small-claims court or with Federal or State regulatory agencies, "[a]11 other disputes arising out of or related to this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory) must be resolved by final and binding arbitration." CP 698. McKee has not filed a claim in small claims court or a complaint with the FCC or a state regulatory agency like the Washington Utilities and Transportation Commission. CP 1281-97.

Both the cover letter and the FAQs highlighted the Dispute Resolution Clause in the Agreement. CP 717, 721-22. The cover letter stated in paragraph three: "Please review the Agreement carefully, including Section 7 (Dispute Resolution), which describes AT&T's new binding arbitration process that uses a neutral third party rather than a jury for resolving disputes that may arise." CP 717. Similarly, in response to a FAQ entitled, "What should I know about the AT&T Consumer Services Agreement," the third sentence stated, "[i]t also describes AT&T's new binding arbitration process, which uses a neutral third party rather than a jury for resolving disputes that may arise." CP 721-22. Thus, even before a customer reads the actual Agreement, AT&T alerts that customer to the existence of its dispute resolution clause in two companion documents to its Agreement. CP 717, 721-22.

Section 7 of the Agreement begins with a notice in bold, capitalized text, which states:

IT IS IMPORTANT THAT YOU READ THIS ENTIRE SECTION CAREFULLY. THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND

BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY.

CP 698. Section 7 also provides the following:

- The parties must use the Consumer Arbitration Rules of the American Arbitration Association;
- Class actions and joinder of claims are prohibited;
- Consumers must file claims within 2 years;
- Arbitrations are confidential at the customer's option;
- The FAA and New York law govern; and
- Damages are limited to those not barred by the Agreement.

CP 698.

E. McKee Consents to the Agreement by Using AT&T

McKee used AT&T's service and thereby consented to the Agreement. CP 694, 706, 1039-41. The Fulfillment Package and Agreement stated in numerous places that McKee would be bound by the Agreement if he used AT&T's long-distance service. CP 694, 706, 721. A removable cover sheet that contained general information stated: "You accept the terms of the Agreement by using or paying for your AT&T state-to-state or international services." CP 706, 721, 1114-25. The FAQs also notified customers that "[y]ou accept the terms of the Agreement simply by using or paying for any AT&T state-to-state or internal consumer calling service." CP 721, 1122. Similarly, the first page of the Agreement notified McKee, in bold, upper-case text that by **"USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES,**

CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT."

CP 133, 694.

There is no evidence in the record regarding when McKee first used AT&T's service, but at the latest it was in December 2002, because McKee received a December 2002 bill for services. CP 127-28. McKee has not disputed that he used AT&T's services in December 2002.

F. McKee Fails to Opt Out of the Agreement

AT&T's Fulfillment Package and the Agreement provided McKee with several long-distance service options if he did not like AT&T's Agreement. CP 133-39, 694-700.⁵ First, AT&T permitted customers to avoid the terms and conditions of the Agreement by calling a "dial around" number, 10-10-345. CP 133-39, 694-700. AT&T notified McKee that the "Agreement does not cover ... calls made by dialing 10-10-345... ." CP 133, 694, 1119.

Second, AT&T permitted customers to reject the Agreement by calling 1-888-288-4099 to cancel service. CP 133, 694, 1119. AT&T notified new customers of this right by prominently displaying the notice in bold and upper-case type in the second paragraph of the first page of the Consumer Services Agreement. CP 133, 694, 1119.

⁵ The Fulfillment Package attached to Ms. Morlock's declaration contains a copy of the 2001 version of the Agreement. CP 1114-25. That was not the version of the Agreement sent to McKee. McKee received the March 2002 version of the Agreement in his Fulfillment Package, and that version of the Agreement can be found in the record at CP 694-700.

Finally, McKee had a choice of carriers. He could have used another carrier, such as Verizon, if he did not want to agree to the terms and conditions of the Agreement. CP 780-836.

G. McKee Consents to December 2002 Agreement

Section 9 of the Agreement allowed AT&T to change its terms and conditions. CP 138, 700. The Agreement provided that customers would be bound by revisions to the Agreement if they continued to use or pay for the services after a change was made. CP 139, 700. AT&T amended the Agreement in November 2002, effective on December 1, 2002. CP 126-39. The amended Agreement retained the mandatory arbitration provision and changed three other clauses of the March 2002 version that had been sent to McKee. Compare CP 694-700 with CP 126-39. All changes favored McKee by extending the statute of limitations, clarifying the applicability of the FCA, and allowing more types of damages. CP 126-39.

AT&T included the revised Agreement with McKee's December 2002 billing statement. The billing statement also included a notice of the changes to the Agreement, in bold, as follows:

Effective November 1, 2002, AT&T revised Section 7 of the AT&T Consumer Services Agreement (CSA). Among other revisions to Section 7, called Dispute Resolution, AT&T made a change related to the time period within which a claim or dispute must be brought. Also effective November 1, 2002, AT&T made clarifications to Section 4, called Limitations of Liability, and Section 8.f., called Governing Law. To review the CSA, please visit www.att.com/serviceguide/home, or call 1-888-288-4099 to receive a copy of the CSA.

CP 126-39. Thus, at the time McKee filed his Complaint in February 2003, he had notice that the December 2002 Agreement was applicable to him, and that a change had been made to the arbitration provision. CP 126-39, 1281-97. The Amended Agreement was also posted on AT&T's website. CP 128. McKee consented to these changes by using AT&T's service in and after December 2002. CP 133.

H. Procedural History

On February 3, 2003, McKee filed his putative class action against AT&T in Chelan County Superior Court. CP 1281-97.

1. AT&T Moves to Compel Arbitration

On October 23, 2003, AT&T filed a motion to compel arbitration pursuant to the arbitration clause in the "Dispute Resolution" section of the Agreement. CP 1126-35.

On November 20, 2003, McKee moved to stay arbitration and opposed AT&T's Motion to Dismiss or Stay and Compel Arbitration, arguing that the Agreement was procedurally and substantively unconscionable in its entirety. CP 1042-76, 1133. AT&T opposed Plaintiff's Motion to Stay Arbitration on January 9, 2004, and moved to strike portions of Plaintiff's briefing on reply as new and untimely. CP 385-94, 740-837. McKee raised two new arguments in his reply brief. The first argument related to the collateral estoppel effect to be given a California case involving an earlier version of AT&T's Agreement, Ting v. AT&T Corp., 319 F.3d 1126 (9th Cir. 2003). CP 403-31. The second argument related to the constitutionality of the Agreement. CP 403-31.

The trial court heard oral argument on all motions on February 23, 2004. The trial court requested supplemental briefing on McKee's new arguments raised in reply regarding collateral estoppel and the constitutional claims. CP 403-31; RP 3, p. 31.⁶ The parties submitted subsequent briefs on that issue. CP 350-68.

2. The Trial Court Orally Denies AT&T's Motion on June 18, 2004

The trial court held another hearing on June 18, 2004, in which the trial court considered all briefing to date. RP 1, p. 2. The trial court ruled from the bench and orally denied AT&T's Motion to Compel Arbitration, finding the Agreement overall to be procedurally and substantively unconscionable. RP 1, p. 11. The trial court asked McKee to submit a proposed order containing findings and conclusions. RP 1, p. 16.

3. McKee Delays Submitting a Proposed Order With Findings and Conclusions and Seeks Other Relief

McKee inexplicably waited almost eight months to submit a proposed order with draft findings and conclusions. CP 262-83; 320-23. Along with the proposed findings and conclusions, McKee also filed motions for injunctive relief and fees under Washington's Consumer Protection Act ("CPA"). CP 302-19.

AT&T objected to McKee's proposed findings and conclusions and opposed McKee's new motions. CP 262-83. AT&T also submitted two versions of its own proposed findings and conclusions. CP 121-25. One version contained the findings and conclusions that AT&T urged the

⁶"RP 3" refers to the Report of Proceedings for the hearing dated February 23, 2004.

trial court to accept, and the other contained the findings and conclusions made by the trial court in its June 18, 2004, oral decision. CP 121-25.

4. **The Trial Court Adopts Its Oral Decision Without Making Specific Findings or Conclusions**

The trial court heard oral argument on the proposed findings and conclusions and McKee's request for injunctive relief and attorneys' fees on June 16, 2005 - almost one year after it had ruled from the bench.

RP 2. The trial court denied McKee's requests for injunctive relief and fees and expressed frustration over the length of time that had passed since the court's oral ruling. RP 2, pp. 28-29, 35.

With respect to the order denying AT&T's motion to compel arbitration, the trial judge said that too much time had passed since his oral decision for him to maintain consistency in the case.⁷ The trial court then adopted its oral decision from June 18, 2004, and asked McKee to submit an order so stating. RP 2, p. 31. As a result, the final order lacks specific findings and conclusions. CP 26-28.

The trial court recognized that its ruling would be reviewed on appeal. RP 1, pp. 2-3 ("Mr. Kane talked about this case probably going up one way or the other, irrespective of who the Court rules for or against, on an interlocutory appeal. I imagine that will happen here, and so the focus

⁷ The trial court stated: "I am going to apologize because really I am having an exceedingly difficult time keeping track of this case and part of it is probably because . . . we go months at a time, which in my life is a long time . . . so . . . I mean, I forget what happened last year because so much happened and I've had so many cases. And I know you have too because this is not the only case either of you work on, but I lose continuity and when I lose continuity, then I lose kind of intellectual integrity almost so I can't maintain consistency in the case. I'll do the best I can with what I've got." RP 2, p. 29.

of my decision is going to be more what the decision is than it will be the basis for the decision").

5. The Trial Court Does Not Resolve Which Version of the Agreement Applies

The limited nature of the court's decision and the nature of the record make it difficult to determine which version of the Agreement the trial court analyzed. The trial court had three different versions of the Agreement before it. AT&T ultimately argued that the December 2002 version of the Agreement governed McKee's claims. CP 53-58. McKee did not take a position on this issue and cited provisions from the August 2001 and March 2002 Agreements in his arguments. CP 1042-76. The trial court stated that it relied upon the version attached to Mr. Spierer's 2004 declaration. RP 2, p. 32. Mr. Spierer's declaration, however, attached two different versions: (1) the March 2002 version; and (2) the August 2001 version. The trial court must have considered the August 2001 version because it cited portions of that version of the Agreement in finding the overall Agreement to be unconscionable. RP 1, pp. 10-11. For example, the trial court found that the confidentiality requirement was unconscionable, RP 1, p. 10, and that clause did not exist in either the March 2002 or the December 2002 versions. CP 133-39, 690-726.

6. AT&T Appeals

AT&T did not file a motion for reconsideration because the trial court had informed counsel that it considered AT&T's briefing on the findings and conclusions to constitute a motion for reconsideration. RP 2,

p. 31 ("Ms. Kinkead [AT&T's counsel] has filed - really it's a motion for reconsideration, I think, and I'm going to deny that motion for reconsideration. And as I've said, I'm ready to go up or down on the Court's prior oral decision of June 18, [2004]."). AT&T timely filed this appeal, and the trial court stayed its proceedings. CP 11-12, 24.

V. STANDARD OF REVIEW

This Court reviews questions of law, such as arbitrability, de novo. Walters v. AAA Waterproofing, Inc., 120 Wn. App. 354, 357, 85 P.3d 389 (2004). Both the preemption and unconscionability conclusions involved in the arbitrability issue present issues of law that are reviewed de novo. Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002); Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

The only factual finding for this Court's review is the trial court's finding that the August 2001 version of the Agreement applied. This finding must be reversed if it is not supported by substantial evidence. Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." World Wide Video, Inc. v. City of Tukwila, 117 Wn.2d 382, 387, 816 P.2d 18 (1991) (citing Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). Because none of the facts at issue are disputed, all factual issues - including which version of the Agreement

applied - can and should be decided as a matter of law. City of Seattle v. Shepard, 93 Wn.2d 861, 867, 613 P.2d 1158 (1980).

VI. ARGUMENT

A. **The Trial Court Should Have Applied the Federal Communications Act, the Federal Arbitration Act, and New York Law**

The December 2002 Agreement contained a choice of law clause that stated: "This Agreement is governed by the Federal Communications Act to the full extent applicable, and otherwise by the law of the State of New York, without regard to its choice of law rules. The arbitration provisions in Section 7 are governed by the Federal Arbitration Act. This ... provision applies no matter where you reside, or where you use or pay for the Services." CP 138.

As an initial matter, therefore, this Court must decide what law governs the Agreement. AT&T contends and McKee has admitted that the Federal Arbitration Act governs his Agreement. CP 1051-53. Where contracts are governed by the FAA, courts must apply the law specified in the agreement unless the law conflicts with the FAA. See, e.g., Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd., 91 Wn. App. 703, 712-13, 959 P.2d 1140 (1998) (choice-of-law provisions ordinarily valid under the FAA); Hutcherson v. Sears Roebuck & Co., 342 Ill. App. 3d 109, 116-17, 793 N.E.2d 886, 276 Ill. Dec. 127 (Ill. App. Ct. 2003) (enforcing choice of law provision in an agreement governed by the FAA, without regard to the forum state's choice of law rules); Park v. Merrill Lynch, 582 S.E.2d 375,

378 (N.C. Ct. App. 2003) (where FAA agreements stipulated that all controversies "shall be governed by the laws of the State of New York," court held that New York law "will determine whether the instant arbitration agreements are valid"); Smith Barney, Harris Upham & Co... Inc. v. Luckie, 85 N.Y.2d 193, 201, 647 N.E.2d 1308, 623 N.Y.S.2d 800 (N.Y. 1995); Motorola Credit Corp. v. Uzan, 388 F.3d 39, 50-51 (2d Cir. 2004); Washington Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 264 (5th Cir. 2004). McKee did not argue that either the FCA or New York law conflicts with the FAA such that the law selected in the Agreement should not be applied. To AT&T's knowledge, neither the FCA nor New York law has ever been found to conflict with the FAA, so the Agreement's choice of law clause should be enforced.

In addition, the FCA and FAA apply independently of the choice of law clause because the FCA governs all long-distance service agreements, and the FAA governs all interstate contracts containing arbitration clauses, as here. 47 U.S.C. § 153 (10); 9 U.S.C. § 2. Therefore, even without the express choice of law clause, the FCA and FAA would apply.

B. The FCA Prohibits Courts From Considering Unconscionability Challenges to the Terms of Long-Distance Agreements

McKee's argument that the overall Agreement or a term of the Agreement is unconscionable is barred by the Federal Communications Act (the "Act" or the "FCA"). 47 U.S.C. §§ 201 and 202 (1999). The Act

sets out a uniform, federal standard for evaluating the rates, terms, and conditions of long-distance agreements, and the Act demonstrates a congressional intent that customers receive uniform terms and conditions of service. See, e.g., Boomer v. AT&T Corp., 309 F.3d 404, 418 (7th Cir. 2002). The FCC implements these standards and ensures that rates, terms, and conditions are uniform, just, reasonable, and nondiscriminatory. *Id.*

The FCC does, however, provide a role for state courts in one aspect of long-distance agreements: whether a long-distance agreement has been validly formed. All other aspects of such agreements are governed solely by the FCC, because in passing the FCA, Congress "sought to ensure that consumers would receive uniform rates and that consumers would not be discriminated against based on their locality." *Id.* at 423. The FCA, therefore, preempts state law unconscionability challenges, which are necessarily based on varying state laws that challenge the terms and conditions of long-distance agreements. *Id.*

1. The FCA Impliedly Preempts State Laws That Could Be Used to Alter or Invalidate Rates, Terms, or Conditions of Long-Distance Agreements

Federal preemption of state laws can occur in one of three ways: (1) expressly, (2) impliedly through the doctrine of conflict preemption, or (3) by field preemption. Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995); In re Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1118 (D. Kan. 2003) ("In re USF"). The second type of preemption - implied conflict preemption - occurs, as it does here, where "it is impossible for a party to comply with

both state and federal requirements, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 287. See also Hardy v. Claircom Commc'ns Group, Inc., 86 Wn. App. 488, 495-96, 937 P.2d 1128 (1997) (FCA preempted Washington CPA claim relating to telecommunication services on airplanes).

Here, state law stands as an obstacle to the accomplishment and execution of Congress's and the FCC's purpose and objective of creating a federal, uniform standard for determining the validity of long-distance service contract rates, terms, and conditions. Allowing states to set the rates, terms, and conditions of long-distance for their own residents is inconsistent with the Act's goals of creating a uniform federal standard, implemented by the FCC, to ensure that rates, terms, and conditions are just, reasonable and do not discriminate among residents of different states. See, e.g., Boomer, 309 F.3d 404.

2. **The Majority of Courts Hold That the FCA Impliedly Preempts Unconscionability Arguments**

Four published decisions have squarely addressed whether the FCA preempts state law unconscionability challenges to the terms and conditions of long-distance agreements. Boomer v. AT&T Corp., was the first case that held that the FCA preempts unconscionability challenges to the terms of long-distance agreements. 309 F.2d 404. It is the leading case on this issue, has been followed by two other courts, and was recently reaffirmed by the Seventh Circuit. See Boomer, 309 F.2d 404;

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); In re USF, 300 F. Supp. 2d at 1119-20 (following Boomer and finding substantive unconscionability challenges preempted by the FCA); 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, No. 02-CV-10752-MEL (D. Mass. 2003) (unpublished decision following Boomer and compelling arbitration) CP 141-48; 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).

A fifth court, in Ting v. AT&T Corp., held that although the FCA creates a federal standard for evaluating the rates, terms, and conditions of long-distance contracts, state courts, applying state laws, can apply and develop that standard in each state. 319 F.3d 1126, 1146 (9th Cir. 2003). The Ting court's holding was wrong⁸ and is not binding on this Court.

⁸ The Ting court made two errors. First, it held that detariffing ended preemption based on its finding that preemption rested on the tariff requirement. Numerous Supreme Court cases, however, illustrate that preemption was not based on the tariff filing requirement and 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). Second, the Ting court ignored that the FCC specifically stated that it would continue enforcing the FCA, and that the FCC allowed states to govern "contract formation." 319 F.3d at 1146-47.

Beezer v. City of Seattle, 62 Wn.2d 569, 573, 383 P.2d 895 (1963) (court may consider construction "placed upon [the] Federal statute by the inferior Federal courts," but such constructions are not binding), rev'd on other grounds, 376 U.S. 224, 84 S. Ct. 704 (1964); Dreamscape Design, Inc., 414 F.3d at 670 (reaffirming Boomer and rejecting Ting because allowing state law challenges to the validity of terms and conditions in AT&T's contract would result in the "very discrimination Congress sought to prevent").

3. The Leading Preemption Case, Boomer v. AT&T Corp., Is Squarely on Point and Should Be Followed

In Boomer, the Seventh Circuit considered facts almost identical to the instant action. The plaintiff in Boomer filed suit against AT&T arguing that AT&T had charged improper taxes. AT&T moved to compel arbitration under the AT&T Agreement, and Boomer argued that AT&T's Agreement (the 2001 version) was unconscionable under Illinois law. 309 F.3d at 421. Boomer argued that the amendments to the FCA in 1996 that allowed detariffing did away with federal preemption of state law challenges to contracts between consumers and carriers. *Id.* at 421. The Seventh Circuit rejected Boomer's argument and concluded that the only reasonable interpretation of the FCA and the FCC's detariffing orders was that "while state law may determine whether a contract has been formed, federal law still governs the validity of the rates, terms, and conditions of a contract." *Id.* at 423 (emphasis added). In other words, state laws relating to offer and acceptance of customer agreements are not preempted, but

state contract and other laws that could be used to invalidate or challenge the rates, terms, or conditions contained in those agreements are preempted. See *id.* The court gave three reasons for its holding, all of which remain sound.

First, Sections 201 and 202 of the FCA, read together, evince a congressional intent that a uniform federal law should govern the rates, terms, and conditions of long-distance services to ensure that they are uniform, just, reasonable, and non-discriminatory. See *id.* at 418.⁹ In particular, Section 202(a) bars carriers from making or giving any "undue or unreasonable preference or advantage to any particular person, class of persons, or locality" 47 U.S.C. § 202. The Boomer court reasoned that if each of the 50 states were allowed to review and invalidate rates, terms, or conditions of agreements, it would "inevitably lead to customers in different states receiving different terms and conditions." 309 F.3d at 418. This would defy the "congressional intent that individual long-distance customers throughout the United States receive uniform rates, terms and conditions of service." *Id.*

Second, the Seventh Circuit found that "a state law challenge to an arbitration clause (or for that matter a provision prohibiting class actions) not only affects the uniformity of that term, but it also threatens to destroy

⁹ As a "common carrier," the rates, terms, and conditions of interstate telephone service that AT&T may offer its customers are subject to the substantive requirements of Sections 201 and 202 of the Communications Act. 47 U.S.C. §§ 201, 202.

the consistency of rates offered consumers throughout the United States."

Id. at 419. The court explained:

As we recognized in Metro East Ctr. for Conditioning & Health v. Qwest Commc'ns. Int'l. Inc., 294 F.3d 924 (7th Cir. 2002), arbitration offers cost-saving benefits to telecommunication providers and "these benefits are reflected in a lower cost of doing business that in competition are passed along to customers." However, if in some states arbitration clauses are stricken as unconscionable or illegal under various states' consumer protection laws, whereas in other states such provisions are validated, the overall cost savings will be reduced.

Id. at 419. In addition, the court found that if AT&T charges its customers the same rate, but provides different terms and conditions, that too is a form of discrimination in charges. Thus, allowing state law to determine the validity of the various terms and conditions would create a "labyrinth of rates, terms, and conditions and this violates Congress's intent in passing the Communications Act." Id. at 420-21.

Moreover, because Congress sought to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers" in passing amendments to the FCA in 1996, and because arbitration lowers service providers' costs and thus lowers their rates, it would be "at odds with Congress's intent" to encourage lower prices if the court found that arbitration clauses are invalid. Id. at 420 n.7.

Third, the court found that Section 201(b) of the FCA demonstrates Congress's intent that federal law determines the reasonableness of the terms and conditions of long-distance contracts.

Section 201(b) declares unlawful rates, terms, and conditions that are not fair, just, and reasonable. 47 U.S.C. § 201(b). Without a uniform body of federal law under the FCA and its standards, providers such as AT&T must guess whether each provision satisfies the laws of all fifty states. Thus, the lack of uniformity in the laws of all fifty states would ultimately impede the Congressional objective of uniformity and of just, reasonable, and nondiscriminatory rates. *Id.* at 422.¹⁰ As the court reasoned, Boomer's argument that the arbitration clause in AT&T's agreement was unconscionable was in essence an argument that the clause was not "fair and reasonable" as required under the FCA. See *id.* at 421. "Permitting such state law challenges would open the door for direct conflicts between federal and state law on the validity of terms and conditions contained in a long-distance service contract." *Id.* at 421.

4. **An Implied Preemption Finding Is Supported by the FCC's Orders**

While the Boomer decision does not cite extensively from the FCC's detariffing Orders, these Orders also demonstrate that the FCC did not intend to allow states to supplant its role of enforcing the FCA. The FCC's determinations are entitled to substantial deference and are binding

¹⁰ In Ting, the court found that the plaintiffs' state law claims were not preempted by the FCA and found that after detariffing "the substantive principles of [Sections 201 and 202] of reasonableness and nondiscrimination remain intact. But the same cannot be said of the principle of preemption, which . . . did not survive detariffing." 319 F.3d at 1139. The court concluded that state courts, and not the FCC, could determine whether rates, terms, and conditions are reasonable or discriminatory. *Id.* This conclusion is wrong, for at least two reasons. First, detariffing did not end preemption, as Supreme Court decisions illustrate. Second, the FCC's detariffing orders make it clear that the FCC would continue to enforce Sections 201 and 202 and nowhere suggest that it would be transferring its role to the states.

on courts so long as the FCC's decision is reasonable. See, e.g., Chevron USA, Inc. v. NRDC, Inc., 467 U.S. 837, 844-45, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Because the FCC was construing its own prior decision and regulations, its positions regarding detariffing should not be rejected unless they are "clearly erroneous." MCI WorldCom Network Servs. v. FCC, 274 F.3d 542, 547 (D.C. Cir. 2001).

Prior to detariffing, it was well settled that the FCC enforced the FCA and that state laws were preempted due to the FCC's occupation of the field. See Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27, 31, 40 S. Ct. 69, 64 L. Ed. 118 (1919). The FCC Orders addressing detariffing show that the FCC intended that it would continue to enforce Sections 201 and 202 of the Act, as it had been doing, and that there would therefore continue to be a federal standard that governed the terms of long-distance agreements. Indeed, there is nothing in the FCC detariffing orders that suggests or supports the Ninth Circuit's view in Ting that the FCC intended that state laws would govern the rates, terms, and conditions of long-distance agreements in a detariffed environment. In fact, none of the Orders even proposed allowing states to supplant the FCC's role in determining compliance with Sections 201 and 202 of the FCA, and the FCC stated at least twice in its Orders that it intended to continue its regulatory role of determining whether rates, terms, and conditions satisfied Sections 201 and 202 of the FCA.

For example, in its Second Report and Order, the FCC stated that it anticipated that, after detariffing, it would continue to hear and adjudicate complaints relating to the rates, terms, and conditions of long-distance service agreements. 11 FCC Rcd. 20,730, 20,743 (¶ 21). In its later Order on Reconsideration, the FCC stated that its detariffing decision "will not affect our enforcement of carriers' obligations under sections 201 and 202. . . ." 12 FCC Rcd. 15,014, 15,057 (¶ 77) (emphasis added). While the FCC stated that the FCA "does not govern other issues, such as contract formation and breach of contract," 12 FCC Rcd. at 15,057 (¶ 77), the FCA continues to govern the rates, terms, and conditions of long-distance agreements, and consumers may file complaints with the FCC to challenge those terms. Boomer, 309 F.3d at 421 n.9.

For all of these reasons, this Court should hold that federal law, not state law, governs the rates, terms, and conditions of the Agreement at issue. McKee's argument that certain provisions of the Agreement are unconscionable under Washington law necessarily conflicts with the FCC's plenary authority over these issues under federal law. See Dreamscape Design, Inc., 414 F.3d at 674 ("we do not see how Congress's clearly expressed intent regarding uniformity and reasonableness of rates, as demonstrated in Sections 201 and 202 of the FCA can be squared with Ting's apparent conclusion that state contract law can invalidate the terms or conditions of long-distance contracts after detariffing").

C. The FAA's Two-Part Test Requires Compelling Arbitration of McKee's Claims

Where the FCA does not preempt state law, the Agreement mandates application of the FAA. The United State Supreme Court has repeatedly emphasized that the FAA favors enforcement of valid arbitration clauses and/or agreements. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-25, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). In enacting the FAA, Congress declared a national policy favoring arbitration and withdrew power from the states to require a judicial forum for resolving claims that the parties agreed to arbitrate. Southland Corp. v. Keating, 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). The FAA requires that arbitration agreements or provisions be liberally construed in favor of arbitration, Lundgren v. Freeman, 307 F.2d 104, 110 (9th Cir. 1962), and the agreement or provision is presumed to be valid and enforceable. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) (quoting 9 U.S.C. § 2); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). The FAA also requires courts to resolve all doubts in favor of arbitration. Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 385 (2d Cir. 1961). Consequently, the "standard for demonstrating arbitrability is not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the Act is phrased in mandatory terms." Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475 (9th Cir. 1991). A

party resisting arbitration bears the burden of showing the arbitration clause is invalid or does not encompass the claims at issue. Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

Consistent with these policies, the FAA provides that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 has been interpreted to mean that courts must enforce arbitration clauses and compel arbitration unless "generally applicable contract defenses," such as no offer and acceptance, fraud, duress, or unconscionability may be applied to invalidate the arbitration clause without contravening the FAA. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996). In Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 156 L. Ed. 2d 414, 123 S. Ct. 2402 (2003), the Court held that when deciding whether to compel arbitration, trial courts may only address limited issues. These issues include (1) "certain gateway matters, such as whether the parties have a valid arbitration agreement at all, or (2) whether a concededly binding arbitration clause applies to a certain type of controversy." *Id.* Washington courts apply the same limited two-part test under the FAA. See Todd v. Venwest Yachts, 127 Wn. App. 393, 397, 111 P.3d 282 (2005); Walters v. AAA Waterproofing, 120 Wn. App. 354, 358, 85 P.3d 389 (2004).

Because the FCA preempts a state court from considering unconscionability challenges to the terms of long distance service contracts (see section B, above), the trial court should have limited its inquiry, consistent with the provisions and policies of the FAA, to just two issues: (1) did AT&T offer and did McKee accept an arbitration clause; and (2) were McKee's claims covered by the arbitration clause? Todd, 127 Wn. App. at 397. These limited issues, per the express provisions of the Agreement in this case, are governed by New York law. See Kamaya Co., Ltd., 91 Wn. App. at 712-13.

With respect to the first issue - offer and acceptance - AT&T offered its Agreement to McKee by sending it to him, and McKee accepted it by using AT&T's services. See Boomer, 309 F.3d at 415 (finding that AT&T offered its agreement to customer by mailing it to him and that customer accepted it by using services); Tsadilas v. Providian Nat'l Bank, 13 A.D.3d 190, 190, 2004 N.Y. Slip. Op. 09385 (N.Y. App. Div. 2004) (credit card customer accepted terms by using card after sent notice regarding terms).¹¹ Thus, under substantive New York law, there

¹¹ Numerous courts, including Washington, have held that silence or use of services in the face of an offer can constitute acceptance for purposes of contract formation. M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wn.2d 568, 584, 998 P.2d 305 (2000); Nelson for Soller v. Roger J. Lange & Co., Inc., 229 Ill. App. 3d 909, 912, 594 N.E.2d 391, 393, 171 Ill. Dec. 539, 541 (Ill. App. Ct. 1992) (enforcing arbitration clause in investment account agreement); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1151 (7th Cir. 1997) (enforcing arbitration clause contained in document packaged in box with computer); Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 831-34 (S.D. Miss. 2001) (enforcing arbitration agreement in credit card agreement); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 916-19 (N.D. Tex. 2000) (same); Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627, 632 (D. Del. 1999) (same), aff'd, 254 F.3d 1078 (3d Cir. 2001) (table no. 99-5873); Herrington v. Union Planters Bank, N.A., 113 F. Supp. 2d 1026, 1032-35 (S.D. Miss. 2000) (enforcing arbitration agreement in bank account agreement);

was a valid offer and acceptance under the facts in the case at bar. At the latest, McKee started using AT&T's services in December 2002. CP 127-28. McKee has never disputed that he used and paid for AT&T's services in December 2002.

With respect to the second issue - the scope of the arbitration clause - it is undisputed that all of McKee's claims relate to AT&T's services and charges, and that they fall within the scope of the arbitration clause of the Agreement. McKee has never argued that any of his claims are not covered by the arbitration clause, and they all relate to alleged AT&T charges on his invoices for AT&T services. Consequently, as per substantive New York law, McKee's claims clearly fall within the scope of the arbitration clause in the Agreement and, therefore, the FAA requires arbitration of McKee's claims in this case.

D. Under New York Law, the Agreement Is Neither Procedurally nor Substantively Unconscionable

Even assuming (without admitting) that the trial court could consider whether, under state law, the Agreement was unconscionable without violating the FCA, the court should not have found the Agreement unconscionable in this case. The trial court should have applied New York law to determine whether the Agreement was unconscionable

Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410, 1416-18 (M.D. Ala. 1998) (enforcing arbitration agreement in charge card agreement). Acceptance of an agreement by silence or through use of the product or service is therefore well-recognized as valid.

because the Agreement contained a New York choice of law clause. See Section A, above.¹²

Under New York law, a contract provision will only be found to be unconscionable if it is both procedurally and substantively unconscionable. Greenwald v. Weisbaum, 6 Misc. 3d 281, 284 n.3, 785 N.Y.S.2d 664 (N.Y. 2004) ("it must generally be shown that the contract was both procedurally and substantively unconscionable when made"). Because there was no basis for finding procedural unconscionability here, as discussed in the next section, there is no basis for finding the Agreement was unconscionable under New York law.

1. The Agreement Is Not Procedurally Unconscionable

The touchstone for evaluating the extent to which an agreement is procedurally unconscionable is whether a party "lacked meaningful choice." Warren Elec. Supply, Inc. v. Davidson, 284 A.D.2d 869, 870, 727 N.Y.S.2d 502 (N.Y. App. Div. 2001) (unconscionability requires an "absence of meaningful choice").¹³

To evaluate the extent of meaningful choice that existed, a court must examine the following factors: (1) the size and commercial setting of the transaction; (2) whether deceptive or high-pressured tactics were employed; (3) the use of fine print in the contract; (4) the experience and

¹² Similarly, the court should not have found the Agreement unconscionable under Washington law, which is the law the court applied.

¹³ The test is substantially the same under Washington and New York law. Compare Am. Home Assurance Co. v. McDonald, 182 Misc. 2d 716, 721, 698 N.Y.S.2d 436 (N.Y. App. Div. 1999), with Adler v. Fred Lind Manor, 153 Wn.2d 331, 348-49, 103 P.3d 773 (2004).

education of the party claiming unconscionability; and (5) whether there was a disparity of bargaining power. Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 10-11 (N.Y. 1988).¹⁴ None of these factors support a finding that the Agreement at issue is procedurally unconscionable.

First, AT&T does not dispute that its Agreement is a contract of adhesion, but the existence of an adhesion contract alone does not require a finding of procedural unconscionability. *Id.* The legal effect of an adhesion contract is not procedural unconscionability, but only that ambiguities are construed against the drafter. Can v. Maryland Cas. Co., 88 Misc. 2d 424, 426, 388 N.Y.S.2d 196 (N.Y. Civ. Ct. 1976).¹⁵ This, of course, makes sense because, if every standardized contract was unconscionable, either entire industries would be forced to shut down or the costs to consumers would increase dramatically to allow for each contract term to be bargained for individually. See, e.g., RESTATEMENT (SECOND) CONTRACTS (1999) § 211 & cmts. a-b (standardized terms are essential in modern society).

Second, McKee had ample opportunity to understand the terms of the Agreement and a reasonable opportunity to reject those terms.¹⁶

AT&T's Fulfillment Package listed a toll-free number he could call to

¹⁴ Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 304, 103 P.3d 753 (2004).

¹⁵ Washington law is the same. See Adler, 153 Wn.2d at 348; Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 459, 45 P.3d 594 (2002).

¹⁶ When the trial court held that AT&T's Agreement was procedurally unconscionable, it ignored the long-standing principle that one "who accepts a written contract is conclusively presumed to know the contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party." Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 897, 28 P.3d 823 (2001).

have an AT&T representative explain the terms of the Agreement to him. CP 133-39. The Agreement also was posted on AT&T's website, and McKee was notified about the website posting in several places in the Fulfillment Package. CP 683. McKee even acknowledged that he thought he "may have received something in the mail from them [AT&T] containing several papers about their services after I agreed to their long distance plan." CP 1040. Although McKee chose not to read them, these papers expressly notified McKee that if he did not want to be bound by the terms of the Agreement, he could either cancel his service by calling 1-888-288-4099 or use the "dial around" number to place his long-distance calls, 10-10-345. CP 133-39. By failing to opt out of the Agreement, McKee consented to be bound by it. See Tsadilas v. Providian Nat'l Bank, 13 A.D.3d 190, 786 N.Y.S.2d 478, 2004 N.Y. Slip Op. 09385 (N.Y. App. Div. 2004) (finding credit cardholder consented to arbitration provision by failing to opt out and continuing to use card).¹⁷

In addition to these two options, McKee could have selected Verizon, Sprint, or other service providers. CP 780-837. Because McKee failed to make another freely-available choice, the Agreement should not be found to be procedurally unconscionable. See Chandler v. AT&T Wireless Servs., Inc., 358 F. Supp. 2d 701, 705 (S.D. Ill. 2005) (finding no procedural unconscionability although plaintiff possessed no negotiating

¹⁷ Again, Washington law reaches the same result. See M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wn.2d 568, 584, 998 P.2d 305 (2000) (use of software constituted consent to terms of software agreement).

power because she was "free to make other choices, such as choosing a cellular service other than AWS"). McKee failed to submit any evidence that he could not have chosen another service provider, and this failure of proof alone defeats his argument of procedural unconscionability. See Ranieri v. Bell Atlantic Mobile, et al., 304 A.D.2d 353, 354, 759 N.Y.S.2d 448 (N.Y. App. Div. 2003); Brower v. Gateway 2000, 246 A.D.2d 246, 254 (N.Y. 1988); In re USF, 300 F. Supp. 2d at 1136.

Third, the terms and conditions of AT&T's Agreement and arbitration clause were not "hidden in a maze of fine print." On the contrary, AT&T's entire Agreement was a mere seven pages long, and the arbitration provision was one and a half pages long due to highlighting. CP 694-700 (March 2002); 133-39 (December 2002). See Brower, 246 A.D.2d at 252 (16-paragraph agreement did not hide arbitration clause in maze of fine print). The dispositive provisions were in bold, upper-case typeface or stood alone in a single paragraph. CP 694-700; 133-39. The December 2002 version of the Agreement is attached in Appendix B. All terms were written in short sentences and plain language, none were in "fine print," and the key terms were in boldface type and capital letters. For example, the first paragraph of section 7 "Dispute Resolution" announced:

IT IS IMPORTANT THAT YOU READ THIS ENTIRE SECTION CAREFULLY. THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU

CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY.

CP 136. Just in case the customer missed the class action waiver in this first paragraph, AT&T repeated it on the same page, later in Section 7:

NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OR OTHER PERSON, OR RESOLVED ON A CLASS-WIDE BASIS.

CP 137. The wording and structure of the Agreement, along with the Fulfillment Package materials, show that AT&T did everything it could to communicate the terms of the Agreement to McKee and to allow him to reject those terms or use another provider.

McKee presented no evidence that he lacked meaningful choice or was somehow forced into contracting with AT&T. There is thus no basis for a finding of procedural unconscionability, and under New York law, that finding ends the inquiry. Greenwald v. Weisbaum, 6 Misc. 3d 281, 284 n.3, 785 N.Y.S.2d 664 (N.Y. App. Div. 2004) (noting that a plaintiff generally must show procedural and substantive unconscionability).

2. The Agreement Is Not Substantively Unconscionable

The trial court committed three errors with regard to its finding of substantive unconscionability. First, the trial court considered the wrong version of the Agreement. Second, the trial court applied the wrong standard for substantive unconscionability and improperly considered McKee's argument that arbitration violates his constitutional rights. Third, the trial court erred in ignoring specific precedent upholding each

of the challenged provisions. These provisions included a class action bar, a confidentiality requirement, a shortened statute of limitations, a New York choice of law clause, and a limitation on liability. RP 1, pp. 10-11.

a. The Trial Court Analyzed the Wrong Version of the Agreement

Before determining whether the Agreement was unconscionable, the trial court should have determined which version of the Agreement applied to McKee's claims. The trial court acknowledged that the parties could not "agree on what kind of a Consumer Services Agreement is at issue," such that the trial court felt that the court needed testimony or a "factual declaration or affidavits to be submitted so the court can make an honest attempt at determining whether an injunction is proper here...." RP 2, p. 35. The trial court, however, did not undertake such an analysis. RP 2, p. 32.

The trial court could not definitively identify which version it considered,¹⁸ RP 2, p. 32, but it should have found that the December 1, 2002, version of the Agreement governed McKee's claims.¹⁹ AT&T attached the December 2002 version of the Agreement to Mr. Speirer's declaration, CP 133-39, and had attached the most recent version of the

¹⁸ The trial court stated that it relied "upon that agreement which was attached to Mr. Spierer's declaration which I believe was filed in January of 2004, so that's the best I can tell counsel from my perspective today as to what I was thinking about last summer." RP 2, p. 32. There were, however, two versions of the Agreement attached to that declaration: the March 2002 version and the 2001 version. CP 690-725.

¹⁹ McKee has not challenged AT&T's ability to revise the Agreement, and the revisions are valid under contract law. Prior courts have found such modifications valid because both parties provide consideration for the revised agreement. See Boomer v. AT&T Corp., 309 F.3d at 416. The service provider agrees to alter its terms, and the customer agrees to those terms by using future services. Id.

Agreement (which was not materially different from the December 2002 version) long before the court's decision. CP 340-49. Because McKee was not billed until December 2002, the December version of the Agreement governed the entire relevant period of his relationship with AT&T. Later versions of the Agreement did not change in any way relevant to this dispute.

This is significant because, as will be discussed in greater detail below, the December 1, 2002, version of the Agreement did not include two of the challenged clauses that were troubling to the court and obviously critical to the court's overall finding that the Agreement was substantively unconscionable. CP 133-39. Specifically, the court's oral decision mentions both the confidentiality and statute of limitations clauses, neither of which is included in the December version of the Agreement. Since the court considered the "totality of the circumstances" in determining the overall Agreement to be substantively unconscionable, RP 1, pp. 9-10, these errors clearly were significant.

(1) The Trial Court Considered the Wrong Confidentiality Clause

The court considered the Agreement's "confidentiality requirement" in finding the Agreement substantively unconscionable. RP 1, p. 10. Although the August 2001 version of the Agreement did contain a clause requiring that all arbitrations be confidential (a provision which reflects federal communications law policy in favor of protecting consumer confidential information), that clause was revised in the March

2002, and later versions to allow customers to request non-confidential arbitrations. CP 133-39, 694-700. The August 2001 Agreement provided that "[a]ny arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content, or results of any arbitration or award, except as may be required by law, or to confirm and enforce an award." CP 702-15. McKee cited this confidentiality requirement in his motion to stay arbitration, CP 1062, so it is likely that the trial court considered the August 2001 clause in finding substantive unconscionability. The trial court must have considered this clause, since a clause that permits waiver of a confidentiality provision is not unconscionable. See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 8 n.4 (1st Cir. 1999); Chemical Bank v. Arthur Andersen & Co., 143 Misc. 2d 823, 541 N.Y.S.2d 327 (1989) (rejecting plaintiff's argument that court should not give effect to a "private" confidentiality agreement, which, in this case, was a stipulation of settlement and, thus, "highly favored" and "not [to] be cast aside lightly").²⁰

The March and later versions of the Agreement provided:
"Arbitrations under this Agreement shall be confidential as permitted by federal law. By notifying AT&T within twenty days after commencing an arbitration proceeding, you may elect to relieve both parties to the arbitration of confidentiality obligations." CP 694-700.

²⁰ See also Barnett v. Hicks, 119 Wn.2d 151, 159, 829 P.2d 1087 (1992).

There is nothing unconscionable about giving the consumer an election to maintain his or her arbitration in confidence.

(2) **The Trial Court Considered a Non-Existent Statute of Limitations Clause**

The trial court also listed the clause shortening the statute of limitations to two years in his substantive unconscionability ruling. RP 1, pp. 10-11. This clause, however, was not in the December 2002 Agreement. CP 133-39. Again, McKee argued that the Agreement contained such a clause, CP 1064, and again, the clause was not in the relevant version of the Agreement and should not have been considered. Even if it had been in the relevant version of the Agreement, its inclusion would not support a finding of substantive unconscionability under either New York or Washington law. See, e.g., Brintec Corp. v. Akzo N.V., 171 A.D.2d 440, 440-41, 567 N.Y.S.2d 24, 25 (N.Y. Ct. App. 1991) ("It is well settled that such an agreement, which modifies the statute of limitations by specifying a short, but reasonable period within which to commence an action, is enforceable provided it is in writing.").²¹

b. The Trial Court Did Not Apply the Correct Legal Standard for Substantive Unconscionability

In addition to reviewing the wrong version of the Agreement, the trial court applied the wrong law in evaluating whether the Agreement was

²¹ See also Syrett v. Reisner McEwin & Assoc., 107 Wn. App. 524, 527-28, 24 P.3d 1070 (2001) (finding that the plaintiff "provid[ed] no explanation of why the six month contractual limitation here should not be viewed as reasonable" where, under Washington law, "parties may agree to a shorter limitation period on filing suit than the period of the applicable statute of limitations").

substantively unconscionable. The trial court should have applied New York law, but erroneously applied Washington law. Nonetheless, under either state's law, the court misstated the standard for substantive unconscionability.

Under New York law, the test for substantive unconscionability is whether one or more terms are unreasonably favorable to one party. Providian Nat'l Bank v. McGowan, 179 Misc. 2d 988, 992, 687 N.Y.S.2d 858 (N.Y. Civ. Ct. 1999). "Unreasonableness" means "grossly unreasonable or unconscionable in light of the mores and business practices of the time and place." *Id.* An "unreasonably favorable" term is therefore not merely a bad bargain. See Master Lease Corp. v. Manhattan Limousine, Ltd., 177 A.D.2d 85, 89-90, 580 N.Y.2d 2d 952 (N.Y. App. Div. 1992) (noting, "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party"); Universal Leasing Servs., Inc. v. Flushing Hae Kwan Rest., 169 A.D. 2d 829, 831, 565 N.Y.S.2d 199 (N.Y. App. Div. 1991) (listing examples of unreasonably favorable terms). Under Washington law, the test for substantive unconscionability is whether the contract contains clauses or terms that are overly harsh, "shocking to the conscience," or "exceedingly calloused." Adler v. Fred Lind Manor, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004); Gill v. Waggoner, 65 Wn. App. 272, 278, 828 P.2d 55 (1992).

The trial court, however, found that it should determine whether the agreement was "fair" or "detrimental" to the plaintiff. The trial court stated that it decided that it should "look at these agreements and try to determine in some respects whether or not an arbitration clause is a true alternative to litigation or if it operates to the benefit of, in this case, the defendant, and I think it does, and to the detriment of the plaintiff, and I think it does, to the extent that it just doesn't seem to be fair." RP 1, p. 13. As a result, the trial court measured whether the Agreement was "unfair" to McKee, operated to his detriment, or was not a true alternative to litigation. These inquiries are not allowed under either New York or Washington law and are specifically prohibited by the FAA. Cf., Sablosky v. Edward S. Gordon Co., Inc., 535 N.E.2d 643, 73 N.Y.2d 133, 138, 538 N.Y.S.2d 513 (N.Y. 1989) (noting that "mutuality of remedy is not required in arbitration contracts" and that arbitration is an alternative to litigation, even if "a party gives up an important right when it agrees to submit a dispute to arbitration"); City of Cohoes v. Unif. Firefighters of Cohoes, 177 Misc. 2d 242, 243, 675 N.Y.S.2d 781 (N.Y. Sup. Ct. 1998) (recognizing the "nearly universal encouragement for parties to engage in voluntary arbitration as an alternative means of dispute resolution," but noting that arbitration is fundamentally different from litigation); Walters, 120 Wn. App. at 359 (where arbitration agreement is supported by consideration, mutuality not required). Thus, even assuming that arbitration was more "unfair" to McKee than litigation, Washington and

New York courts enforce arbitration agreements/clauses as a matter of public policy. See, e.g., Flynn v. Labor Ready, Inc., 193 Misc. 2d 721, 723, 751 N.Y.S.2d 722 (N.Y. 2002) (noting that although class action might be less costly alternative to arbitration, which, in turn, is generally less costly than litigation, court would enforce arbitration clause in employment agreement because it is a binding contractual term). Courts are not allowed to remake contracts to comport with their own conception of fairness or to insert terms the court feels would be more reasonable. This is particularly true with respect to agreements governed by the Federal Arbitration Act. See, e.g., Perry v. Thomas, 482 U.S. 483, 489-90, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (trial courts may not strike down arbitration clauses for reasons that do not ordinarily result in striking other types of contract clauses). Consequently, the trial court's "fairness" assessment violated numerous, long-standing principles relating to contract law and the role of the judiciary with respect to arbitration clauses. See, e.g., Montgomery Ward & Co., Inc. v. Annuity Bd., 16 Wn. App. 439, 444, 556 P.2d 552 (1976) ("People should be entitled to contract on their own terms").

Moreover, the trial court seems to have considered McKee's arguments that the Agreement violated his constitutional free speech, open forum, and jury trial rights in finding that the Agreement was unconscionable. "Courts may not invalidate arbitration clauses by asserting state constitutional rights because the FAA reflects `a national

policy favoring arbitration and withdrew the power of the states to require a judicial forum' for arbitrable claims." See, e.g., Southland Corp., 465 U.S. at 10 (citation omitted). The Supremacy Clause establishes that with respect to contracts in interstate commerce, Congress can dictate the availability of an arbitration process upon the parties' agreement. In any event, several courts have held that arbitration is not inherently unconscionable. See, e.g., Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 306 (4th Cir. 2001).

c. All of the Challenged Clauses Have Been Analyzed and Upheld in New York

The trial court's use of the wrong standard for judging substantive unconscionability prompted it to ignore direct New York precedent upholding the specific clauses of the December 2002 Agreement. The December Agreement contained the following clauses that were found to be unconscionable: a mandatory arbitration clause, a clause prohibiting class actions, a choice of law clause, and a damages limitation clause. RP 1, pp. 10-11. All of these clauses have been previously found valid.

(1) Mandatory Arbitration Clauses

Not surprisingly, arbitration clauses are not in and of themselves unconscionable under New York law. Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 N.Y.2d 173, 182, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (N.Y. 1995) (In the absence of an established ground for setting aside any contract provision, "a court must enforce the parties' arbitration agreement according to its terms."). Since the Agreement first

became effective in August 2001, there have been more than 60 instances where lawsuits were filed in violation of the mandatory arbitration clause. (This number includes 45 cases that were consolidated as an MDL proceeding.) CP 130. All of those courts enforced the mandatory arbitration clause. CP 130, 141-72. Thus, with this one exception, no court has ever refused to enforce this Agreement's mandatory arbitration clause. See, e.g., Von Steen v. Musch, 3 Misc. 3d 207, 215, 776 N.Y.S.2d 170 (N.Y. 2004) (denying motion for stay of arbitration where the agreement required arbitration before the AAA); Ranieri v. Bell Atlantic Mobile, 304 A.D.2d 353, 354-55, 759 N.Y.S.2d 448, 449 (2003) (rejecting plaintiff's unconscionability argument and upholding arbitration clause).

(2) **Clauses Prohibiting Class Actions**

Under New York law, a "contractual proscription against class actions ... is neither unconscionable nor violative of public policy." Tsadilas v. Providian Nat'l Bank, 13 A.D.3d 190, 191, 786 N.Y.S.2d 478 (N.Y. App. Div. 2004) (allowing credit card company to add class action waiver clause to terms of consumer agreement previously entered into); Ranieri, 304 A.D.2d at 354 (holding that a class action bar was not unconscionable and did not violate public policy). An explicit waiver of the right to bring a class action is not unconscionable because the "right" to bring a class action is not substantive but is merely procedural, and the absence of this right is not patently unfair. Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000). Parties such as AT&T and McKee may "stipulate to whatever procedures they want," and this Court

should not sacrifice the freedom of contract for a procedural right. See Bavarati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).²²

(3) Choice-of-Law Clauses

The trial court, without explanation, included the choice-of-law provision in its decision that the overall Agreement was substantively unconscionable. RP 1, pp. 10-11 ("And the basis that Mr. McKee alleges for substantive unconscionability is five-fold, I believe, and the first is that ... there's a New York choice of law issue here"). There was no basis for finding that a choice of law clause renders any contract unconscionable, and special treatment of agreements containing arbitration clauses is prohibited by the FAA. Perry, 482 U.S. at 489-90.

The FAA prohibits courts from invalidating arbitration agreements under state laws that apply only to arbitration agreements. Perry, 482 U.S. at 489-90. New York courts routinely enforce choice of law clauses and have held that they are not unconscionable.²³ Salvano, 85 N.Y.2d at 180

²² Most state and federal courts routinely and rigorously enforce arbitration agreements that prohibit class actions. See Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002). This Court should not give "short shrift" to the principles favoring arbitration. See Walther v. Sovereign Bank, 872 A.2d 735, 750-51 (Md. 2005) (noting California cases such as Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003), and stating that such cases give "short shrift" to the principle favoring arbitration and represent an "unquestionably minority view"). Washington upholds class action waiver clauses, even when they are contained in arbitration provisions. See Stein v. Geonerco, Inc., 105 Wn. App. 41, 48-49, 17 P.3d 1266 (2001); Heapy v. State Farm Mut. Auto. Ins. Co., 117 Wn. App. 438, 440, 442, 72 P.3d 220 (2003).

²³ Indeed, the court in Zuver addressed a related issue, and held that the application of another state's law would not be unconscionable against Washington residents, as long as both parties were subjected to the same law. Zuver, 103 P.3d at 766-67 (where defendant had the right to utilize Colorado law, which allowed for punitive damages, but plaintiff

("If the parties' arbitration agreement contains a choice-of-law clause providing that the law of a particular State will govern their arbitration, the parties' choice-of-law clause will be given effect if to do so will not conflict with the policies underlying the FAA."). The trial court was therefore prohibited from finding that a choice of law clause is unconscionable simply because it is coupled with an arbitration clause.²⁴ It should be noted that the application of a single state's law also promotes the uniformity of rates, terms and conditions that the FCA requires.

In any event, the trial court should not have considered the choice of law clause at all because it is not included within the text of the arbitration provision. Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). Under Prima Paint, the validity of the arbitration clause must be evaluated separately from the surrounding contract terms. Only fraud in the inducement of the agreement itself would vitiate the clause. Id. at 403-04. See also

did not, contract was substantively unconscionable because effect of state law was not uniform).

²⁴ Several other jurisdictions uphold choice of law clauses in mandatory arbitration agreements. See, e.g., Hutcherson v. Sears Roebuck & Co., 342 Ill. App. 3d 109, 131, 793 N.E.2d 886, 276 Ill. Dec. 127 (2003) (where governing law provision in credit card agreement designated Arizona law, court would apply Arizona law to contract disputes under the Agreement); Melun Indus., Inc. v. Strange, 898 F.Supp. 995, 999-1000 (S.D.N.Y. 1992) (applying New York law based upon choice-of-law provision where New York law does not conflict with the FAA); Motorola Credit Corp. v. Uzan, 388 F.3d 39, 50-51 (2d Cir. 2004) (applying choice-of-law clause to determine which law governs disputes regarding the validity of an arbitration agreement); ASW Allstate Painting & Constr. Co., Inc. v. Lexington Ins. Co., 188 F.3d 307, 310 (5th Cir. 1999) (enforcing choice-of-law provision where law of chosen state does not undermine the FAA); Smith Barney, Harris Upham & Co., Inc. v. Luckie, 85 N.Y.2d 193, 201, 647 N.E.2d 1308, 623 N.Y.S.2d 800 (N.Y. 1995) (parties are "at liberty to include a choice of law provision in their agreement, and the parties' choice will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA.").

Nagrampa v. Mailcoups, Inc., 401 F.3d 1024, 1029 (9th Cir. 2005). The arbitration provision is treated as separable from the contract because of the strong federal policy favoring arbitration. Therefore, the Court below was in error when it considered other clauses in the Agreement that are not part of the arbitration clause in evaluating the validity of the arbitration provision.

(4) **Damages Clauses**

The trial court articulated no specific reason for finding the limitation on damages provision in section 4 of AT&T's Agreement substantively unconscionable. RP 1, pp. 10-11. The damages provision in Section 7 - "Dispute Resolution" - provides: "**THE ARBITRATOR MAY NOT AWARD DAMAGES THAT ARE BARRED BY THIS AGREEMENT AND MAY NOT AWARD PUNITIVE DAMAGES OR ATTORNEYS' FEES UNLESS SUCH DAMAGES OR FEES ARE EXPRESSLY AUTHORIZED BY STATUTE.**" CP 137.

Section 4 of the Agreement further elaborates on the types of damages that are barred by the Agreement. CP 135-36. New York courts consistently uphold damages limitations in contracts. Cirillo v. Slomin's, Inc., 196 Misc. 2d 922, 939, 768 N.Y.S.2d 759 (2003) (clauses limiting damages treated the same as exculpatory clauses in general and are enforceable against claims of ordinary negligence but not claims of intentional misconduct). Again, the trial court should not have been able to ground its determination that the arbitration clause was unenforceable on a determination that the separate and unrelated damages provision was

somehow "unconscionable," and that underlying ruling was itself without basis in New York law. Perry, 482 U.S. at 403-04.²⁵

E. Any Purportedly Unconscionable Provisions in AT&T's Agreement Are Severable

If this Court finds that any terms of the Agreement are unconscionable, they should be severed and arbitration should be compelled. Where, as here, "parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration." Zuver, 153 Wn.2d at 320. See also Heen & Flint Assoc. v. Traveler's Indemnity Co., 93 Misc. 2d 1, 8, 400 N.Y.S.2d 994 (N.Y. 1977) (applying Restatement 2d of the Law of Contracts test, which permits courts broad flexibility to prevent unconscionable results, including enforcing the contract but excising the unconscionable term).

AT&T's Agreement contains a severability clause in Section 8(e), which McKee never challenged. See, e.g., CP 699. Section 7 of the Agreement also contains its own severability provision. CP 698 ("If any portion of this Dispute Resolution Section is determined to be unenforceable, then the remainder shall be given full force and effect.").

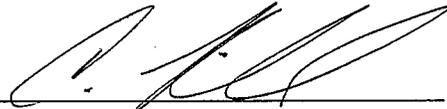
²⁵ Washington courts also consistently uphold damages limitations in contracts. See M.A. Mortenson Co. v. Timberline, 140 Wn.2d 568, 588, 998 P.2d 305, 315-16 (2000) (remedies limitation not procedurally unconscionable where it was not hidden in a maze of fine print but appeared in all capital letters); Veeder v. NC Mach. Co., 720 F. Supp. 847, 852 (W.D. Wash. 1989) (remedies limitation not procedurally unconscionable because it was in capital letters near the signature line).

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's judgment denying AT&T's Motion to Compel Arbitration and issue a mandate to the trial court compelling arbitration and staying trial court proceedings.

RESPECTFULLY SUBMITTED this 7th day of December, 2005.

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Attorneys for Appellant AT&T Corp.

By 

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Appendix A

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CERTIFICATE OF TRANSMITTAL
I declare that the enclosed copy of the document to which this is affixed to the Macey of record for all parties by U.S. Mail postage prepaid; or by attorney messenger service.

FILED
-JUL 19 2005
MI A. WOODS
Clerk of the Superior Court

in the County of Wenatchee, Washington

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

MICHAEL McKEE, individually)
and on behalf of all other)
persons similarly situated,)
Plaintiff,)
AT&T CORPORATION, a foreign)
corporation,)
Defendants,)

NO. 03-2-00133-8

ORDER GRANTING PLAINTIFF'S
MOTION TO STAY ARBITRATION AND
DENYING DEFENDANT'S MOTION TO
COMPEL ARBITRATION

This matter came before the Court on the Defendant's Motion to Compel Arbitration and Stay Proceedings and Plaintiff's Motion To Stay Arbitration. The court heard oral argument of counsel for Plaintiff and Defendant and considered the pleadings and other papers filed in this action.

Based on the argument of counsel, the evidence presented, and the reasoning of the Court in its oral decision of June 18, 2004, attached hereto, which contains the Court's findings of fact and conclusions of law, the Court HEREBY ORDERS, ADJUDGES, and DECREES that Plaintiff's Motion to Stay Arbitration is granted and Defendant's Motion To Compel Arbitration is denied..

DATED this 19th Day of July, 2005

JOHN BRIDGES

JOHN E. BRIDGES
Superior Court Judge

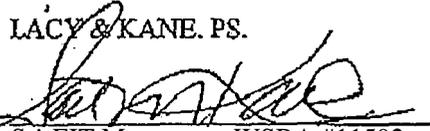
ORDER GRANTING PLAINTIFFS MOTION
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Presented by:

LACY & KANE, P.S.

By: 
S ^ EIT M. WSBA #11592
Attorney for Plaintiff

Copy received; Approved as to form;
Notice of presentation waived:
DAVIS WRIGHT TREMATNE, LLP

By: 1st- Per Authorization
CASSANDRA L. KINKEAD, WSBA #22845
Attorneys for Defendant

ORDER GRANTING PLAINTIFF'S MOTION
TO STAY ARBITRATION AND DENYING
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

MICHAEL McKEE, individually)
and on behalf of all other)
persons similarly situated,)

Plaintiff,)

No. 03-2-00133-8

vs.)

AT&T CORPORATION, a foreign.)
corporation, ')

Defendant.)

VERBATIM REPORT OF PROCEEDINGS
Court's Oral Decision

BE IT REMEMBERED that on the 18th day of JUNE, 2004,
the above-entitled and numbered cause came on for hearing
before the HONORABLE JOHN E. BRIDGES at the Chelan County Law
& Justice Building, Wenatchee, Washington.

APPEARANCES

FOR THE PLAINTIFF: Mr. Scott M. Kane
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East Wenatchee, WA 98802

FOR, THE DEFENDANT: Ms. Cassandra L. Kinkead
Davis Wright Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

REPORTED BY: Ms. LuAnne Nelson
Official Court Reporter
P.O. Box 880
Wenatchee, WA 98807

COPY

3 THE COURT: All right. Taking up on the record, this
4 case is McKee versus AT&T Corporation, and this is Chelan
5 County Cause Number 03-2-00133-8, and the matter is before
6 the Court this afternoon to, I think, primarily address
7 competing motions. The defendants have filed a motion asking
8 the Court to compel arbitration -- stay proceedings and
9 compel arbitration. And in response, of course, Mr. McKee
10 has filed a motion asking the Court to stay arbitration and
11 proceed in the trial court level. There are some other
12 surrounding matters, issues, I guess, but primarily that's
13 what's going on here today. And counsel have done a yeoman's
14 job, I think, of attempting to educate the Court and
15 providing the Court with any number of cases. I know in my
16 office, I think I have three volumes like this of just cases
17 that were cited in the various memorandums that have been
18 filed, and I've tried to look at those cases and I'll talk
19 about that in a moment.

20 Mr. Kane talked about this case probably going up one
21 way or the other, irrespective of who the Court rules for or
22 against, on an interlocutory appeal. I imagine that will
23 happen here, and so the focus of my decision is going to be
24 more what the decision is than it will be the basis for the
25 decision because I think the Court of Appeals and, I'm sure,
thereafter the Supreme Court is not particularly interested
in why I've done what I'm going to do but, rather, just what

the trial court did. I say that because I think this is
going to *be* really considered more like a summary judgment
than anything else and review, I believe, will be de novo so
I don't intend to outline specific findings of fact in
response to these two motions that are before the Court.

I've always felt uncomfortable, and this case really
brings this to my mind, saying that this is the law and this
is the law because it's what I say the law is and, in fact, I
think a trial judge never says this is my law but, rather, a
trial *judge, such* as myself, hopefully tries to rely upon
other cases decided by other courts as to what the law is as
to any particular fact and legal pattern that's brought
before the Court. And so the question of whether or not the
arbitration clause in the Consumer Services Agreement, which
has been referred to as CSA principally here, whether it is
or is not enforceable is of some significance, I know, to
both parties in this case, and it's a hard question to answer
in my mind because of the interplay of not only the contract
provisions in this case but also, we have the Federal
Arbitration Act that enters into the Court's analysis.
have what I'm going to call a similar state statute that
enters into the analysis.

But to complicate things even more, we have the nature
of this action and, therefore, I think, the interplay of the
Federal Communications Act, and finally, and perhaps not

1 surprisingly, the seemingly different opinions by different
courts as to, arguably at least, similar issues. I think
it's only been within the last perhaps five years that the
4 issue of whether or not arbitration clauses will be or will
not be enforced has risen to the level of trial courts and it
really has become a major issue and it's not the first time
it's been handled here in Chelan County. I'm sure it won't
be the last time that it's been handled here.

9 And I'm always somewhat troubled, I think, by the
10 argument which Mr. Kane makes here, and it's really a
11 philosophical argument, I think, partly a philosophical
12 argument, that attorneys and particularly trial attorneys
13 like Mr. Kane have to make, and then the response that the
14 Court has to make because courts. have philosophies too, I
15 guess. And the argument is that we have an individual such
16 as Mr. McKee, just a simple person in a simple town in a
17 simple state, jousting, if you will, with AT&T in this
18 particular instance. And I look at these -- I try to look at
19 these cases based on a jury instruction that we give
20 routinely in cases where the defendant is a corporation and,
21 as I recall, and I didn't bring the jury instruction into
22 court with me, but we, as finders of fact, are supposed to
23 look at every person, whether they be an individual or they
24 be a corporation, in the same light, and so that's what -- of
25 course, that's the context and, I think, the way I have to

1 approach this particular case.

2 Now, having said that -- and I may not address every
3 **issue that you folks have briefed** because my impression is,
and this is not a criticism, is that neither plaintiff or
defendant has left any stone unturned in this case. And I
6 guess before I launch into this, Mr. Kane has talked about
7 delay. There has been some delay in this case, but I don't
perceive that the delay was a procedural type delay where at
least the Court feels that the defendants in this case are
10 just trying to extend this case out. And, of course, I
11 wasn't a part of this case before it went up to the Federal
12 District Court, nor while it was there, but more after it has
13 come back but, I mean, attorneys have a job to do and I
14 recognize that and so certainly I don't think blame can be
15 levied by the Court because of perceived delay, and : don't
16 perceive any delay in this case, at least delay that would
17 operate to the disadvantage of the plaintiff.

18 I want to start with. collateral estoppel which is an
19 argument that kind of arose at the very -- at the very end of
20 the first briefing period. I think that was the end of 2003
21 and then later, the early part of 2004, because I think the
22 clerk's minutes, which I brought into court from the last
23 time we all were together here, are clerk's minutes of
24 February 23, and it's my recollection that the issue of
25 collateral estoppel had come up kind of late in the

proceedings, and I don't remember if specifically it was brought up by Mr. Kane in his reply brief. I think it was, and I think Ms. Kinkead at that point **felt that she** needed more time to address that issue specifically. And although this is not in the clerk's minutes, and that's not a comment, Rita, on your clerk's minutes, but my impression was, and I could be wrong here, Ms. Kinkead was asking for some specifics as to exactly what findings and conclusions that Mr. Kane was asserting collateral estoppel applied to since there **were a number of findings and** conclusions in the Ting case.

And I think part of the reason for the continuance, other than Ms. Kinkead wanting more time on the collateral estoppel, was to give Mr. Kane a chance to identify with some particularity the findings that he was going to rely upon -- and I have so many note pads here -- and he's done that or he did that. Maybe I **left that** note pad in the **office. And so** in response to that, then AT&T responded and that's at issue and I think I need to address that issue. Again, in my mind, the issue is simply whether or not. collateral estoppel applies such that the designated findings that **the Court** addressed in Ting are now binding on this Court. More particularly, are binding on AT&T. And counsel have again educated the Court.

I understand there are four elements that must be shown

with respect to collateral estoppel, and I'm not going to go through all of these elements, but principally, I believe two elements are refuted by AT&T, and I don't want to mischaracterize Ms. Kinhead's arguments. I think she would probably argue that none of the elements have been met but she focuses on two, and the one I want to focus upon is what I perceive to be the first element that I think both plaintiff and defendant agree upon. And simply put, are there identical **facts and identical legal issues**, and I don't think there are, so I'm **going** to determine now that collateral estoppel does not apply such that the defendants here, AT&T, are bound by the decision in Ting. That's number one.

Now number two. I want to get just to the merits of these arguments, and I think -- and I agree with Mr. Kane in this regard -- the Court has to look **at this as** to whether or not there's unconscionability procedurally and/or substantively with respect to the Consumer Services Agreement. That's the bottom line from the Court's perspective here. And I know there are competing not just philosophies but competing analyses when we're dealing with so many different cases and so many different statutes. And certainly I recognize and wholeheartedly support the idea of alternative dispute resolution, arbitration, for instance, as we have here, and I don't accept an argument, if Mr. Kane is

1 making it, and I'm not necessarily saying he is, that just
2 because this is an arbitration clause that this huge
corporation has put in this agreement that Mr. McKee may or
may not have seen, certainly didn't sign, that it's
automatically abhorrent. I don't think that, because I think
6 courts have always, at least in the more recent history of
courts, adopted the. position that resolution outside of court
is good, trials are bad, generally speaking. But the issue
is now before the Court and so I'm going to undertake the
10 analysis.

.11 For the purposes of my analysis, I have copied off and
12 brought into court with me page six of Mr. Kane's initial
13 motion and memorandum to stay arbitration, because he
.14 outlined eight issues on page six at the beginning of that
15 memorandum and I have found it helpful to simply answer yes
16 or no to the various queries that Mr. Kane indicates he's
17 going to address in his memorandum. And the first query is
18 whether or not the Court should apply New York law or
19 Washington law to govern the Consumer Services Agreement.
20 And I think, and I think by almost everybody's analysis here,
21 Washington law should govern this. Now, when I say
22 Washington law, what I think I'm saying is this, that when
23 we're trying to decide whether or not the Consumer Services
24 Agreement should be disregarded with respect to the mandatory
25 arbitration clause and we're trying to decide whether there's

unconscionability with respect to the various clauses in the Consumer Services Agreement, we need to be **looking to** Washington law in that regard and not New York law. So that's the answer the Court gives to number one.

.6 The second statement of issue or question is whether, the defendant's dispute resolution provision is procedurally unconscionable, and then the third *question is* whether or not that dispute resolution provision, arbitration clause, in other words, is substantively unconscionable. In that regard
10 then, I feel it partially incumbent upon me to talk a little
11' bit about unconscionability, and I'm not here to tell Ms
.12: Kinkead and Mr. Kane what the law is. They probably know
13. this law better than me and certainly have briefed it to the
14 bitter end.

15 First, it's my understanding that the issue of
16 unconscionability is an issue of law and not an issue of
.17 fact, and that's one reason why I think if the case goes up
18 on appeal, the Court of Appeals is not interested in any of
19 my findings but only my conclusions. Secondly, I believe the
20' burden of proof in this case is on Mr. McKee because he is
21, the party attacking the Consumer Services Agreement, the
22 contract, that is. And finally, I believe I am guided, based
23 on **the case law counsel** have given me, that in trying to
24 determine whether or not there is unconscionability,
25. procedural or substantive, I need to look at the totality of

the circumstances and not just upon one minute aspect of the Consumer Services Agreement.

4 And so with that in mind, undertaking first procedural
unconscionability, I understand the inquiry is into the
manner in which the contract was entered into, and I believe
that Mr. McKee asserts basically three bases why he believes
and argues to the Court there is here procedural
unconscionability; the first being that this is a contract of
adhesion. Secondly has to do with the length and complexity
10 of the Consumer Services Agreement and, third, the fine print
11 -and the alleged concealment of important terms. With respect
12 to substantive unconscionability, the Court understands that
13 that involves an analysis of whether or not there are clauses
14 or terms in the contract that are so one-sided or overly
15 harsh as to, I think, **shock** the conscience of the Court.
16 And, of course, Judge Lasnik, I believe, talked about that a
17 little bit in the Luna case as it relates not just to
18 Washington law but to also California law which is a little
19 different.

And the basis that Mr. McKee alleges for substantive
21 unconscionability of the Consumer Services Agreement **is** five-
22 fold, I believe, and the first is that there is a prohibition
23 of joinder of claims and class actions, that there is a
24 confidentiality requirement, that there is a shortening of
25 the statute of limitations, that there's a New York choice of

1 law issue here, and I think the CSA requires New York law to
apply, and that there is a limitation on liability **in** section
four of the CSA restricting damages. And so in looking at
those issues, the Court believes as follows -- concludes as
follows: That there is both procedural and substantive
unconscionability.

7 I recognize Ms. Kinkead argues, because she breaks all
of these issues down, that some courts simply don't buy any
of this. It's my impression, however, that the courts in
10 Washington do and have, and so I'm going **to do the** best I can
11 to follow what I perceive to be the rulin^gs of past courts.
12 Now, in saying that, I'm not relying upon the Luna Court and
13 Judge Lasnik as **providing** necessarily specific authority to
14 the Court, but I have read that case now on a number of
15 occasions because I was actually ready to give a decision
16 back in February, so I've read it a couple times since then.
17 I've read the Ting case, which I'm not **citing as** authority
-18 either, but how those courts analyzed these **kinds** of issues
19 and particularly Ting, I think, because it involved a
20 Consumer Services Agreement, although in a different context.
21 and certainly not by way of collateral estoppel, but the
22 rationales the Court gave have influenced me **in** this
23; particular case, and so I'll find unconscionability here..

.24 Other arguments have been made by Mr. McKee and they
25 involve, I think, generally what I'll call unconstitutional

claims. That's whether we're talking about the
2 unavailability of jury trials, and I can't remember -- I
don't know if I remember all of the arguments that were made.
4 I think it was jury trials --

MS. KINKEAD: Free speech.

THE COURT: Yeah, jury trials, free speech, and there
was one more, I think.

MS. KINKEAD: A right to open judicial proceedings.

THE COURT: A right to open judicial proceedings. I
10 don't think, and I will conclude, that although all of that,
11 of course, happens if the Court would grant the defendant's
12, motion here, that is, Mr. McKee would not have a jury trial,
13: that perhaps his free speech rights would be impacted in some
-14 respects -- and what was the other one?

MS. KINKEAD: Open judicial proceedings.

16; THE COURT: Open judicial proceedings may be impacted.
17- I say may because I think there is some **liberality in** the
18: Consumer Services Agreement. I think when the Court again
19 tries to look at this in a global context, all of those have
20: some :effect upon the Court's decision. Individually, no.
21: issue exists as to whether or not **the Consumer Services**
22 Agreement or the provisions, rather, of that agreement are
23 severable. I don't think they are severable. I think this
24 is a package.

25. And finally, Mr. Kane on behalf of Mr. McKee asserts

1 that the defendant's motion to compel arbitration is barred
2 here by the doctrine of laches. I hope I haven't
misunderstood the argument, but I think laches goes to the
delay between the time the case was filed until the time that
the case was initially set for hearing before this Court in
February. Part of that being, of course, periods of time
spent in the federal system, but I don't think the doctrine
of laches applies and the Court will not accept that
particular argument.

.10 I thought to myself as I was reviewing the materials
11 last week, and then more recently over the last two days
12 here, when we look at arbitration provisions, as we are in
13 this Consumer Services Agreement, whether or not the Court
14 should, and I've concluded it should, look at these
15 agreements and try to determine in some respects whether or
16 not an arbitration clause is a true alternative to litigation
17 or it operates to the benefit of, in this case, the
18 defendant, and I think it does, and to the detriment of the
19 plaintiff, and I think it does, to the extent that it **just**
20 **doesn't** seem to be fair. And I recognize courts, all of us,
21 at some point in time, as courts and judges, probably more
22 often than not have enforced arbitration agreements because
.23. they are a wonderful alternative for the parties, but here, I
-24 think that the detriment is such that it's just
25 unconscionable and so the Court will deny the defendant's

motion and will grant the plaintiff's motion. Any questions, folks?

MR. KANE: Because the parties have actually discussed the issue of potential for an appeal, we have questioned, if it's unconscionable, whether or not injunctive relief preventing its enforcement be appropriate, given the context of our other claims. In other words, if the arbitration clause cannot be enforced during the pendency of the appeal, which may take some time, it's plaintiff's contention that an injunction should issue preventing the arbitration clause from being enforced during the pendency of the appeal, and I would like that to be an issue -- I wonder if the Court's considered that issue and, if not, if they could please address the issue.

THE COURT: **Well, I** have not considered the issue and I think my query to Ms. Kinkead is whether she's ready to address the issue today. Part of this, of course -- of course, maybe you folks have already decided that one or both of you will appeal, and I don't know the answer to that, but that's the first question that I think Ms. Kinkead now has to ask her clients.

MS. KINKEAD: **Right.**

THE COURT: But the other overriding question is, are you ready to address injunction today?

MS. KINKEAD: I don't believe so, Your Honor. I think

2 the answer may be that even if you were to grant injunctive
relief, we would move to stay the injunction pending the
4 appeal. We will obviously comply with your ruling today, so
as I sit here right now, I'm not really seeing the need for
the injunctive relief, but if Mr. Kane wants to move for an
6 injunction, we can respond.

THE COURT: I think, Mr. Kane, I would feel more
comfortable if we did it kind of in an orderly fashion, and I
guess I really don't want to invite a lot more briefing
10 because I've read so much in this case, but that's an issue
11 that's not really been briefed at all.

12 MR. KANE: Correct.

13 THE COURT: And it's not necessarily a novel issue, I
14 think, but I think I'd like to have a little law. And part
15 of it is whether or not, you know, AT&T appeals.

16 MR. KANE: Okay.

17 MS_ KINKEAD: I have an additional question, Your
18 Honor.

19: THE COURT : Ma'am.

20 MS. KINKEAD: Do you **plan** to rule as well on the
21 preemption arguments?

22 THE COURT: Well, I can if you need me to do that. I
23 believe the issue -- and I'm going to have to phrase it. ir_ my
24 language -- is whether or not the Federal Communications Act
25 preempts state law or vice versa. I don't think it does.

2 And for the purposes of this case here, I guess I'll have to
disagree with Boomer. I think Boomer is a little -- somewhat
4 distinguishable from here, but it's my impression, from the
analysis I have to undertake, that the law of the State of
Washington preempts the Federal Communications Act.

MS. KINKEAD: Thank you, Your Honor.

7 THE COURT: Who's going to draft, just so I know.

MR. KANE: I will order the Court's Oral Decision and I
will draft.

10 THE COURT: Okay. Thank you very much, both of you.

11 MR. KANE: Thank you, Your Honor.

12: (End of Court's Oral Decision)

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STATE OF WASHINGTON

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County of Chelan

I, LuAnne Nelson, a Certified Shorthand Reporter, and official reporter for Chelan County Superior Court, do hereby certify:

That the foregoing Verbatim Report of Proceedings was reported at the time and place therein stated and thereafter transcribed under my direction and that such transcription is a true, complete and correct record of the proceedings.

LuAnne Nelson f-y—
Official Court Reporter
CSR No. 299-06 NE-LS-OL-M464C7

Appendix B



Consumer Services Agreement

- 4) Consumer Service Guides Home
- ii Consumer Services Agreement
- 4) Domestic Service Guides
- 4) International Service Guides
- fa Miscellaneous Charges, Credits, and Taxes
- 4) Recent Rate Changes
- 4) Tariff Information
- 4) Consumer Service Guides Search
- Glossary
- 4) Frequently Asked Questions

Ea **AT&T Consumer Services Agreement (as Amended 11/1/02)**

THANK YOU FOR USING AT&T SERVICES. In this Agreement ("Agreement"), "you" and "your" mean the customer of the AT&T services defined below, and "AT&T," "we," "our," and "us" mean AT&T Corp., Alascom, Inc., and any AT&T affiliates authorized to provide you with AT&T services.

BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THESE PRICES, CHARGES, TERMS AND CONDITIONS, DO NOT USE THE SERVICES, AND CANCEL THE SERVICES IMMEDIATELY BY CALLING AT&T AT 1-888-288-4099* FOR FURTHER DIRECTIONS.

"Service" or "Services" means: (1) the AT&T state-to-state and international consumer telecommunications services you are enrolled in, use, or pay for that AT&T provided to you under tariffs filed with the Federal Communications Commission as of July 31, 2001; and (2) any new or additional AT&T state-to-state and international consumer telecommunications services that you enroll in, use, or pay for, after July 31, 2001.

This Agreement does not cover AT&T local services, AT&T in-state long distance services, calls made by dialing 10-10-345, AT&T Wireless Services, AT&T Internet services, and AT&T video services. The Services covered in this Agreement are subject to billing availability and may not be available at all locations.

"AT&T Service Guides" contain the specific prices and charges, service descriptions and other terms and conditions not set forth here that apply to each of your Services. You can review the AT&T Service Guides on our web site at www.att.com/serviceguide/home or request a copy of the AT&T Service Guides for the Services you are enrolled in by calling AT&T toll free at 1-888-288-4099.* **THIS AGREEMENT INCORPORATES BY REFERENCE THE PRICES, CHARGES, TERMS AND CONDITIONS INCLUDED IN THE AT&T SERVICE GUIDES.**

1. CHARGES AND PAYMENT.

a. General. You agree to pay us for the Services at the prices and charges listed in the AT&T Service Guides. The prices and charges for any particular call may depend on a number of factors listed in the AT&T Service Guides, which include, for example, the duration of a call, the time of day and day of week, the distance called, and the type of service. Service types include, for example, direct-dialed from home, operator-assisted, or calling card calls. The prices and charges for the Services may also include, for example, monthly fees, monthly minimums, or connection charges.

b. Price Changes. We may change the prices and charges for the Services from time to time. We may decrease prices without providing advance notice. Increases to the prices or charges for the Services are effective no sooner than fifteen days after we post them on our web site at www.att.com/serviceguide/home. Increases to charges that recover our costs associated with government programs are effective no sooner than three days after we post the increases on our

web site (excluding taxes and surcharges under Section 1.e.). We will provide further notices of increases to the prices and charges as follows:

For the Services covering direct-dialed calls from home, under the state-to-state basic schedule and the state-to-state and international calling plans, we will (1) notify you of these increases by bill message or other notice; and (2) make available in advance recorded announcements of these price increases. These recordings can be obtained by calling AT&T toll free at 1-888-288-4099, 24 hours a day, seven days a week, and will be updated on the first and fifteenth day of each month.

For the following types of calls, we will provide you the prices and charges if you request this information at the time you make a call (or at the time you receive a collect call): AT&T Calling Card calls; AT&T collect calls; AT&T person-to-person calls; calls made with a commercial credit card or local phone company calling card; calls billed to a third party; and other types of operator-assisted calls.

c. Payments. You must pay all bills or invoices on time (on or before the due date) and in U.S. money. We do not waive our right to collect the full amount due if you pay late or you pay part of the bill, even if you write the words "Paid In Full" (or similar words) on any correspondence to us.

If you make any late payments, and we bill you for the Services, we will charge you a late fee of 1.5%, which we apply to that period's charges and any outstanding charges and late payment charges that remain unpaid at the time of the next bill. If the state law where you receive the Services requires a different rate, we will apply that rate. If a local telephone company or other entity bills you for the Services on our behalf, that company's late payment charges and policies will apply.

If your check, bank draft or electronic funds transfer is returned for insufficient funds, and we bill you for the Services, we will charge you an additional \$15. If the state law where you receive the Services requires a different fee, we will charge you that amount. If a local telephone company or other entity bills you for the Services on our behalf, that company's returned check charge and policy will apply. When payment is made by credit card, payment will also be subject to terms and conditions required by the credit card issuer.

d. Charges and Billing. Charges accrue through a full billing period. We may prorate or adjust a bill if the billing period covers less than or more than a full month. (For this purpose, each month is considered to have 30 days.) To determine the charge for each call, we round up to the next full minute for any fraction of minutes used. We will determine the format of the bill and the billing period, and we may change both the bill format and the billing period from time to time.

You are responsible for preventing the unauthorized use of the Services, and you are responsible for payment for any such unauthorized use.

e. Taxes and Other Charges. You must pay all taxes, fees, surcharges and other charges that we bill you for the Services, unless you can show documentation satisfactory to us that you are exempt. Taxes and surcharges will be in the amounts that federal, state and local authorities require us to bill you. We will not provide advance notice of changes to taxes and surcharges, except as required by applicable law.

f. Credit Check and Deposits. You give us permission to obtain your credit information from consumer credit reporting agencies at any time. If we bill you for the Services and we determine that you may be a credit risk for (1) unsatisfactory credit rating; (2) insufficient credit history; (3) fraudulent or abusive use of any AT&T services within the last five years; or (4) late payments for current or prior bills, we may require a deposit (or an advance payment as permitted by state law) to ensure payment for the Services. The amount of the deposit will be no more than any estimated one-time charges required for the Services, plus three months of the estimated average

per-minute charges and/or monthly fees for the Services. We will pay simple interest at the annual rate of 4% on the deposit, subject to the state law where you receive the Services. If you fail to pay for the Services when due, we may use the deposit without giving notice to you. If you pay undisputed bills by the due date for twelve consecutive billing months, we will credit the deposit to your account. If a credit balance remains on your account, we will refund or credit that amount.

g. **Credit Limits.** If we bill you for the Services, we may set a credit limit based on your payment history or your credit score from consumer credit reporting agencies. If we do this, we will notify you of your initial credit limit and all changes to your credit limit. If you exceed your credit limit, we will restrict your access to the Services, including direct-dialed, operator-assisted, and calls requiring a 900 or 976 prefix. Acres to emergency services (9-1-1) will not be affected by this restriction. If you fail to make timely payments, we may also lower your credit limit.

2. SUSPENDING AND CANCELLING THE SERVICES.

a. Your Cancellation of the Services. If you use more than one Service, you may change or cancel individual Services by calling the AT&T customer service number on your AT&T bill; subject to the applicable terms and conditions in the AT&T Service Guides. This Agreement remains in effect for any Services that you continue to be enrolled in, use, or pay for. If you want to cancel all of the Services, discontinue your use of all the Services and call us toll free at 1-888-288-4099 for further instructions.

b. Fraudulent Use. You will not use the Services for any unlawful, abusive, or fraudulent purpose, including, for example, using the Services in a way that (1) interferes with our ability to provide Services to you or other customers; or (2) avoids your obligation to pay for the Services. If AT&T has reason to believe that you or someone else is abusing the Services or using them fraudulently or unlawfully, we can immediately suspend, restrict, or cancel the Services without advance notice.

c. Failure to Pay. Upon advance notice, we may suspend, restrict, or cancel the Services and this Agreement, if you do not make payments for current or prior bills by the required due date, including payments for late fees or any other required additional charges.

d. Other. AT&T may from time to time discontinue certain Services, subject to applicable law and regulation:

e. Outstanding Charges. If Services are suspended, restricted, or cancelled, any charges will accrue through the date that AT&T fully processes the suspension, restriction or cancellation. You must pay all outstanding charges for these Services, including payment of any bills that remain due after the date of cancellation. Subject to Section 7 and applicable state law, you must reimburse us for any reasonable costs we incur, including attorneys' fees, to collect charges owed to us. If you want us to renew the Services, we may require that you pay a deposit and/or service restoral fee.

3. INDEMNIFICATION.

YOU AGREE THAT WE SHOULD NOT BE RESPONSIBLE FOR ANY THIRD-PARTY CLAIMS AGAINST US THAT ARISE FROM YOUR USE OF THE SERVICES. FURTHER, YOU AGREE TO REIMBURSE US FOR ALL COSTS AND EXPENSES RELATED TO THE DEFENSE OF ANY SUCH CLAIMS, INCLUDING ATTORNEYS' FEES, UNLESS SUCH CLAIMS ARE BASED ON OUR WILLFUL MISCONDUCT OR GROSS NEGLIGENCE. THIS PROVISION WILL CONTINUE TO APPLY AFTER THE AGREEMENT ENDS.

4. LIMITATIONS OF LIABILITY.

NOTHING IN THIS AGREEMENT LIMITS OUR LIABILITY, IF ANY, FOR OUR WILLFUL OR

INTENTIONAL MISCONDUCT.

IF OUR NEGLIGENCE CAUSES DAMAGE TO PERSON OR PROPERTY, WE WILL BE LIABLE FOR NO MORE THAN THE AMOUNT OF DIRECT DAMAGES TO THE PERSON OR PROPERTY. IF OUR NEGLIGENCE CAUSES DAMAGE OF ANY OTHER SORT, WE WILL BE LIABLE FOR NO MORE THAN THE AMOUNT OF OUR CHARGES FOR THE SERVICES DURING THE AFFECTED PERIOD. FOR ALL CLAIMS THAT ARE NOT THE RESULT OF AT&T'S WILLFUL OR INTENTIONAL MISCONDUCT, WE WILL NOT BE LIABLE FOR PUNITIVE, RELIANCE, OR SPECIAL DAMAGES (UNLESS AN APPLICABLE STATUTE EXPRESSLY AUTHORIZES SUCH DAMAGES), AND WE WILL NOT BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOST PROFITS OR REVENUE OR INCREASED COSTS OF OPERATION. THESE LIMITATIONS APPLY EVEN IF THE DAMAGES WERE FORESEEABLE OR WE WERE TOLD THEY WERE POSSIBLE, AND THEY APPLY TO ANY NEGLIGENCE CLAIM THAT DOES NOT INVOLVE WILLFUL MISCONDUCT OR INTENTIONAL MISCONDUCT, NO MATTER HOW THAT CLAIM IS STYLED OR ON WHAT LEGAL GROUNDS (SUCH AS CONTRACT, TORT, STATUTE, MISREPRESENTATION) IT IS BASED.

WE WILL NOT BE LIABLE FOR ANY DAMAGES - AND WILL BE LIABLE ONLY FOR THE AMOUNT OF OUR CHARGES FOR THE SERVICES DURING THE AFFECTED PERIOD - IF SERVICES ARE INTERRUPTED, OR THERE IS A PROBLEM WITH THE INTERCONNECTION OF OUR SERVICES WITH THE SERVICES OR EQUIPMENT OF SOME OTHER PARTY. THIS SECTION WILL CONTINUE TO APPLY AFTER THE AGREEMENT ENDS.

5. WARRANTIES.

EXCEPT AS THIS AGREEMENT EXPRESSLY STATES, WE MAKE NO EXPRESS WARRANTY REGARDING THE SERVICES AND DISCLAIM ANY IMPLIED WARRANTY, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. WE ALSO MAKE NO WARRANTY THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE. WE DO NOT AUTHORIZE ANYONE, INCLUDING, BUT NOT LIMITED TO, AT&T EMPLOYEES, AGENTS OR REPRESENTATIVES, TO MAKE A WARRANTY OF ANY KIND ON OUR BEHALF AND YOU SHOULD NOT RELY ON ANY SUCH STATEMENT.

6. CREDIT ALLOWANCES FOR INTERRUPTIONS.

If an interruption or failure of Services is caused solely by AT&T and not by you or a third party or other causes beyond our reasonable control, you may be entitled to a credit allowance as specified in the applicable AT&T Service Guide.

7. DISPUTE RESOLUTION.

IT IS IMPORTANT THAT YOU READ THIS ENTIRE SECTION CAREFULLY. THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY.

a. Binding Arbitration. The arbitration process established by this section is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. You have the right to take any dispute that qualifies to small claims court rather than arbitration. All other disputes arising out of or related to this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory) must be resolved by final and binding arbitration. This includes any dispute based on any product, service or advertising having a connection with this Agreement and any dispute not finally resolved by a small claims court. The arbitration will be conducted by one arbitrator using the procedures described by this Section 7. If any portion of this Dispute

Resolution Section is determined to be unenforceable, then the remainder shall be given full force and effect.

The arbitration of any dispute shall be conducted in accordance with the American Arbitration Association's ("AAA") Supplementary Procedures for Consumer-Related Disputes, as modified by this Agreement, which are in effect on the date a dispute is submitted to the AAA. You have the right to be represented by counsel in an arbitration. In conducting the arbitration and making any award, the arbitrator shall be bound by and strictly enforce the terms of this Agreement and may not limit, expand, or otherwise modify its terms.

NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER PERSON, OR RESOLVED ON A CLASS-WIDE BASIS. THE ARBITRATOR MAY NOT AWARD DAMAGES THAT ARE BARRED BY THIS AGREEMENT AND MAY NOT AWARD PUNITIVE DAMAGES OR ATTORNEYS' FEES UNLESS SUCH DAMAGES OR FEES ARE EXPRESSLY AUTHORIZED BY A STATUTE. YOU AND AT&T BOTH WAIVE ANY CLAIMS FOR AN AWARD OF DAMAGES THAT ARE EXCLUDED UNDER THIS AGREEMENT.

b. Arbitration Information and Filing Procedures. Before you take a dispute to arbitration or to small claims court, you must first contact our customer account representatives at the customer service number on your AT&T bill for the Services, or write to us at AT&T, P.O. Box 944078, Maitland, Florida 32794-4078, and give us an opportunity to resolve the dispute. Similarly, before AT&T takes a dispute to arbitration, we must first attempt to resolve it by contacting you. If the dispute cannot be satisfactorily resolved within sixty days from the date you or AT&T is notified by the other of a dispute, then either party may then contact the MA in writing at AAA Service Center, 134555 Noel Road, Suite 1750, Dallas, Texas 75240-6620 and request arbitration of the dispute. Information about the arbitration process and the AAA's Arbitration Rules and its fees are available from the AAA on the Internet at www.adr.org, or by contacting us at www.att.com/serviceguide/home or AT&T, P.O. Box 944078, Maitland, Florida 32794-4078. The arbitration will be based only on the written submissions of the parties and the documents submitted to the AAA relating to the dispute, unless either party requests that the arbitration be conducted using the AAA's telephonic, on-line, or in-person procedures. Additional charges may apply for these procedures. Any in-person arbitration will be conducted at a location that the AAA selects in the state of your primary residence. Arbitrations under this Agreement shall be confidential as permitted by federal law. By notifying AT&T within twenty days after commenting an arbitration proceeding, you may elect to relieve both parties to the arbitration of confidentiality obligations.

c. Fees and Expenses of Arbitration. You must pay the applicable AAA filing fee when you submit your written request for arbitration to the AAA. The AM's filing fee and administrative expenses for a document arbitration will be allocated according to the AAA's Rules, except as stated herein, for claims of less than \$10,000, you will only be obligated to pay a filing fee of \$20 and we will pay all of the AAA's other costs and fees. For claims between \$10,000 and \$75,000, you will pay a fee to the AAA of no more than \$375, and we will pay all of the AAA's other costs and fees. If you elect an arbitration process other than a document ("desk") or telephone arbitration, you must pay your allocated share of any higher administrative fees and costs for the process you select. If you request such an alternative process, or for claims of \$10,000 or greater, AT&T will also consider, upon receiving your request and on a case-by-case basis, paying some or all of the AAA's fees and expenses that you would otherwise be allocated under the AAA's rules. You also may ask the AAA about the availability of a pro bono arbitrator and/or a waiver or deferral of fees and expenses from the AAA; more information about the AAA's rules and policies is available at the AAA's website, which is www.adr.org. Unless applicable substantive law provides otherwise, each party will pay its own expenses to participate in the arbitration, including attorneys' fees and expenses for witnesses, document production and presentation of evidence. If you prevail before the arbitrator, however, you may seek to recover the AAA's fees and the expenses of the arbitrator from us. If we prevail before the arbitrator, and if we show that you acted in bad faith in bringing your claim, then we may seek to recover the AAA's fees and

expenses of the arbitrator from you.

8. MISCELLANEOUS.

a. No Third Party Rights. This Agreement does not provide any third party with a remedy, claim, or right of reimbursement.

b. Acts Beyond Our Control. Neither you nor we will be responsible to the other for any delay, failure in performance, loss or damage due to fire, explosion, power blackout, earthquake, volcanic action, flood, the weather elements, strike, embargo, labor disputes, civil or military authority, war, acts of God, acts or omissions of carriers or suppliers, acts of regulatory or governmental agencies, or other causes beyond our reasonable control, except that you must pay for any Services used.

c. Assignment. We can assign all or part of our rights or duties under this Agreement without notifying you. If we do that, we have no further obligations to you. You may not assign this Agreement or the Services without our prior written consent.

d. Notices. Notices from you to AT&T must be provided as specified in this Agreement. Notice from you to AT&T made by calling AT&T is effective as of the date that our records show that we received your call.

AT&T's notice to you under this Agreement will be provided by one or more of the following: posting on our web site, recorded announcement, bill message, bill insert, newspaper ad, postcard, letter, call to your billed telephone number, or e-mail to an address provided by you.

e. Separability. If any part of this Agreement is found invalid, the rest of the Agreement will remain valid and enforceable.

f. Governing Law. This Agreement is governed by the Federal Communications Act to the full extent applicable, and otherwise by the law of the State of New York, without regard to its choice of law rules. The arbitration provisions in Section 7 are also governed by the Federal Arbitration Act. This governing law provision applies no matter where you reside, or where you use or pay for the Services.

g. Entire Agreement. This Agreement (which incorporates by reference the AT&T Service Guides) constitutes the entire agreement between us and supersedes all prior agreements, understandings, statements or proposals, and representations, whether written or oral. This Agreement can be amended only as provided in Section 9 below. No written or oral statement, advertisement, or service description not expressly contained in the Agreement will be allowed to contradict, explain, or supplement it. Neither you nor AT&T is relying on any representations or statements by the other party or any other person that are not included in this Agreement.

9. CHANGES TO THIS AGREEMENT.

This Agreement may only be changed in the manner provided for in this Section 9. We may change this Agreement, including the incorporated AT&T Service Guides, from time to time. If we make any changes to the prices or charges, we will comply with our notice commitments described in Section 1 of this Agreement. With respect to all other changes to this Agreement, we will notify you of the changes, and they will be effective no sooner than fifteen days after we post them at www.att.com/serviceguide/home. You may also request a copy of the revised Agreement, including revised AT&T Service Guides for the services you are enrolled in, by calling AT&T toll free at 1-888-288-4099.

IF YOU CONTINUE TO BE ENROLLED IN, USE, OR PAY FOR THESE SERVICES AFTER ANY CHANGES IN THE PRICES, CHARGES; TERMS OR CONDITIONS, YOU AGREE TO THE CHANGES.

10. ENROLLMENT IN ANOTHER AT&T SERVICE. -

To enroll in an additional Service, or to switch from your existing Service to a different Service, you must notify us by: (1) returning an enrollment form provided in AT&T marketing materials; (2) calling the AT&T customer service number on your AT&T bill; (3) calling the AT&T customer service number provided in AT&T marketing materials; or (4) going to our web site at www.attcorn and following any further instructions provided for enrollment. The terms and conditions of this Agreement, including those in the incorporated AT&T Service Guides, will apply to the new or additional AT&T Service.

BY ENROLLING IN, USING, OR PAYING FOR THESE NEW OR ADDITIONAL SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT.

* Customers outside the U.S. call: 1-877-288-4725.
TTY for customers with hearing/speech disabilities: 1-800-833-3232.

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