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**WHO IS REALLY BEING PROTECTED BY REGULATION OF THE
COMMUNICATIONS INDUSTRY?: IMPLICATIONS OF *AMERICAN
TELEPHONE & TELEGRAPH CO. V. CENTRAL OFFICE
TELEPHONE, INC.***

I. INTRODUCTION

With the growth of the Internet and the World Wide Web, cellular telephones, and traditional telephone service, the communications industry is one of the fastest growing industries in the world.¹ Early on, like industries preceding it, the unregulated communications industry met with public resistance due to perceived unfair pricing practices.² State legislatures responded to the public outcry by passing laws that regulated the rates that communications companies could charge for services.³ Soon, however, the industry grew beyond the scope of local and state regulations, and Congress acted to regulate the growing national communications industry.⁴ This initial regulation quickly proved to be inadequate to address the still-growing communications industry.⁵ Finally, Congress drew on its experience with regulation of the transportation industry, and passed the Communications Act of 1934 (“Communications Act”).⁶ The Communications Act required common carriers in the telecommunications industry to file rate tariffs that precisely described the allowable rates for services.⁷ The Communications Act

1. THE FUTURE OF THE INTERNET 6 (Charles P. Cozic ed., 1997).

2. See JOHN F. STOVER, *AMERICAN RAILROADS* 97 (2nd ed. 1997) indicating that merchants, farmers, and communities pushed for government regulation of the railroad industry because of discrimination in freight rates. See also LEONARD S. HYMAN ET AL., *THE NEW TELECOMMUNICATIONS INDUSTRY: EVOLUTION AND ORGANIZATION* 73 (1987) where, in response to customer complaints about cost and service, the Indiana legislature in 1885 passed a law regulating the price of telephone service.

3. See ALAN STONE, *WRONG NUMBER: THE BREAKUP OF AT&T* 48 (1989). By 1921, forty-five of the forty-eight states had established Public Utility Commissions to regulate the telephone industry.

4. *Id.* Congress passed the [Mann-Elkins Law in 1910], which subjected the telephone industry to federal rate jurisdiction, overseen by the Interstate Commerce Commission (ICC).

5. *Id.* The [Willis-Graham Act was passed in 1921], which extended the jurisdiction of the ICC to telephone company mergers and acquisitions.

6. HYMAN, *supra* note 2, at 86. The Communications Act of 1934 created the Federal Communications Commission (FCC) to regulate the telephone industry’s interstate and foreign business.

7. 47 U.S.C. § 203(a).

has been held by the Supreme Court to supercede any state law claims concerning matters related to the regulation of the telecommunications industry.⁸ This was also the holding in the recent Supreme Court case, *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (“AT&T”).⁹ While upholding the supremacy of the Communications Act over state law attempts to regulate the industry, *AT&T* also established a pathway allowing state law contract and tort claims to be superseded under the guise of a relationship to regulation of the communications industry.

This note will first examine the development and history of the Communications Act. Next, it will outline the factual history and lower court decisions in the case. It will then discuss the majority, the concurrence, and the dissenting opinions in *AT&T*. Finally, this note will examine the implications of the *AT&T* decision to the communications industry and to the public.

II. BACKGROUND

A. Regulation of Industries

At the turn of the century, both the transportation and the communications industries were expanding rapidly across the United States.¹⁰ With the growth of these industries, the public demanded regulation to stop the unreasonable and discriminatory application of rates by the industries.¹¹ Congress complied with the public’s wishes by passing the Interstate Commerce Act (“ICA”) in 1887, which regulated the more mature transportation industry.¹² As the communications industry also matured, Congress passed the Communications Act of 1934 (“Communications Act”), and applied the same rules to the communications industry that it had developed and applied to the transportation industry through the ICA.¹³ Both of these acts provided similar filed-rate doctrines, requiring common carriers to file tariffs describing all of

8. See, e.g., *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) where the damages in a state law breach of contract case were barred by the filed rate doctrine of the Communications Act.

9. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998).

10. See *STOVER*, *supra* note 2, at 81-82. The railroads were building to the Pacific coast, and railroad companies had received land grants of 170 million acres from the federal government. See also *HYMAN*, *supra* note 3, at 88-91 showing an increase in the number of telephones installed each year throughout the late 1800s and early 1900s.

11. *STOVER*, *supra* note 2, at 97; *HYMAN*, *supra* note 2, at 73.

12. See *STOVER*, *supra* note 2, at 123. [The Interstate Commerce Act (“ICA”)] required that all interstate rates be “reasonable and just”.

13. *HYMAN*, *supra* note 2, at 86. The Communications Act, like the ICA, required that service be provided at “reasonable charges”.

their rates and charges so that the public could determine what the proper rates were.¹⁴

1. Interstate Commerce Act – Regulation of Transportation

By the late 1800's, railroad transportation had become the primary means of transporting goods across the United States.¹⁵ Major railroad companies controlled the railroad cars, and therefore controlled the flow of goods across the country.¹⁶

In markets served by more than one railroad company, the competition to attract customers was fierce. Railroad companies engaged in price wars, accepting miniscule profits in order to attract customers.¹⁷ Many railroads in these markets did not survive the competition, and were either taken over or driven out of business by more financially secure companies.¹⁸

However, in markets where there was no competition among railroads, the opposite occurred. Rates for transporting goods in these markets were unreasonably high. With no alternative available, manufacturers would pay the high shipping rates, and pass the cost along to the consumers in the form of higher prices for goods.¹⁹

The combination of the rate wars in areas with competition, and the artificially high rates in areas with no competition resulted in inconsistent pricing for similar shipping.²⁰ Manufacturers and consumers demanded federal action in order to regulate the transportation rates. In response, Congress passed the Interstate Commerce Act in 1887 ("ICA").²¹ The ICA provided for rate schedules to be published and regulated, and required

14. See STOVER, *supra* note 2, at 123. [The Interstate Commerce Act ("ICA")] required that all rate schedules for railroad services be published. See also 47 U.S.C. § 203(a) (Communications Act) requiring telephone common carriers to publicly display and file their rate schedules.

15. MAURY KLEIN, UNFINISHED BUSINESS: THE RAILROAD IN AMERICAN LIFE 15-16 (1994). Railroads transported iron, coal and cotton, transforming the textile, food, and mail order businesses.

16. STOVER, *supra* note 2, at 96. The railroads possessed a "complete monopoly" of the nation's commercial freight and passenger movement.

17. *Id.* at 108-109. Rate wars occurred when rival railroads operated or competed for the same service areas. Rate wars were further aggravated by bankrupt rail companies, or those in receivership, charging artificially low rates.

18. KLEIN, *supra* note 15, at 25-26.

19. *Id.* at 124-125. Two different rates structures for shipping had developed. One rate applied to local, noncompetitive traffic, and a second rate for through, or competitive traffic.

20. *Id.*

21. The [Cullom bill in the Senate] and the [Reagan bill in the House] were combined into the Interstate Commerce Act, which President Cleveland signed into law on February 4, 1887. STOVER, *supra* note 2, at 123.

common carriers to file tariffs that detailed the charges for services.²² With regulation provided by the ICA, shipping rates were published, and the general public was able to ascertain the proper shipping rates for a given route.²³ This virtually eliminated the price wars and uneven rates, and restored public confidence in the transportation industry.²⁴

2. Communications Act of 1934 – Regulation of Communication

As the transportation industry had developed and expanded in the United States, the telecommunications industry was similarly developing.²⁵ By the time that ICA regulation of the transportation industry became mature, Congress had already responded to public concern about the communications industry and passed the Mann-Elkins Act in 1910.²⁶ The Mann-Elkins Act regulated the rates that telecommunications companies could charge for their services.²⁷ In addition, the Mann-Elkins Act established the Interstate Commerce Commission (“ICC”) as a governing board for the communications industry, and imposed an obligation on telecommunications common carriers to provide service at “just and reasonable rates.”²⁸

The booming telecommunications industry, however, outpaced the power of the ICC’s regulation, and companies such as American Telephone & Telegraph expanded across the country.²⁹ Unlike the railroad industry, telephone companies were considered to be primarily local industries, and the existing federal regulation was ineffective.³⁰ When it became obvious that the communications industry was no longer merely a local concern, Congress passed the Communications Act.³¹

22. *Id.* at 123. The bill also established the Interstate Commerce Commission (“ICC”) to administer the Act.

23. *Id.*

24. *Id.* at 123-124, noting that the public reaction to the regulation was generally favorable. Additional confidence was instilled when President Cleveland appointed five capable men to the newly founded ICC.

25. HYMAN, *supra* note 2, at 88-91, showing that the telephone industry was growing at over four times the rate of the general economy.

26. STONE, *supra* note 3, at 48. The Mann-Elkins Act extended the jurisdiction at the ICC and gave it the power to federally regulate the telephone industry.

27. *Id.*

28. *See* STONE, *supra* note 3, at 48. *See also* Mann-Elkins Act of 1910, ch. 309, §7, 36 Stat. 539 (1910).

29. STONE, *supra* note 3, at 48.

30. *See* STONE *supra* note 3, at 48, where most telephone litigation concerned local rates or service. The inability to regulate the large companies, such as AT&T, was at issue in several major proceedings.

31. STONE, *supra* note 3, at 48. *See also* HYMAN, *supra* note 2, at 86, quoting the Communications Act of 1934’s purpose [o]f regulating interstate and foreign commerce in communication”.

The Communications Act was intended to regulate the public telephone and communication system.³² Drawing on its experience with the ICA, Congress incorporated many of that Act's provisions into the Communications Act.³³ In addition, Congress added provisions to create the Federal Communications Commission ("FCC") as a government agency to govern the communications industry.³⁴ As with the ICA, the Communications Act required carriers to file tariffs, or a schedule of charges, classifications, regulations, and practices.³⁵ The Communications Act further required prior notice for tariff rate changes, and also mandated that common carriers file and charge rates solely in accordance with published schedules.³⁶ Just as the ICA had regulated the transportation industry and restored public confidence in the rate system, the Communications Act similarly regulated the communications industry.

B. *Early Decisions*

In both transportation and communication cases, the Supreme Court has consistently upheld the validity of both the ICA and the similar Communications Act filed-tariff requirements.

In *Chicago & Alton R.R. Co. v. Kirby*, the Court dismissed a breach of contract case against a railroad based on preemption by the ICA.³⁷ There, a railroad had agreed to ship a group of racehorses on a particular fast train.³⁸ When the shipment did not take place on that train, the shipper of the horses instituted a breach of contract claim against the railroad.³⁹ The Court found that the agreement to use a specific train for transporting the horses was an agreement for a special service, which was not provided for in the published tariff.⁴⁰ Since the purpose of the published tariff was to avoid giving an

32. *Id.*

33. See 47 U.S.C. § 203(a) incorporating the requirements to publicly display and file rate schedules, just as the ICA had required the transportation carriers to also display and file such schedules.

34. HYMAN, *supra* note 2, at 86.

35. 47 U.S.C. § 203(a).

36. *Id.*

37. *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 166 (1912).

38. *Id.* at 162. Several different trains and routes were available to ship the livestock. However, the route that ensured arrival in the shortest time was preferred. An agreement was made to deliver the horses via the "Horse Special", a fast stock train that ran only three times a week.

39. *Id.* at 162-163. The horses did not ship via the "Horse Special", they were in fact shipped via a later and slower train, causing the horses to arrive forty-eight hours later than anticipated. This later arrival prevented the horses from being put into proper condition for a planned sale.

40. *Id.* at 165.

advantage to one shipper that would not be extended to all, the Court found the contract for the special shipping to be invalid.⁴¹

Similarly, in *Davis v. Cornwell*, the Court held that a promise by a carrier to provide a group of railroad cars on a specified day was invalid.⁴² Again, the Court found that the promise to provide the cars on a specific day was an advantage to one shipper that was not extended to all, and was not allowed for in the published tariff.⁴³ The Court therefore found the agreement to provide the cars to be invalid because the ICA preempted it.⁴⁴

Likewise, in communications cases, the Court has applied the filed-rate doctrine of the Communications Act, just as it has applied the doctrine of the ICA to transportation cases.

In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Court reiterated the validity of section 203 of the Communications Act, including the filed-rate doctrine.⁴⁵ Quoting from an earlier case, the Court stated, for better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire "to 'increase competition' cannot provide [it] authority to alter the well-established statutory filed rate requirements."⁴⁶

The Court has been consistent in allowing the filed-rate doctrine in both the ICA and the Communications Act to preempt any agreements made outside of the context of the filed tariff. In both transportation and communications cases, the Court has followed the intent of the acts to provide uniform, published rates that the public can access to determine the proper charges for a carrier's services.

41. *Id.* at 166. The purpose of the Commerce Act was to establish reasonable rates and uniform application of those rates. This purpose would be defeated if any advantage were given to one particular shipper. The Court found that allowing a shipper to specify the use of a particular fast train was an advantage given to one that was not given at all. This was not allowable unless the particular rates and shipping methods had been described in the published and filed rate schedules.

42. *Davis v. Cornwell*, 264 U.S. 560, 562 (1924). *Cornwell* ordered empty cattle cars to be ready for his use on a particular day. When they were not provided on that day, he sued for damages for failure to provide the cars.

43. *Id.* at 562. The Court compared this case to *Chicago & Alton R.R. Co. v. Kirby*, and found that the promise here to provide empty cars on a particular day was similar to the promise in *Kirby* to provide use of a particular train. The Court found that the promise of availability on a particular day was not provided for in the published tariff, and was therefore preempted by the tariff.

44. *Id.* at 562.

45. 512 U.S. 218 (1994). AT&T alleged that MCI was collecting unpublished rates for providing long distance service, in violation of the Communications Act. *Id.* at 234. The Court affirmed the finding of the Court of Appeals, and held that carriers must comply with the filed-rate doctrine of 47 U.S.C. § 203(a).

46. *Id.* at 234, citing *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 118, 135 (1990).

III. AT&T v. CENTRAL OFFICE TELEPHONE

A. *Summary of Facts*

American Telephone & Telegraph Company (“AT&T”) is a long-distance service provider, and as such, they are considered to be a common carrier under the Communications Act.⁴⁷ In addition to providing long distance services to its own customers, AT&T also sells its long distance services to resellers, who in turn sell the long distance service to their customers. Central Office Telephone, Inc. (“COT”) is a reseller of long distance services. COT purchases long distance service from providers such as AT&T, and then resells the service to its customers at a profit.⁴⁸

In 1989, AT&T offered a long distance service called Software Defined Network (“SDN”) service. Among its features, SDN allowed the reseller to offer the long distance service to small businesses and residences, rather than just to large businesses. Since SDN service required large volume commitments from resellers, the rates for SDN were typically lower than the rates for other long distance services. In addition to the SDN service, AT&T offered several billing options to the reseller, including an option called Multilocation Billing (“MLB”) whereby AT&T would directly bill the reseller’s customers for the SDN service, with the reseller remaining ultimately responsible for all payments.⁴⁹ As required by the Communications Act, AT&T filed tariffs with the FCC defining the rates for its long distance services, including its SDN service. The filed tariffs not only defined the service rates, they limited AT&T’s liability for non-willful misconduct.⁵⁰

After implementing the SDN service, orders from resellers increased and AT&T had delays in actually providing the SDN service. In addition, AT&T experienced “suppressed billing”⁵¹ problems which resulted in some customers not receiving bills for long distance calls until one year after they had made the calls. In response to these problems, AT&T limited the number of new SDN

47. *See* American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 118 S.Ct. 1956, 1960 (1998); *See also* 47 U.S.C. 153(10) defining common carrier; *See also* 47 U.S.C. § 203(a).

48. American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 118 S.Ct. 1956, 1960 (1998).

49. *Id.*

50. *Id.* at 1960-1961. The agreement between the parties stipulated that the service would be provided pursuant to the rates, terms and conditions as set forth in AT&T’s filed tariffs, and that the filed tariffs would govern both parties’ obligations.

51. *See* Central Office Telephone, Inc. v. American Telephone and Telegraph Co., 108 F.3d 981, 987 (1997). “Suppressed billing” occurs when the billing system cannot immediately register a call to a particular customer. The calls are lumped into an unbilled toll group until a billing guide is set up, then the customer is billed for all of the past unbilled calls.

customers it would accept, and transferred the handling of reseller customers to a new customer service center.⁵²

On October 30, 1989, COT entered into a contract with AT&T to purchase SDN service, which it planned to resell to its customers. In addition, COT chose the MLB option, allowing AT&T to directly bill COT's customers for the SDN service. AT&T promised that the initial SDN service would be set up in four to five months, and additional service requests would be processed within 30 days.⁵³

In April 1990, COT began reselling the SDN service, and encountered immediate problems. There were delays in starting up the SDN service for its customers, as well as suppressed billing problems. In addition, COT customers were being billed incorrectly by AT&T. AT&T was billing under a different plan than the one that COT had selected. This resulted in customers receiving one hundred percent of the discount that COT was receiving from AT&T for volume purchases, rather than the fifty percent discount that COT intended. In October 1990, COT switched from the MLB direct billing plan to a plan where COT received the entire bill for COT's SDN service directly from AT&T. COT then individually billed its customers for the SDN service.⁵⁴

COT continued to resell the SDN service, but it was unable to fill its commitment to AT&T for usage in the first contract period. AT&T also said that COT owed them \$200,000 in bills for the period in which COT was under the MLB building plan. COT then informed AT&T that it was terminating its contract as of September 30, 1992, one and one-half years prior to the expiration of the contract.⁵⁵

On November 27, 1991, COT filed suit against AT&T alleging breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference with contract.⁵⁶

B. District Court Opinion

In *Central Office Telephone Company, Inc. v. AT&T*, the district court jury returned a verdict of \$13,000,000 in favor of COT for its breach of contract and tortious interference with contract claims.⁵⁷ Additionally, the jury found in favor of COT on AT&T's counter-claim for \$200,000 in unpaid charges.⁵⁸

52. *Id.*

53. *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1961 (1998).

54. *Id.*

55. *Id.*

56. *Id.* The suit was filed in the United States District Court for the District of Oregon.

57. *Central Office Telephone Inc. v. American Telephone and Telegraph Co.*, 108 F.3d 981, 988 (1997). The judgment was entered on July 1, 1994.

58. *Id.*

The district court rejected AT&T's argument that the state law contract and tort claims were preempted by the filed tariff doctrine of §203(a) of the Communications Act. Instead, the court found that AT&T's interpretation of the filed-rate doctrine was too broad and that the doctrine did not preempt COT's state law claims.⁵⁹ The court reasoned that since COT was complaining only about the manner in which AT&T acted, and not disputing the validity of the doctrine of the rates set in the tariff, that the filed-rate doctrine did not apply. The court also rejected AT&T's claim that there was no substantial evidence that any of its conduct was within the tariff's meaning of willful misconduct.⁶⁰

The court, however, denied COT's request to present evidence of AT&T's financial condition to support its claim for punitive damages. It then granted AT&T partial judgment as a matter of law, and omitted COT's damages for the period after September 1992, since the evidence did not support damages for that period.⁶¹ In addition, the court denied AT&T's motions for a new trial and remittitur, and held that as a matter of law, the filed-rate doctrine did not preempt COT's claims.⁶²

C. Ninth Circuit Court of Appeals Opinion

The Ninth Circuit Court of Appeals upheld the findings of the district court, except the decision not to submit punitive damages evidence to the jury. The decision was reversed, and the case was remanded on that issue.⁶³

The court rejected AT&T's claim that COT's state law claims were preempted by the Communications Act.⁶⁴ AT&T asserted that the tariff-filing requirement of the Communications Act is "Congress's chosen means of preventing unreasonableness and discrimination in charges . . . the tariff-filing requirement is the heart of the common-carrier section of the Communications Act."⁶⁵

The court found, however, that the billing option originally chosen by COT was not covered by the filed-rate doctrine, as was testified to by AT&T's tariff

59. *Id.*

60. *Id.*

61. *Id.* at 988-989.

62. *Id.* at 988.

63. *Central Office Telephone, Inc. v. American Telephone and Telegraph Company*, 108 F.3d 981, 994 (1997).

64. *Id.* at 990. The court found that the filed-rate doctrine could not apply to any of COT's claims with regard to billing, even if it could apply to other aspects of the SDN service.

65. *Id.* at 989.

expert at trial.⁶⁶ The court found that the filed-rate doctrine could therefore not apply to any of COT's claims regarding that billing.⁶⁷

The Supreme Court granted certiorari to determine whether COT's state law claims were preempted by the federal filed-rate requirements of the Communications Act.⁶⁸ The Court reversed the decision of the Ninth Circuit, finding that COT's state law claims were preempted by the Communications Act.⁶⁹

IV. ANALYSIS

A. *Court Opinion*

Justice Scalia delivered the majority opinion. First the majority considered the intent of the Communications Act, and examined the nature of special rates and privileges covered by the Communications Act.⁷⁰ They next analyzed COT's claims and determined their origin.⁷¹ They concluded that COT's state law claims were derived from their contractual relationship with AT&T, and that COT's claims were therefore preempted by §203 of the Communications Act.⁷²

1. The History and Intent of the Communications Act

The majority first looked to the history and development of the Communications Act.⁷³ The Communications Act required every common carrier to file tariffs of charges with the FCC, describing all charges and conditions affecting those charges.⁷⁴ In addition, §203(c) of the Act made it illegal to allow any special privileges or charges, unless specified in the published tariff.⁷⁵ The Communications Act modeled its provisions on the earlier Interstate Commerce Act, which regulated transportation carriers.⁷⁶ The

66. *Id.* at 990. AT&T's expert testified that the provisions of the tariffs do not apply between AT&T and the reseller (COT), but between AT&T and the end user.

67. *Id.*

68. 47 U.S.C. §203(a) is the "filed-rate" section of the Communications Act.

69. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1965 (1998).

70. *Id.* at 1962. Looking at 47 U.S.C. §§ 203(a) and 203(c), the Court traces the history of the "filed-rate doctrine", and its application in several cases involving rate disputes.

71. *Id.* at 1964 where the Court is determining whether the claims in question were "wholly derivative" of the tariff agreement.

72. *Id.* at 1965.

73. *Id.* at 1962.

74. *Id.* at 1962; *See also* 47 U.S.C. § 203(a).

75. *See* 47 U.S.C. § 203(c) which addresses the similar problems seen in prior transportation cases where special rates or privileges were given to one shipper but not to another.

76. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1962 (1998).

goal of both of these Acts was to prevent unreasonable and discriminatory charges.⁷⁷

The majority then examined several prior cases where the filed-rate doctrine had been held to be the only lawful charge,⁷⁸ even if a common carrier intentionally misstated its rate and a customer relied on that misrepresentation.⁷⁹ While recognizing the perceived harshness of this rule,⁸⁰ the majority cited *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* where the Court explained that maintaining nondiscriminatory rates is the goal of the Communications Act, and that the filed rate doctrine was “the heart of the common-carrier section of the Communications Act.”⁸¹

The majority further explained that these discriminatory privileges can come in many forms, and did not have to simply be discounted rates.⁸² Citing *Chicago & Alton R.R. Co. v. Kirby*, the majority concluded that any special privileges not spelled out in the tariff can be a violation of the Communications Act.⁸³

2. The Communications Act Applied to COT’s Claim

The majority next examined the state law claims that COT levied against AT&T and whether those claims were preempted by the Communications Act.⁸⁴ The majority concluded that the issues raised by COT – the representations made by AT&T concerning fast hookup time for the SDN service, the allocation of billing charges, and other matters – were precisely the subjects specifically addressed by AT&T’s filed tariff.⁸⁵ The majority found that COT’s tort claim derived only from the contractual relationship with AT&T.⁸⁶

The majority further explained that guarantees of times for establishment of service, and agreements to allocate charges in a particular way, are in “flat

77. *Id.*

78. *Id.*, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) and *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932).

79. *Id.* at 1962. *See also* *Kansas City Southern R.R. Co. v. Carl*, 227 U.S. 639, 653 (1913).

80. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1963 (1998).

81. *Id.*, citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994).

82. *Id.* at 1963.

83. *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155 (1912), where an agreement to use a faster train for a particular shipment was held to be invalid because the shipper’s tariff did not provide for the use of any particular train.

84. *American Telephone & Telegraph Company v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1963 (1998).

85. *Id.*

86. *Id.* at 1964.

contradiction” to the tariff.⁸⁷ Noting that COT’s claims are the very types of claims that the Communications Act was meant to preempt, the majority cites *Keogh v. Chicago & Northwestern R.R. Co.* where the Court stated that “[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.”⁸⁸

Finally, the majority dismisses COT’s argument that §414 of the Communications Act dictates a different result, and that the relief awarded by the jury below is consistent with the tariff.⁸⁹ The majority cites long-held cases holding that §414 of the Communications Act⁹⁰ preserves only those rights that are not inconsistent with the filed-tariff requirements.⁹¹

The majority reversed the judgment of the Ninth Circuit, and held that COT’s state law claims were preempted by the filed rate doctrine of the Communications Act.⁹²

B. Concurring Opinion

Chief Justice Rehnquist provided his perspective in the concurring opinion. The concurrence expanded on the majority’s finding that the tortious interference was “wholly derivative of the contract claim”, and was therefore barred by the filed-rate doctrine.⁹³

Chief Justice Rehnquist pointed out that this “wholly derivative” finding was necessary to prevent COT’s tort claim from proceeding.⁹⁴ The filed-rate doctrine’s purpose is to ensure that the tariff sets the terms by which the common carrier provides services to its customers.⁹⁵ Chief Justice Rehnquist also noted that it is crucial to recognize that this is the only relationship that the tariff controls.⁹⁶ Furthermore, Chief Justice Rehnquist stated that in order for the filed-rate doctrine to work correctly, it only needs to preempt suits that seek to alter the terms and conditions set forth in the tariff.⁹⁷ Citing *Chicago & Alton R.R. Co. v. Kirby* and *Keogh v. Chicago & Northwestern R.R. Co.* as cases where parties sought special treatment or special rates in violation of the

87. *Id.* at 1964.

88. *Id.* at 1965.

89. *Id.*

90. 47 U.S.C. § 414, the saving clause of the Communications Act duplicates the saving clause of the ICA which preserves only those rights that are not inconsistent with the statutory filed-tariff requirements.

91. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1965 (1998). *See also* *Adams Express Co. v. Croninger*, 226 U.S. 491, 507 (1913).

92. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1965-1966 (1998).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

tariff's filed rates.⁹⁸ Chief Justice Rehnquist noted that this case was similar. Here, as in the cited cases, COT attempted to enforce an agreement with terms different than those set forth in the tariff.⁹⁹ Therefore, as in the cited cases, the filed-rate doctrine should bar such a claim.¹⁰⁰

Chief Justice Rehnquist acknowledged that the filed-rate doctrine does not control the entire relationship between the common carrier and its customers.¹⁰¹ The doctrine exists only to ensure that the filed rates are the exclusive source of the terms for providing services.¹⁰² It cannot act as a shield against all state law claims, only against those claims that derive from the tariff.¹⁰³

C. *Dissenting Opinion*

Justice Stevens filed a dissenting opinion, arguing that COT's tort claim stands separately from the contract claim, and was therefore not preempted by the filed-rate doctrine.¹⁰⁴ The dissent agreed with the majority that the tort claim would be barred by the filed-rate doctrine if it were "wholly derivative of the contract claim".¹⁰⁵ However, the dissent points out that the jury's finding on this tort claim was supported by evidence that went well beyond, and differed in nature from, the contract claim.¹⁰⁶

The dissent pointed out that while the majority was correct in stating that the filed-rate doctrine would preempt some tort claims, the Court has never before applied that doctrine to bar relief for conduct so far removed from the relationship governed by that doctrine.¹⁰⁷

98. *See* Chicago & Alton R.R. Co. v. Kirby, 225 U.S. 155 (1912), where a promise to provide a particular fast train for shipment was found to be in contradiction of the filed tariff, and therefore unenforceable. *See also* Keogh v. Chicago & Northwestern R.R. Co., 260 U.S. 156 (1922) where an antitrust complaint challenging the rate that was filed and the tariff was disallowed.

99. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1966 (1998).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1967 (1998).

105. *Id.*

106. *Id.* The dissent argues that if AT&T had included a letter in each bill it sent that characterized COT as unethical, then that tortious conduct would certainly not be defensible under the filed-rate doctrine. Similarly, the dissent argues, the information that AT&T did send out to COT's customers showing COT's markup on their bills should not be defensible under that doctrine.

107. *Id.* at 1968.

Furthermore, the dissent distinguished this case from the precedents relied upon by the majority.¹⁰⁸ COT's tort claim never challenged the filed-rates as in *Keogh v. Chicago & Northwestern R.R. Co.*, and it does not seek special services as in *Chicago & Alton R.R. Co. v. Kirby* and *Davis v. Cornwell*.¹⁰⁹ The dissent sees this case as being analogous to *Nader v. Allegheny Airlines, Inc.*, where the court held that a common-law tort claim could coexist with the Federal Aviation Act.¹¹⁰

Finally, the dissent was troubled that the majority's holding essentially closed the door to state law tort claims for tortious interference with business relations merely because the relationship involved a common carrier.¹¹¹ The dissent pointed out that in this case, at least some of the interference occurred independently of the customer-carrier relationship. Therefore, there would have been a sustainable action even if the contract had never been entered into.¹¹²

V. IMPLICATIONS

The implications of the Court's decision in this case are subtle, yet potentially far-reaching. On first examination, the Court seemed to simply uphold the longstanding preemption authority of the filed-rate doctrine of the Communications Act. However, on closer examination, the Court appears to have broadened the scope of that doctrine.

The Court in *AT&T* found that the claim of tortious interference was "wholly derivative" of the regulated contract claim,¹¹³ rather than an independent claim, and was therefore preempted by the filed-rate doctrine. As Justice Stevens pointed out in his dissent, the jury in the district court found that AT&T had acted willfully and intentionally in interfering with COT's business relations.¹¹⁴ This, he maintained, established that the tortious conduct of AT&T was not merely derivative of the contract violations, it was independent conduct that should not be afforded protection by the Communications Act provisions.¹¹⁵ The Court, however, held that the conduct of AT&T was derivative of the regulated relationship, and that the claim was superceded by the filed-rate doctrine.

108. *Id.*

109. *Id.*

110. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), where a state law tort claim was not superceded by the Federal Aviation Act, it was found to be related to the authority of the Act.

111. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1968 (1998).

112. *Id.*

113. *Id.* at 1965.

114. *Id.* at 1968.

115. *Id.*

With this holding, the Court provides an opening that future defendants may take advantage of. Defendants in communications cases involving common carriers will certainly attempt to use the holding in *AT&T* as a shield from liability for their actions. While previous cases provided for rate and provision agreements to be superceded by the filed-rate doctrine, this case allows conduct that is beyond that relationship to also be preempted by the doctrine. The holding in *AT&T* provides great incentive for establishing that the defendant's activities were merely somehow related to the regulated contractual relationship. If defendants can establish this relationship, they can use the preemptive authority of the Communications Act and the holding in *AT&T* as a shield, and dismiss any state-law claims against them.

As the communications industry expands, with telephone, cellular, and even Internet communication continuing to grow exponentially, many more consumer and communications companies will enter into agreements for services. While parties will likely adhere to the terms of these agreements, there will certainly be cases where conflicts occur as to the terms of the agreement, or the conduct of the parties to the agreement. The Communications Act and the filed-rate doctrine exist to regulate the properly charged rates and the terms of communications agreements. Under the filed-rate doctrine, any agreements contrary to the filed tariffs will be superceded, and only the published, filed tariff rates will apply. However, under *AT&T*, the conduct of the parties, however egregious, may also be regulated by the Communications Act and the filed-rate doctrine. Even tortious conduct, if somehow related to the contractual agreement, may be superceded by the Communications Act. Consumers are likely to be the losers, as communications companies seek protection for any of their tortious conduct behind the shield of the Communications Act.

VI. CONCLUSION

The decision in *AT&T* is not dramatic, yet it will likely be far reaching. While the decision upholds the preemptive power of the filed-rate doctrine of the Communications Act, it also arguably extends that power beyond its previous reach. The Court in *AT&T* has extended the preemptive power of the Communications Act beyond claims concerning only the actual regulated contractual agreement to claims that are merely related to the agreement. Communications companies currently regulated by the filed-rate doctrine of the Communications Act, as well as those that enter the industry in the future, may be tempted to test the waters at the edge of the decision, and rely on the Communications Act to shield them from state law tort claims.

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