

No. 243991

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

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**MICHAEL MCKEE,**

**Respondent,**

**v.**

**AT&T CORPORATION,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for. Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

Scott M. Kane (WSBA No. 11592)  
Lacy & Kane  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oaldand, CA 94607-3616

*Attorneys for Respondent*

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## INTRODUCTION

The trial court held that AT&T's arbitration clause, which prohibits its customers from bringing class actions against it, is unenforceable under Washington law. While the Washington Supreme Court is currently considering the question of whether an arbitration clause in a contract of adhesion that bars consumers with small claims from participating in class actions is unconscionable,<sup>1</sup> there is strong precedent for the proposition that such a provision is unenforceable.

Understandably, then, AT&T is eager to have this Court avoid the question of whether its contract term violates Washington law.

Accordingly, AT&T offers two arguments to the effect that this Court must ignore Washington law and uphold its arbitration clause anyway.

First, AT&T argues that Washington courts are prohibited from striking down any unconscionable term in a contract between AT&T and its Washington customers, because the Federal Communications Act ("FCA") supposedly requires that long-distance carriers have uniform contracts that are identical for all of their customers. AT&T's sweeping claim of federal preemption is untenable. Since the Federal Communications Commission ("FCC") detariffed long-distance service, the FCC has allowed phone carriers to have different contracts with

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<sup>1</sup> *Scott v. Cingular Wireless LLC*, No. 77406-4 (argument scheduled Feb. 28, 2006).

different customers for many reasons. Under the language, history and structure of the FCA; AT&T's-preemption claims fails.

Second, AT&T argues that, when it does business in Washington, its contractual choice of New York law governs its mandatory arbitration clause for Washington customers. Although choice-of-law terms are often enforceable, this one cannot be enforced under Washington's choice-of-law rules because its application to AT&T's arbitration clause would be contrary to Washington's policy of protecting Washington consumers, and because Washington has a materially greater interest in regulating these in-state consumer transactions than does New York or any other state.<sup>2</sup>

In sum, this Court should reject both of AT&T's arguments for shielding its adhesive and exculpatory consumer arbitration clause from the core requirements of Washington contract law.

**ISSUES PERTAINING TO APPELLANT'S  
ASSIGNMENTS OF ERROR**

1. Did the trial court correctly rule that the FCA does not preempt the application of generally applicable state contract and consumer protection laws to the terms of a detariffed long-distance carrier's

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<sup>2</sup> The Washington Supreme Court is currently facing a very similar challenge to a choice-of-law provision that would apply Virginia state law to a consumer contract, with the effect that consumers could not bring or participate in class actions. *Dix v. ICT Group, Inc.*, No. 75132-03 (argument scheduled Feb. 28, 2006).

- contract with consumers, when the contract's terms would deprive consumers-of any effective remedy for their claims? -(Yes.)
2. Where a provision in an adhesive contract prohibits consumers with very small claims from bringing or participating in a class action, is that provision unconscionable and unenforceable under Washington law? (Yes.)
  3. If a choice-of-law provision in an adhesive contract would deny Washington consumers any meaningful remedy for violations of their rights under the state's consumer protection statutes, is that choice-of-law provision unenforceable? (Yes.)

STATEMENT OF THE CASE

Plaintiff-respondent Michael McKee represents a putative class of Washington residents who have been long-distance telephone customers of AT&T and who allegedly were charged an improper utility tax surcharge after August 31, 2001 or were subject to a monthly late fee of 1.5% of their outstanding balance due.

McKee, a resident of Chelan County, signed up for AT&T service in November 2002. CP 1126. McKee never signed any agreement with AT&T, was not informed of any terms and conditions associated with AT&T service prior to using the service, and recalls only that he "may have received something in the mail from them containing several papers

after [he] agreed to their long distance plan." CP 1040 ¶ 6. After using AT&T's services, McKee began to receive bills that included city utility- - - tax surcharges, despite the fact that he lived outside city limits. CP 1041 ¶ 8. After being unable to resolve the problem by contacting AT&T, CP 1039-40, McKee filed this case in the Superior Court for the State of Washington, Chelan County, on February 3, 2003, alleging violations of Washington's Consumer Protection Act ("CPA"), RCW 19.86, and Usury Act, RCW 19.52, as well as common-law claims. CP 1281-97, 838-48.

On October 24, 2003, AT&T moved to compel McKee to arbitrate his claims individually, claiming that McKee was bound by an arbitration clause included in a Customer Service Agreement ("CSA") that AT&T claimed had been mailed to McKee as part of a "fulfillment package" after he ordered AT&T service. CP at 1127-28, 1114-15.

The CSA AT&T submitted in support of its motion to compel arbitration banned class actions, required that arbitration be kept confidential, shortened the time within which customers could bring their claims, and limited AT&T's liability. CP 1118-19. In addition, the CSA contained a choice-of-law clause specifying that the Federal Arbitration Act ("FAA") governed the arbitration clause and that New York law governed the remainder of the agreement. CP 1118. McKee opposed AT&T's motion to compel arbitration on grounds that the class action ban

and other terms were unconscionable under Washington law. CP 1042-1076; CP-403-560. \_

McKee put three expert declarations before the trial court. Owen F. Clarke, Jr., a former Washington Assistant Attorney General for 25 years and the head of the Consumer Protection Division's Spokane office for 17 years, CP 567 ¶ 3, testified that unless they can proceed on a class-wide basis, the consumers McKee represents will be unable to find qualified counsel to represent them. CP 567 ¶ 7. He explained:

First, consumer cases such as this one are almost as complicated when litigated on an individual basis as they are when litigated on a class basis. Hence, litigating an individual case consumes many attorney hours and creates substantial, expense with only a small economic return to the client... .

Second, there is simply too much risk and too little reward in cases like this to interest lawyers in taking them individually on a contingent basis. . . . The consumer contract laws are detailed and complex and damages are therefore difficult to predict. The pool of plaintiffs' lawyers who are capable of, and interested in, evaluating the merits of claims like the plaintiffs' is very small. Conversely, defendants like AT&T are always represented by experienced capable counsel, whom they pay hourly... .

CP 568 ¶ 8-9. Mr. Clarke further testified that the possible availability of attorneys' fees in some cases would have little impact, because "[e]ven if the plaintiff wins, and even if the plaintiff is awarded some attorneys' fees, it is my experience that the decision-maker will frequently award less than the full amount of fees incurred . . . ." CP 568-69 ¶ 9.

Finally, Mr. Clarke's testimony made clear that the prohibition on class-wide-relief in AT&T's contract amounts to an exculpatory-clause, -- because it deprives the company's customers of the only means of obtaining the legal assistance necessary to obtain relief:

Based on all these factors I believe it is unlikely that any private attorney would agree to litigate the issues raised in a consumer claim of the type involved in this case, except on a contingent and class-wide basis.

CP 569 ¶ 8. Garfield R. Jeffers, an attorney with 38 years of practice in Washington, likewise testified that "I can say with certainty that I know of no private lawyer who would agree to litigate the issues raised in a single consumer claim" absent class-wide relief. CP 565 ¶ 7.

McKee also introduced a declaration from David A. Thorner, an attorney since 1972 whose practice focuses on civil litigation. CP 570-72. Mr. Thorner has represented both plaintiffs and defendants in consumer class actions in Washington courts. CP 570-71 ¶ 2. He likewise concluded that, based on his experience, "if these AT&T customers are not able to proceed on a class action basis, neither the plaintiff nor the vast majority of the members of the representative class will be able to find qualified counsel to represent them." CP 571 ¶ 6.

On June 18, 2004, the trial court orally denied AT&T's Motion to

Compel Arbitration. RP 1 at 13-14.<sup>3</sup> First, the court held that Washington law, not New-York--law; governs-the-enforceability of-the mandatory- - - arbitration clause in AT&T's CSA. RP 1 at 8-9.

Second, the court held that the CSA's "length and complexity," "fine print," "concealment of important terms," and adhesive nature render it procedurally unconscionable. RP 1 at 10-11.

Third, the court held that the arbitration clause is substantively unconscionable. RP 1 at 11. Judge Bridges clarified the standard he was using to determine unconscionability:

With respect to substantive unconscionability, the Court understands that that involves analysis of whether or not there are clauses or terms that are so one-sided or overly harsh as to . . . shock the conscience of the Court.

RP 1 at 10. The court declined to sever unconscionable terms from the remainder of the CSA. RP 1 at 12.

Lastly, the court held that the FCA does not preempt McKee's state-law unconscionability claims. RP 1 at 15-16.

Throughout the briefing before the trial court, and in particular after the court had issued its oral decision on unconscionability, the parties disputed which version of the CSA applies to McKee. Over the course of the litigation, AT&T put before the court no less than seven copies of at

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<sup>3</sup>"RP 1" refers to the Report of Proceedings of the Court's Oral Decision dated June 18, 2004.

least five versions of the CSA. CP 702-15 (August 1, 2001 version); CP 694-700-(March-1; 2002 version); CP 133-1-39 (November 1,-2002-- - - version); CP 1117-19, CP 717-19, CP 340-42 (November 25, 2002 letter with CSA version dated "2001" on one page and "2002" on another page); CP 343-49 (September 15, 2003 version). AT&T did not argue that the November 1, 2002 CSA, which it claims omitted or amended some of the terms held unconscionable by the trial court, applies until nine months after the trial court had rendered its oral decision on unconscionability. RP 1; CP 127 ¶ 6, CP 133-39. The trial court never explicitly said which version of AT&T's CSA formed the basis of its holding. RP 2 at 32.<sup>4</sup>

On July 19, 2005, the trial court adopted the findings of fact and conclusions of law in its June 18, 2004 oral decision. CP 48-49.

#### **HISTORY AND BACKGROUND ABOUT THE FEDERAL COMMUNICATIONS ACT AND DETARIFFING**

Understanding the preemption issues posed by AT&T requires discussion of the principal terms of the FCA bearing upon preemption, and an awareness of how the law of FCA preemption has radically changed as a consequence of the growth of competition and deregulation.

As the following paragraphs will document, prior to August 1, 2001, long-distance carriers were not required to form contracts with their customers, because the terms of long-distance service were governed by

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

tariffs filed with the FCC. When long-distance service was deregulated, however, the FCC ordered long-distance carriers to enter into contracts with their customers effective August 1, 2001. The various versions of AT&T's CSA follow this command.

The detariffing of long-distance service was a historic sea-change brought about by the recognition of both Congress and the FCC that long-distance service is no longer a natural monopoly. Accordingly, the response of both Congress and the FCC to an era of widespread competition was to eliminate the reliance upon uniform tariffs that carried the weight of law and instead rely upon market forces (which include the normal backdrop of state commercial laws that apply to all competitive markets). "[T]he current system bears . . . little resemblance to the paradigm that existed prior to" deregulation. *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

### **Before 1996: A Natural Monopoly and the Era of Tariffs**

When long-distance telephone service first became widespread, it was a natural monopoly. Congress recognized that if this monopoly was not regulated, the long-distance company would have enormous power that could be used to give some parties or geographical areas a great advantage over others. A central feature of the Interstate Commerce Act, which was the forerunner to the FCA, was to protect the nation from

possible abuses of this monopoly power by ensuring that all phone service was provided to all people on the same terms. Accordingly, from the early 1900s on, the terms of phone service were not governed by contract principles as an agreement between two parties, but by the principle that the terms themselves became a species of law. See *Western Union Telegraph Co. v. Esteve Brothers*, 256 U.S. 566, 571 (1921) ("The Act of 1920 introduced a new principle into the legal relations of the telegraph companies with their patrons.... The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed.").

While no language in the Interstate Commerce Act itself created a rule of uniformity, that gap was soon filled. When the FCA was enacted, a new legal mechanism was developed to ensure uniformity, and it was incorporated into § 203. This section provides that common carriers shall file schedules with the FCC setting out their rates, as well as "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203. These schedules are known as tariffs. For many decades, long-distance telephone service was governed by these tariffs, which were filed with and approved by the FCC. The preemptive force of § 203 was absolute in its scope. "If approved, the tariff exclusively controlled the rights and liabilities of the parties as a matter of law." *Ting v. AT&T*, 182

F. Supp. 2d 902, 907 (N.D. Cal.), *aff'd with respect to unconscionability*, 3-19 F:3d-1126-(9th-Cir.), *cert denied*, 540 U.S. 811-(2003). -The reason - - for the absolute preemptive force of these tariffs was simple: "A tariff filed with a federal agency is the equivalent of a federal regulation." *Cahnran v. Sprint Corp.*, .133 F.3d 484, 488 (7th Cir. 1998). The absolute preemptive scope of § 203 was embodied in "the filed rate doctrine," which was the "central principle of the regulatory scheme for interstate telecommunications carriers." *Lipton v. MCI Worldcom, Inc.*, 1.35 F. Supp. 2d 182, 187 (D.D.C. 2001) (citation omitted).

To understand AT&T's arguments, it is important to recognize two other provisions of the FCA in addition to § 203. Section 201 provides that the terms of long-distance service must be "just and reasonable." 47 U.S.C. § 201. AT&T argues that this means that state contract laws may never render any term of a long-distance carrier's contract unconscionable.

Section 202 of the FCA provides that long-distance carriers may not "give any undue or unreasonable preference" to any particular set of customers. 47 U.S.C. § 202. AT&T contends that applying Washington contract law to AT&T's conduct in this case is preempted by § 202 because applying that law to AT&T's conduct in Washington constitutes "unjust or unreasonable discrimination" that gives Washington customers an "undue or unreasonable preference or advantage."

### **Detariffing and the FCC's Response**

-In -1996, Congress-deregulated long-distance service. It -did this by-amending the FCA to permit the FCC to forbear from enforcing § 203, and thus to eliminate the filed rate doctrine. Congress envisioned the 1996 Amendments as "a dramatic break with the past that would revolutionize long-distance service by greatly decreasing the scope of the FCC's role." *Ting v. AT&T*, 319 F.3d 1126, 1143 (9th Or.), *cert. denied*, 540 U.S. 811 (2003). Accordingly, acting pursuant to the 1996 Amendments, 47 U.S.C. § 160(a), the FCC ended the system of tariffs. *Interstate, Interexchange Marketplace, Second Report and Order*, 11 F.C.C.R. 20,730 (1996). AT&T fought detariffing, hoping it could continue to "limit [its] liability through tariff provisions." *Interstate, Interexchange Marketplace, Order on Reconsideration*, 12 F.C.C.R. 15,014, 15,020 (1997). Instead, in the place of tariffs, the FCC required that the same backdrop of laws that govern companies in other fields-"incentives and rewards"-would apply to carriers. *Second Report and Order*, 11 F.C.C.R. at 20,733.

### **The Role of State Law In the Detariffed Environment**

The withdrawal of FCC regulation was not meant to herald an era of lawlessness in the telecommunications industry. Instead, the framers of the 1996 Amendments intended that state law would play an important role in preserving consumer protections. *See Ting*, 182 F. Supp. 2d at 908

(citing comments in legislative history about the crucial role of state consumer protection laws).- The FCC concurred. In its statements relating to detariffing, the FCC said that it would henceforth rely upon the "marketplace" to ensure that §§ 201 and 202 were enforced. E.g., *Second Report and Order*, 11 F.C.C.R. at 20,733. When the FCC has used the term "marketplace" in similar contexts, it has always contemplated that term as including state contract and consumer protection laws.<sup>5</sup>

AT&T reacted with alarm to the FCC's position that, in the detariffed environment, long-distance carriers would be subject to state consumer protection laws. It filed a petition requesting that the FCC announce that it was going to continue to enforce §§ 201 and 202 as they related to the terms of long-distance service. AT&T also requested that the FCC make an express statement that this continued enforcement would "exclusively" govern the terms of service. AT&T did not get what it wanted. Rather, as the district court found in *Ting*, the FCC "granted in part and denied in part AT&T's petition. . . ." *Ting*, 182 F. Supp. 2d at 909. The FCC's Order on Reconsideration provided in relevant part:

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<sup>5</sup> In *In re Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19,898 (1999), for example, the FCC agreed with several carriers that the 1996 Act established a preference for "the competitive forces of the marketplace, rather than governmental regulation," but cautioned that it did not agree that "such preference for competition over regulation results in a general exemption for the [mobile phone] industry from the neutral application of state contractual or consumer fraud laws." 14 F.C.C.R. at 19,903. Accordingly, the FCC's statements on detariffing spoke of the centrality of state consumer protection and contract laws. See, e.g., *Second Report and Order*, 11 F.C.C.R. at 20,753.

[T]he [FCA] continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory. [However,] we note that the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, *consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.*

12 F.C.C.R. at 15,057 (emphasis added).

Thus, while the FCC clarified that it would continue to regulate the "rates, terms and conditions" of service, it also held that consumers would have remedies under state consumer protection and contract laws as to issues regarding the legal relations between the carrier and customer. The order did not state that any body of state law was preempted. The FCC subsequently stated on its website that consumers "are protected by the full range of state laws, including those governing ... consumer protection, and deceptive practices." *Ting*, 182 F. Supp. 2d at 909.

### **Since Detariffing, the FCC Has Abandoned the Uniformity Principle In A Series of Rulings**

In the detariffed environment, the FCC has made clear that carriers no longer must offer uniform contract terms to all consumers. Indeed, the FCC has made clear that carriers are now free under §§ 201 and 202 to offer different terms to different consumers, and the agency relies upon the marketplace to ensure that these distinctions are not unreasonable or

unjust. In *Orloff v. Vodafone Airtouch Licenses*, 17 F.C.C.R. 8987 (2002), for example, the FCC permitted a carrier to negotiate separate and different agreements with each of its consumers. The FCC held that these contract variations did not violate section §§ 201 or 202. 17 F.C.C.R. at 8996-99;<sup>6</sup> see also *In re Bruce Gilmore v. Southwestern Bell Mobile*, 20 F.C.C.R. 15079, at \*23 (2005) (it is reasonable under §§ 201 and 202 for a phone carrier to negotiate better deals with some customers than others, so long as there is no market failure that prevents customers from switching carriers if they are dissatisfied); *In re Digital Cellular*, 20 F.C.C.R. 8723, 8729 (2005) (it is reasonable under §§ 201 and 202 for phone carrier to offer service on different terms to one company than to another).

### **SUMMARY OF ARGUMENT**

In this case, AT&T has allegedly cheated a large number of customers out of individually small sums of money. As the factual record demonstrates, if AT&T is able to bar these customers from bringing or participating in a class action, few if any of them will have any remedy for this wrong no matter how valid their factual and legal arguments are.

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<sup>6</sup> The *Orloff* case arose in the cellular phone context. While it is true that cellular phone companies were never subject to tariffs, the FCC's statements relating to §§ 201 and 202 in that context apply with equal force in the long-distance context. In its decisions to detariff long-distance service, the FCC made clear that its goal was to create a system that would rely upon the same market policing forces for long-distance service that governed cellular phones. See *Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking*, 11 F.C.C.R. 7141, 7158 (1996). In other words, the cellular phone context is the model for detariffed long-distance service, and the FCC's interpretations of §§ 201 and 202 involving cellular companies are completely applicable here.

Meanwhile, by imposing a class action waiver, AT&T has not given up a remedy it would ever use against its customers.-Accordingly, the - provision banning class actions is one-sided in favor of AT&T, and it is effectively an exculpatory clause. Under well-established Washington law, provisions in adhesive contracts that are one-sided and/or exculpatory are unconscionable and unenforceable.

In two recent cases, *Zuver v. Airtouch Communications, Inc.*, 153 Wn. 2d 293, 103 P.2d 753 (2004), and *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.2d 773 (2004), the Washington Supreme Court struck down a total of four provisions embedded in two companies' arbitration clauses that were either one-sided in favor of the stronger party, or effectively exculpatory. The logic of these cases applies so plainly to AT&T's ban on class actions that AT&T's desire to have this Court decide this appeal on some ground other than Washington state law is readily understandable.

AT&T argues that the FCA preempts Washington state contract law, as it might apply to any term of a long-distance contract that is unconscionable under state law, on the grounds that the FCA supposedly requires "that customers receive uniform terms and conditions." AT&T Brief at 19. AT&T's argument is counter to the terms, purpose and structure of the FCA, as well as the FCC's own statements about the Act.

As the History and Background above makes clear, the point of the

1996 Amendments to the FCA was to reduce the FCC's role and. replace FCC-enforced-uniformity-with -"market forces"-including normal- state contract and consumer protection laws. The legislative history demonstrates that Congress saw an important role for state consumer protection laws in the detariffed environment.

In addition, several provisions of the 1996 Amendments affirmatively rely upon and incorporate state consumer protection laws. AT&T's preemption argument thus puts the FCA at war with itself. Given the overwhelming evidence here that the ban on class actions in AT&T's CSA would have the effect of gutting Washington's consumer protection laws, interpreting §§ 201 and 202 of the FCA in a way that would permit these laws to be eviscerated would directly conflict with the provisions of the FCA that rely upon such state laws.

Furthermore, the FCC has made clear that uniformity is no longer required in the detariffed environment. In a series of cases, phone carriers have treated customers differently, and the FCC has consistently held that this disuniformity is legal because of the market the consumers can always go to another carrier if they choose. By pretending that the FCA continues to require absolute uniformity, and thus conflicts with and preempts the application of normal state contract law principles to contracts for phone service, AT&T ignores the FCA's history since 2001.

While AT&T is correct that a handful of courts have accepted its position on the-FCA's preemption-of state laws-of-substantive ----- unconscionability, and only one court has directly rejected it (*Ting*, 319 F.3d 1126), the cases supporting AT&T's position are deeply flawed. Those cases rely upon false factual assumptions and ignore the FC.C's actions since detariffing.

In sum, this Court should hold that the FCA does not preempt basic rules of Washington state contract law where such preemption would gut the enforcement of the state's consumer protection laws.

Likewise, AT&T cannot evade Washington law through its New York choice-of-law clause. Under well-established, generally applicable Washington choice-of-law rules, AT&T cannot enforce a contractual choice of law whose application would conflict with a fundamental Washington public policy and where, as here, Washington has a materially greater interest in the in-state consumer transactions than any other state.

## ARGUMENT

### **STANDARD-OF-REV-IFW**

While conclusions of law are reviewed *de novo*, factual determinations of the trial court should be accorded deference. *See Ridgeview Properties v. Starbuck*, 96 Wn. 2d 716, 719, 638 P.2d 1231 (1982) ("where the trial court has weighed the evidence, . . . review is limited to determining whether substantial evidence supports the findings"). Here, the trial court's findings concerning the "length and complexity" and "fine print" of AT&T's arbitration clause in support of its procedural unconscionability holding are essentially factual findings, and thus may not be disturbed if they are supported by substantial evidence.

### **II. THE FEDERAL COMMUNICATIONS ACT DOES NOT PREEMPT STATE LAW OF UNCONSCIONABILITY.**

#### **A. There is a Heavy Presumption Against Preemption in This Case.**

This case must be analyzed in light of the strong presumption against federal preemption of state law. "In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention `clear and manifest.' *Bates v. Dow Agrosciences*, 125 S. Ct. 1788, 1801 (2005) (internal citations omitted). The presumption against preemption applies both to the existence of preemption and the scope of preemption. *Medtronic, Inc. v.*

*Lohr*, 518 U.S. 470, 484-85 (1996). This presumption helps ensure that the balance between --federal -and-state-power-will not-be-disturbed--- unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The presumption against preemption applies in even greater force here, given that the Washington law of unconscionability that AT&T claims is preempted is a core doctrine of contract law traditionally governed by states:<sup>7</sup> In addition, "consumer protection is a field traditionally regulated by the states." *Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004) (citations omitted).

Notwithstanding this presumption, federal law can preempt state law in three situations: where a Congressional Act has "an express provision for preemption," where Congress intends federal law to "occupy the field," and "to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trade Council*, 530 U.S. 353, 372 (2000).

AT&T acknowledges that it has no claim of express preemption or field preemption in this case, and relies solely upon a claim of conflict

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<sup>7</sup> See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) ("[T]he cases before us, which center upon appellant Northern's claim for damages for breach of contract . . . , involve a right created by *state* law"); *id.* at 90 (Rehnquist, J. and O'Connor, J., concurring) (" [T]he lawsuit ... seeks damages for breach of contract ... which are the stuff of traditional actions at common law. . . . There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims . . . arise entirely under state law.").

preemption. AT&T Brief at 19-20.

- Implied conflict-preemption-requires-a very strong showing, however, and AT&T has not met that standard. Implied preemption arises only when there is an "actual conflict" between federal and state law, either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

**B. There is No Conflict Between the FCA and the Washington State Contract Law at Issue Here.**

**1 FCA Sections 201 and 202 Do Not Bar the Application of State Contract Law.**

As set forth in the Background above, § 203 of the Act, and its tariff provision, required that the terms of long-distance service be identical for all consumers. After long-distance service was detariffed, AT&T could no longer hide behind § 203. Accordingly, AT&T attempts to re-read a century of Supreme Court decisions and argue that § 203 and the filed rate doctrine were always mere procedural devices, and that they were superfluous to the Act's actual preemptive force. AT&T now asserts that a requirement of uniformity, and a sweeping preemptive force, arise from two different provisions of the FCA: §§ 201 and 202. Unlike the absolute language of § 203, however, §§ 201 and 202 use heavily qualified

language. These provisions do not speak of complete uniformity, but only bar "unreasonable - preferences- and "unreasonable'-'terms:--In the wake of - -- deregulation, this language cannot be read in the absolute manner in which § 203 was consistently interpreted for decades.

Moreover, to read §§ 201 and 202 in the manner suggested by AT&T is counter to the way that the U.S. Supreme Court addressed FCA preemption in its most recent decision. The cases on which AT&T relies (such as *Boomer v. AT&T*, 309 F.3d 404 (7th Cir. 2002)), depend upon the idea that U.S. Supreme Court's decision in *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), reads a uniformity requirement into §§ 201 and 202. E.g., *Boomer*, 309 F.3d at 418. But the holding in *Central Office* is driven and bounded by the principles and rationale of the filed rate doctrine, and does not apply in the detariffed environment. For example, the *Central Office* Court concluded that the plaintiffs' claims there were barred because they related to "privileges not included in the tariff," 524 U.S. at 226, and repeatedly posed as the determinative issue whether the filed rate doctrine applied to the claims at issue. 524 U.S. at 216, 221-26. *Boomer* argues that *Central Office* could just as well have been based on §§ 201 and 202, but as the Ninth Circuit correctly pointed out, this interpretation of §§ 201 and 202 would render § 203 superfluous. *Ting*, 319 F.3d at 1139.

In fact, the last several years have been extremely unkind to AT&T's -argument, and to the-Seventh-Circuit's-decision-in *Boomer*- - because the FCC itself has repeatedly and consistently rejected demands that it read a uniformity requirement into §§ 201 and 202. Instead, even when a phone carrier reached different terms of service with similarly situated but different customers solely on the basis of market "haggling," *Orloff*, 352 F.3d at 417, the FCC has held that this disuniformity is entirely legal. And the U.S. Court of Appeals for the D.C. Circuit, contrary to the implied holding of *Boomer* and its progeny, had no trouble affirming the FCC's action in this respect. *Orloff*, 352 F.3d at 421.

In addition, AT&T's argument is belied by the legislative intent underlying the Act. When Congress deregulated the long-distance market, it drastically de-emphasized the role and power of the FCC, and frequently expressed concerns for federalism. *Ting*, 182 F. Supp. 2d at 908 (citing quotes from legislative history); *Ting*, 319 F.3d at 1143 (same). To treat the 1996 Amendments as having left the FCC's exclusive authority entirely intact is to re-write this history.

2. **The FCC Intended for Long-Distance Carriers to Be Subject to State Consumer Protection Laws.**

AT&T argues that the FCC's opinions implementing detariffing implicitly declared that all state contract law is preempted as it relates to

the terms of a long-distance carrier's service. E.g., AT&T Brief at 27.

This argument ignores the vast majority of what the FCC has said:

First, when the FCC announced its decision to detariff, it declared that consumers would not only have remedies under the FCA, but would "also be able to pursue remedies under state consumer protection and contract laws." *Second Report and Order*, 11 F.C.C.R. at 20,753. As set forth above, when AT&T complained and asked the FCC to reconsider, the FCC's response was to agree that it would continue to enforce the FCA. It did not say that any state laws were preempted or excluded by the FCA, however, and it did not retract the statement that consumers would continue to have remedies under state contract laws. On the contrary, in its Order on Reconsideration, the FCC made clear that state contract laws apply to long-distance contracts, and that consumers would have remedies under state laws of contract and consumer protection regarding the "legal relationship" between the carrier and consumers. 12 F.C.C.R. at 15,057. Plaintiffs' claims here are based on precisely these state laws.

The FCC's detariffing orders also state that carriers are to be treated like all other businesses in unregulated markets, further disproving AT&T's position. *Second Report and Order*, 11 F.C.C.R. at 20,733. All other unregulated businesses in the U.S. are subject to state contract law and state consumer protection laws. As established above, the FCC has

said that "market forces" include state contract and consumer protection laws: -Indeed,when-acarrier-suggested-that -the FCC's reliance upon - - - - - market forces implied an exemption from "the neutral application of state contractual or consumer fraud laws," the FCC flatly and explicitly rejected that claim. *In re Southwestern Bell*, 14 F.C.C.R. at 19,903.

As noted in the History and Background above, after the Order on Reconsideration, the FCC continued officially to inform consumers that they are protected by the "full range" of state laws relating to contracts and consumer protection. If AT&T's vision of preemption is correct, then the FCC's public statements are flatly false.

The FCC's decision to rely upon contracts also necessarily implies a large role for state law. The filed rate doctrine arises from federal law, but a contract "is not the filed rate and therefore is not a simple creature of federal law." *Fax Telecornunicaciones, Inc. v. AT&T*, 138 F.3d 479, 487 (2d Cir. 1998). Given that contracts-unlike tariffs-are not a species of federal law, it follows that state law must govern them.

### **3. AT&T's Reading of the FCA Conflicts With the Structure of the FCA.**

AT&T's brief does not make any reference to the several provisions of the FCA that explicitly address state consumer protection statutes. In addition to setting in motion the process of detariffing, the

1996 Amendments added three terms to the Act that explicitly rely upon (and-also-save-from-preemption)- state-consumer-protection- laws- *See* 47 U.S.C. § 253 (preserving "consumer protection" laws relating to new carriers entering the long-distance field); 47 U.S.C. § 254 (preserving a role for states in ensuring that universal service is available at rates that are just, reasonable and affordable); 47 U.S.C. § 261(c) (preserving state laws that further competition in the provision of phone exchange services).

As the record here reflects, the ban on class actions in the CSA would bar many of AT&T's customers from effectively vindicating even valid claims. Accordingly, the state laws at issue here fall within a narrow and unusual category-laws that are necessary to ensure that consumers are not stripped of their ability to effectively vindicate their rights under state consumer protection laws.

Accordingly, AT&T's interpretation of §§ 201 and 202 would permit it and other companies to simply promulgate contract terms that would vitiate §§ 253, 254 and 261 of the FCA. To permit such an absurd result would undermine the overall purposes of the FCA.<sup>8</sup>

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<sup>8</sup> AT&T's position that § 202 requires that it be allowed to gut state consumer protection acts is inherently at odds with the language of the statute in another sense. The language of § 202 permits "just" and "reasonable" variations in service, and does not require absolute uniformity. Under AT&T's position, federal law would insist that it was "just" or "reasonable" to allow long-distance carriers to strip consumers of their ability to effectively vindicate their rights under state consumer protection laws.

#### 4. **The *Boomer* Case and Its Progeny Are Not Persuasive.**

AT&T stresses heavily that there are a handful of cases that support its position, and that there are more cases that favor its side than the side of the plaintiffs. Essentially, AT&T asks this Court to view the question of FCA preemption as one to be decided by a "majority rules" approach. However, the cases on which it relies are unpersuasive.

First, this Court should reject AT&T's suggestion that it should just go with a majority position without independently evaluating this legal issue based upon the language and purpose of the FCA and the statements and decisions of the FCC. This is particularly true with respect to federal preemption issues, where one party is asking a court to find that state law is overridden by federal law. Not only is it a great intrusion into state sovereignty to strike down state laws, but the "majority" position of federal courts relating to federal preemption is quite often wrong.<sup>9</sup>

Second, *Boomer* is unpersuasive because it is at odds with a series of subsequent decisions by the regulatory agency charged with implementing the statute. *Boomer* was decided just a few weeks after the

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<sup>9</sup> The U.S. Supreme Court's most recent major decisions on federal preemption make clear that it is not uncommon for federal courts to undervalue the importance of state law, and to too-readily find that state laws are overridden. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (finding that the Federal Boat Safety Act did not preempt state common laws, overruling half a dozen U.S. courts of appeals to the contrary); *Bates*, 125 S. Q. 1788 (finding that the Federal Insecticide, Fungicide and Rodenticide Act did not preempt certain state law labeling claims, despite the clear majority of U.S. court of appeals decisions to the contrary).

FCC decided the *Orloff* case, and neither *Boomer* nor its progeny have noticed that the FCC has consistently moved away from the old tariff-era paradigm of uniformity. In addition, when addressing the issue of the relationship between the FCA and state contract law, the FCC has cited *Ting* with approval. See *In re Sprint PCS and AT&T Corp.*, 17 F.C.C.R. 13,192, 13,198 n. 39 (2002) ("see also *Ting v. AT&T*, 182 F. Supp. 2d 902, 938 (N.D. Cal. 2002) (state law contract claims not preempted in a detariffed environment)"); *Wisconsin v. AT&T Corp.*, 217 F. Supp. 2d 935, 938 (W.D. Wis. 2002) (noting FCC had cited *Ting* "with approval").

Third, when AT&T claims that a wide majority of cases favor its view, it ignores the D.C. Circuit's thoughtful conclusion that the FCA does not require uniformity in the terms of phone service. *Orloff*, 352 F.3d 415. While the facts of *Orloff* are distinguishable, the D.C. Circuit's legal rationale necessarily rejects the premises that underlie *Boomer*.

Fourth, *Boomer* is unpersuasive because the Seventh Circuit refused to permit the parties before it to develop a factual record (instead insisting that it was improper for the district court there to permit any discovery), 309 F.3d at 412-13, and then based its decision on a series of assertions of a factual nature. For example, one of the central holdings of *Boomer* was that subjecting phone companies to normal state laws would increase their costs. *Boomer*, 309 F.3d at 419. This is, self-evidently, an

empirical question of fact, not a legal issue. The *Boomer* court did not indicate-what admissible evidence; if any; existed in-the record to support - - this conclusion. *Id.* In *Ting*, and in the present case; by contrast, actual evidence was put before the courts that disproves many of *Boomer's* critical assumptions. In *Ting*, for example, after the cost issue was raised by AT&T, and after evidence was introduced by each side and the witnesses were cross-examined, the district court specifically found that AT&T had *not* demonstrated that the CSA would reduce its costs. 182 F. Supp. 2d at 931 n. 16. Likewise, the FCC itself has rejected the *Boomer* court's assumption on this point, announcing a finding of fact that requiring compliance with state contract and consumer protection laws will not increase the costs of long-distance carriers. "[R]equiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs." *Order on Reconsideration*, 12 F.C.C.R. at 15,025. The Seventh Circuit's insistence that the issue should be decided in the absence of any factual record may explain why its guess as to the effect of applying state law differs from the conclusions of the FCC and from a court that held a trial on the issue.

Similarly, the *Boomer* court made several assertions about how easily consumers could read AT&T's CSA, and how effectively it was

communicated. 309 F.3d at 414. By contrast, the trial court here found  
- -that AT&-T-'-s-CSA had-excessive-"length and-complexit constituted - - - - -  
"fine print," and was guilty of "concealment of important terms." RP 1 at  
10-11. And in *Ting*, the court found that AT&T's mailings were sent out  
in a way that ensured that they were unlikely to be read by its consumers.  
182 F. Supp. 2d. at 921-13. The *Boozer* court guessed at the facts, and  
several of its guesses were simply wrong. This Court should reject that  
approach, and be guided by the factual record here demonstrating such  
important points as the fact that enforcing AT&T's class action ban would  
amount to an exculpatory clause and gut the state's consumer protection  
laws, undermining three separate provisions of the FCA.

**AT&T's Choice-of-Law Clause Does Not Alter the  
Analysis.**

AT&T makes much of the fact that its most recent CSA says that it  
is governed by the FCA. E.g., AT&T Brief at 17. As the foregoing  
discussion makes clear, the FCA (on its own terms, and as interpreted by  
the FCC) assumes an important role for state contract and consumer  
protection laws. Accordingly, if the CSA "incorporates" the FCA by  
reference, it must incorporate the entire body of law envisioned by the  
overall FCA scheme. Since the 1996 Amendments to the FCA clearly  
envision a role for state law, and since the FCC has declared that state law

plays an important role under the FCA, AT&T's provision incorporating the FCA necessarily incorporates those state-laws-as-well.

**D. Regardless of the FCA, the FAA Expressly Preserves McKee's State-Law Unconscionability Claims.**

Under the Federal Arbitration Act ("FAA"), contractual arbitration clauses are generally enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The U.S. Supreme Court has declared that the quoted language in Section 2 refers to "state law." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Allied-Bruce Ternainix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("§ 2 gives States a method for protecting consumers"). Furthermore, the Washington Supreme Court has made clear that state-law unconscionability challenges are entirely consistent with the FAA. *See Adler*, 153 Wn. 2d at 342; *Zuver*, 153 Wn. 2d at 302.

AT&T, however, argues that the FAA's incorporation of state law is somehow gutted by the FCA, and that only limited provisions of the FAA may be enforced by this Court. AT&T Brief at 28-31. This argument falls flat. Under normal principles of statutory construction, the FAA takes precedence over the FCA in the context of arbitration, because the relevant provision of the FAA addresses the role of state law specifically with respect to arbitration clauses, while the FCA provisions

relied upon by AT&T (AT&T Brief at 22) generically relate to all "rates, terms-and-conditions"-in-long-distance-contracts. *See-Morton -v. Mancari-*, - - 417 U.S. 535, 550-51 (1974) (absent a "clear intention otherwise, a specific statute will not be controlled or nullified by a general one ...."). Accordingly, AT&T's argument that the FAA "requires" enforcement of the clause regardless of state law (AT&T Brief at 31) should be rejected.

### III. AT&T'S ARBITRATION CLAUSE IS UNCONSCIONABLE.

In *Zuver*, 153 Wn. 2d 293, and *Adler*, 153 Wn. 2d 331, the Washington Supreme Court set out and applied two principles: arbitration clauses are substantively unconscionable and thus unenforceable if they are either (a) one-sided in favor. of the stronger party; or (b) effectively exculpatory clauses. In this case, AT&T's CSA bans class actions. CP 702-15; CP 694-700; CP 133-139; CP 1117-19; CP 717-19; CP 340-42; CP 343-49. As explained below, this provision runs afoul of *Zuver* and *Adler*, and is in itself sufficient to support the trial court's ruling that AT&T's arbitration clause is substantively unconscionable.<sup>10</sup> In addition,

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<sup>10</sup> As explained in the Statement of the Case, the CSA submitted by AT&T in support of its motion to compel contained three other unconscionable terms in addition to the class action ban: a confidentiality clause, a contractual time bar, and a limitation on liability. CP 1118-19; RP 1 at 10-11. However, after the trial court orally denied AT&T's motion to compel arbitration, AT&T argued that a more recent version of the CSA-one that removed or amended all unconscionable terms except for the class action ban-applies to this dispute. CP 127-28. It is clear that all of the challenged provisions of AT&T's original CSA are illegal under Washington state contract law. *See Adler*, 153 Wn. 2d at 355-58 (striking term shortening statute of limitations); *Zuver*, 153 Wn. 2d at 315 (striking confidentiality provision); *id.* at 319 (invalidating unilateral limitation on

AT&T's arbitration clause is procedurally unconscionable. As such, the clause-is-unenforceable. 11 -

**A. AT&T's Class Action Ban is Substantively Unconscionable Because It is One-Sided.**

When evaluating substantive unconscionability, courts consider the terms of the agreement in light of the totality of the circumstances, including whether the agreement is a consumer contract. *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1183 (W.D. Wash. 2002). A contract term is substantively unconscionable under Washington law if it is "one-sided or overly harsh." *Adler*, 153 Wn. 2d at 344.

In *Adler*, the Washington Supreme Court invalidated two terms in an arbitration clause on this basis. First, the court held that a term requiring each party to bear its own attorneys' fees was one-sided and substantively unconscionable because it "help[ed] the party with a substantially stronger bargaining position and more resources, to the disadvantage of [the party] needing to obtain legal assistance." 153 Wn. 2d at 355 (citations and quotations omitted). Second, the court held that a

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punitive damages). For reasons of space and clarity, however, this brief largely focuses on the illegal provision (the ban on class actions) present in all versions of the CSA. " As AT&T has conceded, under Washington law, an arbitration clause can be invalidated based on either substantive or procedural unconscionability, or both. CP at 738-39; *Adler*, 153 Wn. 2d at 347 ("Substantive unconscionability alone can support a finding of unconscionability."). Under New York law, a finding of unconscionability requires "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *State v. Avco Fin. Servs.*, 50 N.Y.2d 383, 389, 406 N.E.2d 1075 (1980) (citation omitted).

contractual time bar requiring the aggrieved party to notify the other of its  
- - intent to seek arbitration within 180 days of the event giving rise to the  
dispute "unreasonably favor[ed]" the stronger party. *Id.* at 357-58.

Likewise, in *Zuver*, the court held that two provisions in an arbitration clause—a secrecy provision mandating that all proceedings be kept confidential, and a damages waiver—benefited only the corporation. 153 Wn. 2d at 315 (confidentiality "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations"); *id.* at 318 (damages waiver left intact corporation's ability to pursue damages for "the only type of suit it would likely ever bring").

The court made clear the "effect of th[e] provision"—not whether it is nonmutual on its face—determines whether it is substantively unconscionable. *Id.* (emphasis added). In fact, three of the four terms the court struck in the two cases were nominally mutual. *Adler*, 153 Wn. 2d at 355; *id.* at 357-58; *Zuver*, 153 Wn. 2d at 315.

In this case, it is clear that AT&T's ban on class actions is a one-sided term that strips its customers of a remedy that many would invoke over time, but strips no remedy from AT&T that it would ever wish to pursue. The California Supreme Court has held that:

[S]uch class action or arbitration waivers are indisputably one-sided. Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under

which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action-lawsuits.

*Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005).

Likewise, Judge Lasnik of the Western District of Washington held that a class action ban in a consumer contract was unconscionable under Washington law because it took away a remedy that only consumers would ever use:

Although the Arbitration Rider's class action provision is nominally mutual, because there is no reasonable possibility that Household would institute a class action against its borrowers, the provision is effectively one-sided.

*Luna*, 236 F. Supp. 2d at 1179; *see also Ting*, 319 F.3d at 1150 (class action ban in consumer contract unconscionable under California law); *Al-Safin v. Circuit City Stores*, 394 F.3d 1254, 1261-62 (9th Cir. 2005) (same result under Washington law). This Court should join the consensus.

**B. AT&T's Class Action Ban is Substantively Unconscionable Because It Serves As An Exculpatory Clause.**

AT&T's class action ban is substantively unconscionable for a second reason: it would effectively make the corporation immune from liability for small damages claims by its customers. The Washington Supreme Court made clear in *Adler* and *Zuver* that Washington law does not permit corporations to draft adhesive arbitration clauses that insulate

them from liability for legal violations. *Adler*, 153 Wn. 2d at 357-58 (striking term that would effectively strip a party of "access to a significant legal recourse").<sup>13</sup>

The facts of this case demonstrate that the vast majority, if not all, of AT&T's customers would not be able to bring cases such as this one on an individual basis, because the ban on class actions in AT&T's contract effectively insulates it from any liability for claims such as those raised here, without respect to whether those claims are true and legally valid.

McKee introduced testimony from three experts qualified to speak to the practical effect of AT&T's ban on class actions. CP 566-69, CP 570-72, CP 561-65. Each testified that, without the possibility of pursuing their claims on a class action basis, AT&T's customers would be unable to obtain redress for the wrongs set forth in the complaint. AT&T

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<sup>12</sup> Washington State law barring arbitration clauses from stripping individuals of substantive rights is consistent with the U.S. Supreme Court, which has held that arbitration must allow a party to "effectively vindicate" its rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

<sup>13</sup> New York's highest court has not yet determined whether a corporation may insulate itself from liability for small consumer claims by prohibiting its customers from participating in class actions. The two New York intermediate appellate cases AT&T cites (AT&T Brief at 45) are conclusory and do not address the evidence that, in cases such as this one, class action bans function as exculpatory clauses. On the other hand, courts that have closely examined arbitration clauses whose terms effectively prevent parties from vindicating their claims have refused to enforce them. *See, e.g., Brower v. Gateway 2000*, 246 A.D.2d 246, 254, 676 N.Y.S.2d 569 (App. Div. 1998) ("Barred from resorting to the courts in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well."); *In re Teleserve Systems, Inc. (MCI Telecommunications Corp.)*, 230 A.D.2d 585, 594, 659 N.Y.S.2d 659 (App. Div. 1997) (onerous filing fee rendered arbitration remedy illusory).

did not rebut this testimony with any evidence to suggest that any serious  
- --- number find -attorneys-to-help-them-bring --  
claims of this size on an individual basis. CP 128-29.

Finally, courts throughout the United States have recognized that contractual bans on class actions serve as exculpatory clauses, and thus violate generally applicable state contract laws. The leading case in this area is *Ting*, 319 F.3d 1126. In *Ting*, the U.S. district court held a trial over the question (among others) of whether it was unconscionable for AT&T's arbitration clause to ban class actions. Based on the district court's extensive fact findings, the Ninth Circuit found that AT&T's prohibition on class actions was one-sided and non-mutual. Based upon extensive proof and testimony at the trial, the district court had also found, however, that the ban on class actions effectively would operate as an exculpatory clause. The district court found that the evidence in that case established that before AT&T had adopted its arbitration clause, consumers had successfully prosecuted a number of class actions against long-distance phone carriers. *Ting*, 182 F. Supp. 2d at 915. In one case, AT&T paid 100% of the class members' damages, *id.* at 918, and in another case a class recovered \$88 million from a long-distance carrier. *Id.* The parties in *Ting* stipulated that none of the lawyers in any of the identified earlier class actions could have brought those cases on an

individual basis, whether in court or arbitration. *Id.* Because of these realities;"--the-prohibition on class-action-litigation-functions-as-an- - - effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, . . . [serves] to shield AT&T from liability even in cases where it has violated the law." *Id.* Accordingly, the court held that the ban on class actions in AT&T's arbitration clause was substantively unconscionable. *Id.* at 931.

Applying Washington law, a federal district court reached a similar conclusion about a consumer contract that barred class actions:

The Arbitration Rider's prohibition of class actions would prevent borrowers from effectively vindicating their rights for certain categories of claims. . . . The Arbitration Rider's prohibition of class actions is likely to bar actions involving practices applicable to all potential class members, but for which an individual consumer has so little at stake that she is unlikely to pursue her claim.

*Luna*, 236 F. Supp. 2d at 1178-79. This is consistent with the holdings of several state courts. In *Discover Bank*, 113 P.3d 1100, the California Supreme Court struck down a similar contractual waiver of class actions, where disputes typically involved small damages. *Id.* at 1110. While recognizing that class action waivers are not "in the abstract" exculpatory, the court found that they are exculpatory in effect for many consumers:

[B]ecause . . . damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action

is often the only effective way to halt and redress such exploitation.

*Id.* at 1108-09 (internal quotations and citation omitted). Based on this, the court held that class action waivers in adhesive consumer contracts were unconscionable applied to small-value claims. *Id.* at 1110.<sup>14</sup>

In sum, because it is one-sided and serves as an effective exculpatory clause, AT&T's class action ban is substantively unconscionable under Washington law.<sup>15</sup>

**C. AT&T's Arbitration Clause is Procedurally Unconscionable.**

Under Washington law, a contract is unenforceable for procedural unconscionability if one party lacked a "meaningful choice." *Adler*, 153 Wn. 2d. at 345. To determine whether a meaningful choice existed, courts look at "all the circumstances surrounding the transaction," including the

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<sup>14</sup> Other cases finding class action bans unconscionable include *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002); *Comb v. PayPal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002); *Powertel v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004); *In re Knepp*, 229 B.R. 821 (N.D. Ala. 1999).

<sup>15</sup> In *Zuver* and *Adler*, the Washington Supreme Court chose to sever unconscionable provisions from arbitration clauses, and then enforce the remainder of the arbitration agreement. This approach may not be appropriate with a provision that bans class actions, however, and in this setting, plaintiffs respectfully suggest that the proper approach would be to return the case to court and sever the entire arbitration clause from the CSA. *See, e.g., Keating v. Superior Court*, 31 Cal. 3d 584 (1982), *rev'd on other grounds*, 465 U.S. 1 (1984) ("Whether classwide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court rather than submitting to classwide arbitration.")

manner in which the contract was formed, whether the party had a reasonable -opportunity to-understand--its-terms;-and-whether-important- --- - --- terms were hidden in fine print. *Id.* <sup>16</sup>

Here, the manner in which AT&T imposed its arbitration clauses on its customers supports a finding of procedural unconscionability. First, AT&T concedes that the CSA is a contract of adhesion. AT&T Brief at 33. While this does not end the inquiry, this factor is "properly considered in ascertaining procedural unconscionability." *Adler*, 153 Wn. 2d at 348.

Second, AT&T's contract provides that its customers automatically consent to the arbitration clause and other terms-which are not sent to customers until several days after they enroll-by "enrolling in, using, or paying for the services." CP 1119. The mere fact that a customer has "failed" to choose a different provider, AT&T Brief at 34, in no way means that AT&T's clause is not procedurally unconscionable as a matter of law. This is particularly true given that most long-distance carriers, like AT&T, include mandatory arbitration provisions with class action bans in their form contracts. <sup>17</sup>

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<sup>16</sup> New York courts consider similar factors. *See State v. Wolowitz*, 96 A.D.2d 47, 67 (N.Y. App. Div. 1983).

<sup>17</sup> The FCC determined that service providers requiring mandatory arbitration comprised more than 78% of the long-distance market share in Washington. CP 412; CP 475-512. *See also* Sprint Terms and Conditions, available at <http://www.sprint.com/ratesandconditions/residential/documents/sprinttermsandconditions.pdf>; MCI Customer Service Agreement, available at [http://consumer.mci.com/mci\\_service\\_agreement/res\\_pdf/DEC\\_01\\_05\\_GSA\\_ENG.pdf](http://consumer.mci.com/mci_service_agreement/res_pdf/DEC_01_05_GSA_ENG.pdf).

The U.S. district court in *Ting*, faced with very similar evidence of procedural unconscionability, found that A-T&T subscribers "did not have any meaningful choice with respect to the [term] because the carriers who service 2/3 of the California market all include substantially similar dispute resolution provisions in their contracts." 182 F. Supp. 2d at 914. A meaningful choice would require that there were "reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable." *Id.* at 929 (emphasis added). These facts supported the *Ting* court's finding of procedural unconscionability, *id.* at 930, and the facts on this point are even stronger for the plaintiffs in the current case.

In addition, it is undisputed that AT&T distributed its arbitration clause to customers in a form that predictably ensured only a fraction of its customers would ever read it. In *Ting*, after hearing extensive marketing evidence from the parties and reviewing documentation from AT&T's own marketing team, the district court made numerous factual findings about a notice sent to AT&T customers. Like the fulfillment package sent to McKee, the AT&T mailing at issue in *Ting* included a cover letter and FAQs document, neither of which was sufficient to alert customers to the important legal rights they were giving up. *See Ting*, 182 F. Supp. 2d at 912-13. The court found that "[o]f the people who opened [the] mailing,

a substantial number likely did not read it thoroughly." *Id.* at 913.

-In-sum,because-the-processby-which-AT&I's-class-action-ban-  
was imposed on its customers gave them no meaningful choice, the term  
should not be enforced.

**IV. AT&T'S CHOICE OF NEW YORK LAW TO GOVERN ITS  
ARBITRATION CLAUSE IS INVALID UNDER  
APPLICABLE WASHINGTON CHOICE-OF-LAW RULES.**

AT&T's attempt to salvage its consumer arbitration clause by  
designating it to be governed by New York law fails under Washington's  
choice-of-law rules. It is well established that Washington courts apply  
the Restatement (Second) of Conflict of Laws, § 187 to contractual  
choice-of-law provisions. *See, e.g., O'Brien v. Shearson Hayden Stone,  
Inc.*, 90 Wn. 2d 680, 685, 586 P.2d 830 (1978) (applying § 187; holding  
that Washington law applies to investor contract despite broker's New  
York choice-of-law clause). Under Section 187, a choice-of-law clause  
cannot be enforced if:

[A]pplication of the law of the chosen state would be contrary to a  
fundamental policy of a state which has a materially greater  
interest than the chosen state in the determination of the particular  
issue and which, under the rule of s. 188, would be the state of the  
applicable law in the absence of an effective choice of law by the  
parties.

*O'Brien*, 90 Wn. 2d at 685 (quoting Restatement (Second) § 187(2)(b)).

Under this three-part test of Washington law, AT&T's designation of New

York law to govern its arbitration clause is invalid.

~~First, to the extent New York law would uphold AT&T's~~ --  
arbitration clause provision banning class actions, this is contrary to  
fundamental public policy of Washington concerning consumer  
protection. In *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 106 P.3d 841  
(2005), *rev. granted* (oral argument on Feb. 28, 2006), this Court refused  
to enforce an internet service provider's forum selection clause because  
the selection of a Virginia court applying that state's procedural rules  
would bar consumers from bringing a class action on their claims under  
the CPA. *Id.* at 937.

*Dix* relied on cases recognizing that, as made clear in part III.B,  
*supra*, a contract clause barring class actions by consumers is "the  
functional equivalent of a contractual waiver" of rights under consumer  
protection statutes. *Dix*, 125 Wn. App. at 935-36 (citing *Miles v. America  
Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001); *America Online, Inc. v.  
Superior Court*, 90 Cal. App. 4th 1 (2001)) *see also Luna*, 236 F. Supp. 2d  
at 1178.<sup>18</sup> This Court should hold that AT&T's attempt to apply any New

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<sup>18</sup> Courts applying the § 187 test to choice-of-law designations applied to no-class action arbitration clauses under the law of other states have reached the same conclusion. *See, e.g., Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1298 (2005) ("Delaware's approval of class action waivers, especially in the context of a 'take it or leave it' arbitration clause, is contrary to fundamental public policy in California."); *Tamayo v. Brainstorm USA*, 2005 WL 2293493 at \*1 (9th Cir. Sept. 21, 2005) ("To the extent Ohio law would enforce the class-action waiver at issue, and it is not clear that it would, it would be contrary to California public policy and thus not applicable.").

York law that would uphold an arbitration clause banning class actions is  
-- contrary-to-the fundamental-public-policy-of-Washington under the-CPA. -----

Second, Washington has a materially greater interest in applying its own law to these contracts governing telephone service for Washington consumers than New York has in applying its law. These contracts between Washington consumers and a New York corporation doing business in Washington by holding out its services to Washington residents are subject to the same legal analysis and conclusion reached by the Washington Supreme Court in *O'Brien*. There, a class of Washington residents had invested with a brokerage firm that was incorporated in Delaware, borrowed its money in New York, maintained an office in Seattle, and used a New York choice-of-law clause. *O'Brien*, 90 Wn. 2d at 682-83. In applying Section 187's "materially greater interest" prong, the Supreme Court held that:

The interest rates charged citizens of the State of Washington are involved here, and unquestionably the State of Washington has a materially greater interest in the welfare of its citizens and the impact of the decision in this case will have upon them than does the State of New York.

*Id.* at 686 (citing Restatement § 187, Comment g at 567-69).<sup>19</sup> Here,

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<sup>19</sup> See also *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 367, 936 P.2d 1191 (1997) (overriding Idaho choice-of-law clause, applying Washington law to sale of agricultural seed by Idaho company to Washington farmer, finding that "Washington has an interest in regulating the actions of corporations authorized to do business in this state"); cf. *Granite Equipment Leasing Corp. v. Hutton*, 84 Wn. 2d 320, 326, 525 P.2d

Washington's interest in protecting its resident consumers who contracted for telephone service in Washington with an out-of-state company is the same as that found to be materially greater than New York's interest in *O'Brien*. Therefore, this prong of the Restatement test further weighs in favor of applying Washington law to this dispute.

Third, and finally, for most of the same reasons Washington has a materially greater interest than New York, Washington law is the law that would apply to these transactions in the absence of a choice-of-law clause under Restatement § 188. Again, *O'Brien* is the key case. There, the Supreme Court identified five factors in determining which state's law would apply of its own force under § 188 to transactions between Washington consumers and an out-of-state company doing business in Washington: "(a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *O'Brien*, 90 Wn. 2d at 686 (citing Restatement § 188(2)); *Cox*, 86 Wn. App. at 365-66 (identifying same factors). Here, the first four factors all weigh in favor of applying Washington law inasmuch as the transactions at issue are

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223 (1974) ("Washington has a vital interest in regulating the actions of corporations which do business within its territorial boundaries so as to insure fair business practices therein.").

contracts for telephone service within this state. Since these contracts are  
-----al-l-made between -Washington -consumers-and-a-New York-corporation -----  
doing business in Washington, the fifth factor also weighs in favor of  
applying Washington law. Based on a virtually identical set of relevant  
contacts, *O'Brien* held that "clearly the most significant contacts were  
with Washington" for consumers whose dealings and payments were  
made in Washington. *O'Brien*, 90 Wn. 2d at 687-88; *see also Cox*, 86  
Wn. App. at 366-67 (Washington has stronger interest in transaction  
between Idaho seller and Washington farmers where seller was authorized  
to do business in Washington and product's use occurred in Washington).

In light of the foregoing, AT&T's designation of New York law to  
govern its mandatory arbitration clause for Washington consumers fails  
because (1) any New York law authorizing this clause's prohibition  
against class actions is contrary to Washington's fundamental public  
policy for protecting consumers; (2) Washington has a materially greater  
interest than New York in applying its laws to protect Washington  
consumers; and (3) Washington law would apply in the absence of a  
choice-of-law contract. AT&T did not dispute this analysis under  
Washington's choice-of-law rules in its briefing to this Court. Instead,  
AT&T argued that the FAA both preempts any application of  
Washington's choice-of-law rules and prohibits the Court from even

addressing these issues by reserving them for an arbitrator's

determination.--Both-of-these-arguments-fail. -- - -

First, the FAA does not preempt Washington's or any other state's choice-of-law rules. To the contrary, the FAA expressly preserves application of generally applicable state contract law. *See Casarotto*, 517 U.S. at 686-87 ("[T]he text of [9 U.S.C.] § 2 declares that state law may be applied if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.") (citation omitted); *see also Zuver*, 153 Wn. 2d at 302. Therefore, Washington's generally applicable choice-of-law rules apply to determine which state's law governs AT&T's arbitration clause just like these rules would apply to any other contract term.

AT&T cites this Court's opinion in *Kamaya Co., Ltd. v. Property Consultants, Ltd.*, 91 Wn. App. 703, 959 P.2d 1140 (1998), for the proposition that "[w]here contracts are governed by the FAA, courts must apply the law specified in the agreement unless it conflicts with the FAA." (AT&T Brief at 17). *Kamaya* creates no such requirement. In *Kamaya*, the Court had to determine whether an international commercial real estate contract with a Japanese choice-of-law provision and an arbitration clause, whose validity was not in dispute, required the parties to arbitrate fraud claims. In resolving the conflict between Japanese law (which barred

arbitration of fraud claims) and Chapter 2 of the FAA (9 U.S.C. §§ 201, *et seq.*),--the -Court-was-not asked-and did-not purport-to-resolve-any-questions — concerning *preemption* of any state laws. *Kamaya*, 91 Wn. App. at 712 ("Whether the FAA or Japanese arbitration law governs the arbitrability of their fraud-in-the-inducement claims is not a question of preemption."). Therefore, *Kamaya* does not even begin to suggest that the FAA would preempt Washington's choice-of-law rules. In light of the U.S. and Washington Supreme Courts' repeated holdings that the FAA *preserves* the application of generally applicable state contract law to arbitration clauses, the Court should hold that the FAA *does not* preempt Washington's generally applicable choice-of-law rules here.<sup>20</sup>

Finally, the FAA does not prohibit the Court from deciding which state's law applies to AT&T's arbitration clause by reserving this determination for an arbitrator. In arguing to the contrary (AT&T Brief at 47-48), AT&T cites *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), for the proposition that "the validity of the arbitration clause must be evaluated separately from the surrounding contract terms." This is a clear misapplication of the *Prima Paint* decision. There, the U.S.

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<sup>20</sup> AT&T's argument (AT&T Brief at 46) that "[t]he FAA prohibits courts from invalidating arbitration agreements under state laws that apply only to arbitration agreements," while a true statement of the law, plainly has no relevance to the Washington choice-of-law rules at issue here inasmuch as the cases cited herein and countless others demonstrate that these are rules of general application that have been applied repeatedly to all manner of contracts making no mention of arbitration.

Supreme Court held that a claim of fraudulent inducement of a contract --with an arbitration-clause was arbitrable-because-the fraud-claim-did not ---- implicate the arbitration clause's validity. *Id.* at 403-04 ("[I]f the claim is fraud in the inducement of the arbitration clause itself-an issue which goes to the `making' of the agreement to arbitrate-the federal court may proceed to adjudicate it."). Here, the choice-of-law question goes directly to the validity of the arbitration clause because *this is the precise clause to which AT&T seeks to apply its choice of New York law.* Therefore, this case is distinguishable from *Prima Paint* on its facts and falls within *Prima Paint's* declaration that courts (not arbitrators) must decide questions implicating the existence of an enforceable arbitration clause. ” Therefore; since the issue of which state's law applies is inextricably bound up with the arbitration clause's validity, the FAA requires both that this matter be resolved by the Court (not an arbitrator) and that this matter be resolved under Washington's choice-of-law rules. Under these rules, Washington contract law applies and the trial court's holding that the arbitration clause is unconscionable should be affirmed.

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<sup>21</sup> AT&T's citation to *Nagrampa v. Mailcoups, Inc.*, 401 F.3d 1024 (9th Cir. 2005), is also unavailing, since this opinion has been vacated. *See Nagrampa v. Mailcoups, Inc.*, 413 F.3d 1024 (9th Cir. 2005) (granting *en banc* review; vacating panel opinion).

AT&T's motion to compel arbitration.

Respectfully submitted this-23rd January,-2006. - - - -

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

Scott M. Kane, WSBA No. 11592

Lacy & Kane

P.O. Box 7132

East Wenatchee, WA 98802

F. Paul Bland, Jr. (admitted *pro hac vice*)

Michael J. Quirk

Trial Lawyers for Public Justice

1717 Massachusetts Avenue, NW, Suite 800

Washington, D.C. 20036-2001

Leslie A. Bailey (admitted *pro hac vice*)

Trial Lawyers for Public Justice

555 Twelfth Street, Suite 1620

Oakland, CA 94607-3616

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JULY 04 2006

No. 243991

In the United States Court of Appeals, Division Three  
Washington Court of Appeals, Division Three

By \_\_\_\_\_

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

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**AT&T CORP.,**

**Appellant,**

**v.**

**MICHAEL McKEE,**

**Respondent.**

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

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**RESPONDENT'S STATEMENT OF ADDITIONAL AUTHORITIES**

F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

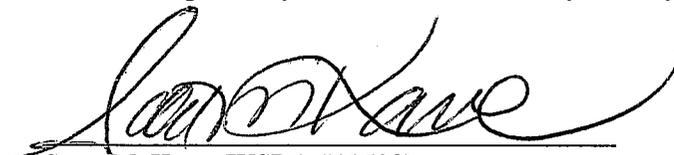
Scott M. Kane (WSBA No. 11592)  
Lacy, Kane, Poulson & Smith, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

*Attorneys for Respondent*

Pursuant to RAP 10.8, Respondent submits this statement of additional authorities to provide the Court with the recent decision in *Kristian v. Comcast Corp.*, -- F.3d ---, 2006 WL 1028758 (1st Cir. April 20, 2006). In *Kristian*, the U.S. Court of Appeals for the First Circuit held that a provision in a cable television company's consumer contract that banned class arbitration was unenforceable because it would prevent customers with small-value, legally complex claims from vindicating their statutory rights. 2006 WL 1028758 at \*30. The court held that, if enforced, Comcast's class arbitration ban would shield the company from liability, even where it had violated the law. *Id.* That holding is relevant to Respondent's argument that AT&T's class action ban is substantively unconscionable because it would effectively operate as an exculpatory clause. Br. of Respondent at 35-39.

Respectfully submitted this 3<sup>d</sup> day of May, 2006.



Scott M. Kane (WSBA #11592)  
Lacy, Kane, Poulson & Smith, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

F. Paul Bland, Jr. (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
1717 Massachusetts Avenue, NW  
Suite 800  
Washington, D.C. 20036-2001

Leslie A. Bailey (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 162  
Oakland, CA 94607-3616

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F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

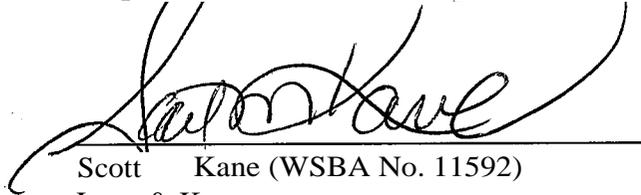
Scott M. Kane (WSBA No. 11592)  
Lacy & Kane  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

*Attorneys for Respondent*

Pursuant to RAP 10.8, Respondent submits this statement of additional authorities to provide the Court with the recent decision in *Rollins, Inc. v. Garrett*, 2006 WL 1024166 (11th Cir. April 19, 2006) (per curiam). In *Rollins*, the U.S. Court of Appeals for the Eleventh Circuit affirmed that a class action ban in a consumer contract is unconscionable under Florida law. 2006 WL 1024166 at \*1. That holding is relevant to Respondent's argument that the class action ban in AT&T's consumer contract is unconscionable under Washington law. Br. of Respondent at

32-39. Respec y submitted this 11 <sup>i</sup> of May, 2006



Scott Kane (WSBA No. 11592)  
Lacy & Kane  
P.O. Box 7132  
East Wenatchee, WA 98802

F. Paul Bland, Jr. (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
1717 Massachusetts Avenue, NW, Suite 800  
Washington, D.C. 20036-2001

Leslie A. Bailey (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

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JUN 05 2006

No. 243991

In the office of the clerk of the  
Washington Court of Appeals, Division Two  
By

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COURT OF APPEALS, DIVISION II  
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**APPEAL FROM THE SUPERIOR COURT  
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F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

Scott M. Kane (WSBA No. 11592)  
Lacy Kane, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

*Attorneys for Respondent*

Pursuant to RAP 10.8, Respondent submits this statement of additional authorities to provide the Court with two recent decisions.

In *Skirchak v. Dynamics Research Corp.*, 2006 WL 1460266, --- Supp. 2d --- (D. Mass. April 6, 2006), the U.S. District Court for the District of Massachusetts held that a class action ban in an employment contract was unconscionable and unenforceable under Massachusetts law, because it could prevent employees from seeking redress for their claims and thus remove any incentive for the corporation to avoid conduct that might lead to class action litigation. 2006 WL 1460266 at \*4. That holding is relevant to Respondent's argument that the class action ban in AT&T's consumer contract is unconscionable under Washington law because it would effectively serve as an exculpatory clause. Br. of Respondent at 35-39.

In *Wisconsin Auto Title Loans, Inc. v. Jones*, 2006 WL 1419645, --- N.W.2d --- (May 25, 2006), the Supreme Court of Wisconsin held that an arbitration clause in a loan contract was unconscionable under Wisconsin law. The *Jones* court first held that the arbitration clause, which was drafted by the stronger party and presented to the borrower on a take-it-or-leave-it basis, was procedurally unconscionable. 2006 WL 1419645 at \*5-8. That holding is relevant to Respondent's argument that AT&T's arbitration clause is procedurally unconscionable. Br. of

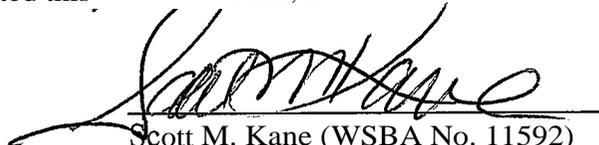
Respondent at 39-42.

Second, the *Jones* court held that the arbitration clause, which required borrowers to arbitrate their claims but granted Wisconsin Auto Title Loans the right to pursue its claims in court, was one-sided and thus substantively unconscionable. 2006 WL 1419645 at \*9-10. That holding is relevant to Respondent's argument that the class action ban in AT&T's arbitration clause, though nominally mutual, is effectively one-sided and thus substantively unconscionable. Br. of Respondent at 33-35.

Finally, the *Jones* court held that its finding of unconscionability was not preempted by the Federal Arbitration Act. 2006 WL 1419645 at \*12. This holding is relevant to Respondent's argument that the FAA preserves, rather than preempts, Respondent's state-law unconscionability arguments. 31-32.

Respectfully submitted this

June, 2006



Scott M. Kane (WSBA No. 11592)  
Lacy Kane, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
1717 Massachusetts Avenue, NW  
Suite 800  
Washington, D.C. 20036-2001

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 162  
Oakland, CA 94607-3616

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In the Office of the Clerk of Court  
Washington Court of Appeals, Division Three

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**..COUR-T--OF APPEALS, DIVISION-III - - - - -**  
**OF THE STATE OF WASHINGTON**

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**AT&T CORP.,**

**Appellant,**

**v.**

**MICHAEL McKEE,**

**Respondent.**

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

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**RESPONDENT'S STATEMENT OF ADDITIONAL AUTHORITIES**

F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

Scott M. Kane (WSBA No. 11592)  
Lacy & Kane  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

*Attorneys for Respondent*

### STATEMENT OF ADDITIONAL AUTHORITIES

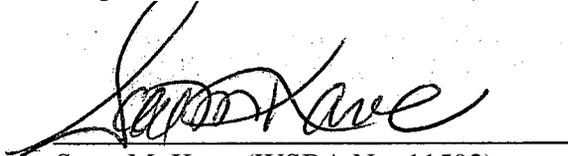
Pursuant to RAP 10.8, Respondent submits this statement of additional authorities to provide the Court with the recent decision in *Lowden v. T-Mobile, USA, Inc.*, 2006 WL 1009279 (W.D. Wash. April 13, 2006). In *Lowden*, the U.S. District Court for the Western District of Washington held that a class action ban in a wireless company's arbitration clause is substantively unconscionable and unenforceable under Washington law.

First, the *Lowden* court held that the class action ban in T-Mobile's arbitration clause is substantively unconscionable under Washington law because it would "deprive Plaintiffs of the means to effectively vindicate their rights under the CPA." 2006 WL 1009279 at \*6. That holding is relevant to Respondent's argument that the class action ban in AT&T's arbitration clause is unconscionable under Washington law because it would effectively serve as an exculpatory clause. Br. of Respondent at 35-39.

Second, the *Lowden* court held that the class action ban in T-Mobile's arbitration clause is substantively unconscionable under Washington law because, although nominally mutual, the term is "effectively one-sided because there is no conceivable set of facts under which T-Mobile would bring a class action against its customers." 2006

WL 1009279 at \*6. That holding is relevant to Respondent's argument that the class action ban in AT&T's arbitration clause is effectively one-sided and thus substantively unconscionable under Washington law. Br. of Respondent at 33-35.

Respect submitted this 15 day of June, 2006

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

Scott M. Kane (WSBA No. 11592)  
Lacy Kane, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

F. Paul Bland, Jr. (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
1717 Massachusetts Avenue, NW, Suite 800  
Washington, D.C. 20036-2001

Leslie A. Bailey (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

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By

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**COURT OF APPEALS, DIVISION  
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**AT&T CORP.,**

**Appellant,**

**v.**

**MICHAEL McKEE,**

**Respondent.**

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**APPEAL FROM THE SUPERIOR COURT  
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F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

Scott M. Kane (WSBA No. 11592)  
Lacy Kane, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

*Attorneys for Respondent*

**STATEMENT OF ADDITIONAL AUTHORITIES**

Pursuant to RAP 10.8, Respondent submits this statement of additional authorities to provide the Court with two recent decisions.

In *Schwartz v. Alltel Corp.*, No. 86810 (Ohio Ct. App. June 29, 2006), the Ohio Court of Appeals held that the arbitration clause in Alltel's wireless contract, which prohibits class treatment or consolidation of any claims, is unconscionable under Ohio law. The *Schwartz* court first held that the arbitration clause is substantively unconscionable. Slip Op. at 10-12. The court noted that, "[b]y eliminating a consumer's right to proceed through a class action, the arbitration clause directly hinders the consumer protection purposes of the [Ohio Consumer Sales Protection Act]." Slip. Op at 10. The court further noted that, "[b]y prohibiting its customers from filing suit as a class, Alltel prevents the cost effective use of class action litigation that can end abusive practices by large corporations in those instances in which individual claims are ineffective." Slip Op. at 11. That holding is relevant to Respondent's argument that the class action ban in AT&T's consumer contract is unconscionable under Washington law because it would effectively serve as an exculpatory clause. Br. of Respondent at 35-39.

Second, the *Schwartz* court held that Alltel's arbitration clause, because it was drafted by the stronger party and contained small, hard-to-

read print, is procedurally unconscionable. Slip Op. at 12-13. That holding is relevant to Respondent's argument that AT&T's arbitration clause is procedurally unconscionable. Br. of Respondent at 39-42.

In *Wong v. T-Mobile U.S.A.*, No. 05-73922 (E.D. Mich. July 20, 2006), the U.S. District Court for the Eastern District of Michigan held that T-Mobile's arbitration clause, which contained an unseverable class action ban, was unenforceable because class actions are necessary for the vindication of consumers' rights under state consumer protection statutes. Slip Op. at 3-8. The court noted: "Defendant makes much of the fact that it contributes toward plaintiffs' arbitration costs, but in order for arbitration to be feasible, the amount at issue must also exceed the value in time and energy required to arbitrate a claim. Defendant is alleged to have bilked its customers out of millions of dollars, though only a few dollars at a time. Plaintiff's damages are a paltry \$19.74, hardly enough to make arbitration worthwhile. Class actions were designed for situations like this." Slip Op. at 8. That holding is relevant to Respondent's argument that the class action ban in AT&T's consumer contract would effectively serve as an exculpatory clause, and thus is unconscionable. Br. of Respondent at 35-39.

Respectfully submitted this 25<sup>th</sup> July, 2006

  
1/01P\*,4,A,

Scott M. Kane (WSBA No. 11592)  
Lacy Kane, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

F. Paul Bland, Jr. (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
1717 Massachusetts Avenue, NW, Suite 800  
Washington, D.C. 20036-2001

Leslie A. Bailey (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

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of the Clerk of Court  
Appeals, Division Three

No. 243991

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**COURT OF APPEAL DIVISION III  
OF THE STATE OF WASHINGTON**

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**AT&T CORP.,**

**Appellant,**

**v.**

**MICHAEL McKEE,**

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**APPEAL FROM THE SUPERIOR COURT  
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F. Paul Bland, Jr.  
(admitted *pro hac vice*)  
Michael J. Quirk  
Trial Lawyers for Public Justice  
1717 Massachusetts Ave., NW  
Suite 800  
Washington, D.C. 20036-2001

Scott M. Kane (WSBA No. 11592)  
Lacy Kane, P.S.  
P.O. Box 7132  
East Wenatchee, WA 98802

Leslie A. Bailey  
(admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616

*Attorneys for Respondent*

**STATEMENT OF ADDITIONAL AUTHORITIES**

Pursuant to RAP 10.8, Respondent submits this statement of additional authorities to provide the Court with the recent decision in *Muhammad v. County Bank of Rehoboth Beach, Delaware*, --- A.2d ----, 2006 WL 2273448 (N.J. Aug. 9, 2006).

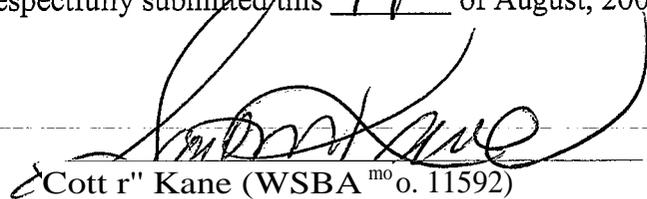
The *Muhammad* court held that the class arbitration waiver in County Bank's consumer contract of adhesion is unconscionable and unenforceable under New Jersey law, because it would effectively serve as an exculpatory clause. 2006 WL 2273448 at \*1; *id.* at \*7-10. The court noted that, as an individual case, the plaintiff's claim "involves a small amount of damages, rendering individual enforcement of her rights, and the rights of her fellow consumers, difficult if not impossible. In such circumstances a class-action waiver can act effectively as an exculpatory clause." *Id.* at \*8. That holding is relevant to Respondent's argument that the class action ban in AT&T's arbitration clause is unconscionable under Washington law because it would effectively serve as an exculpatory clause. Br. of Respondent at 35-39.

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Respectfully submitted this 14<sup>th</sup> of August, 2006

  
Cottor Kane (WSBA No. 11592)

Lacy & Kane  
P.O. Box 7132  
East Wenatchee, WA 98802

F. Paul Bland, Jr. (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
1717 Massachusetts Avenue, NW, Suite 800  
Washington, D.C. 20036-2001

Leslie A. Bailey (admitted *pro hac vice*)  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607-3616