Cooley

FTC v. AT&T Mobility: Ninth Circuit "Throttles" FTC Jurisdiction

September 12, 2016

The US Court of Appeals for the Ninth Circuit, on August 29, issued a decision that exempts "common carriers" from Federal Trade Commission ("FTC") jurisdiction based on their "status" as common carriers, even for activities that are not common carrier services regulated by the Federal Communications Commission ("FCC") or the Surface Transportation Board.

The Ninth Circuit's decision in *FTC v. AT&T,* reversed a lower court's decision, which refused to dismiss an FTC suit alleging that AT&T violated the FTC Act's prohibition of "unfair and deceptive acts and practices" by advertising an "unlimited data plan" without disclosing its plan to "throttle" data to slow service to customers who use more than a specified amount of data.

The Ninth Circuit's decision is ripe for Supreme Court review as it appears to be at odds with other court decisions analyzing the parameters of the exemptions under Section 5 of the FTC Act.

Unless the decision is reversed by the entire Ninth Circuit or by the Supreme Court, or legislation is enacted to give the FTC jurisdiction over common carriers, the decision will have a profound impact on the FTC's authority to regulate business activity, and could limit consumer protection and privacy enforcement, leaving significant gaps in federal consumer protection law. While this decision focused on a communications common carrier, it also affects other common carriers, including bus lines, railroads and trucking services.

The decision

The *FTC v. AT&T* case began in district court in 2014 with the FTC asserting that AT&T had violated Section 5's prohibition on "unfair and deceptive" practices by allegedly throttling data for "unlimited mobile data" customers without adequate consent or disclosures. AT&T moved to dismiss, arguing that, because Section 5 exempts "common carriers," from FTC regulation and AT&T is a "common carrier," *all* its services are exempt from Section 5.

The FTC disagreed, trying to cabin the exception by asserting it applies only when a common carrier is providing common carrier services, such as voice telephone services. It argued that AT&T's mobile wireless voice services were subject to common carrier regulation, but that the company's mobile wireless *data* services fell outside the exemption. The FTC argued that any other approach would leave consumers of non-common carrier services unprotected as "the FCC is not authorized to seek refunds for injured consumers, and its enforcement authority is limited to conduct going back one year."

The district court agreed with the FTC, holding that Section 5's exemption for common carriers applied only to a firm's "common carrier" services, and denied AT&T's motion to dismiss.

The Ninth Circuit reversed, stating that "when Congress used the term 'common carrier' in the FTC Act, [there is no indication] it could only have meant 'common carrier to the extent engaged in common carrier activity.'" It reasoned that "a literal reading of the words Congress selected simply does not comport with [the FTC's] activity-based approach." Thus, the Ninth Circuit concluded the FTC lacks jurisdiction over AT&T's mobile data service, even though that service had not been classified and regulated by the FCC as a common carrier service.

The Ninth Circuit declined to follow an earlier Fourth Circuit case, *Crosse & Blackwell Co. v. FTC*, involving a separate exemption from Section 5 for meatpackers, asserting that decision ignored the plain meaning of Section 5.

The court also failed to address the Second Circuit's decision in *FTC v. Verity International*, raised in both the FTC's papers and the lower court's opinion, which seemed to agree that whether an entity was a common carrier could not be predicated on an entity's status alone, even though the court ultimately resolved the case on the grounds that the appellant was not a common carrier at all.

FTC implications

The decision significantly restricts the FTC's authority over companies that provide any "common carrier" services, a category that, under the FCC's rules, now includes all Internet service providers.

While the specific services at issue in this case were closely related to common carrier services offered by the same company (and which, in fact, are nearly always offered as part of a single package of services), the decision potentially could exempt services far from "common carrier" services from FTC enforcement if provided by a company that also is a "common carrier."

For example, the Ninth Circuit's decision is likely to have implications in the FTC's pending case against AT&T in the Northern District of California, which alleges that, DIRECTV, an AT&T subsidiary that offers satellite television services, has engaged in unfair and deceptive advertising under Section 5 by, among other things, failing to make sufficient disclosures before selling subscriptions.

The Ninth Circuit did leave open the possibility, however, that common carrier status would not be applied to an entity if only a small part of its overall business is engaged in common carrier services. In particular, it noted that AT&T is a common carrier "for a substantial part of its activity" and that its "status as a common carrier is not based on its acquisition of a minor division unrelated to the company's core activities that generates a tiny fraction of its revenue."

This analysis could make it harder for companies to avoid FTC scrutiny by providing common carrier services on a limited basis, but it also would leave room for companies that primarily offer common carriers services to enter adjunct businesses free of FTC scrutiny.

Notably, the decision does not in any way limit the Justice Department Antitrust Division's authority to enforce the antitrust laws against common carriers, as the DOJ's enforcement authority does not stem from Section 5.

FCC implications

This decision draws a firm line between FTC and FCC jurisdiction, and places "common carriers" under the FCC's sole consumer protection oversight. This reinforces recent actions at the FCC intended to focus on consumer protection issues, and it is likely that the FCC will seek to apply its authority broadly.

However, while the FCC's authority over communications common carriers and common carrier services is expansive, especially after the Ninth Circuit's decision, it is not unbounded. Indeed, the Communications Act limits the FCC's direct jurisdiction over common carriers to actual common carrier services, and courts have held that the FCC's ancillary authority over non-common carrier services is limited. As a result, courts are unlikely to permit the FCC to regulate purely non-common carrier activities, such as the selling of advertising. That could potentially mean that conduct the FTC might regulate absent the Section 5 exemption may also be outside the FCC's authority.

In light of the FCC's 2015 Network Neutrality order, under which the FCC reclassified broadband Internet access service as a common carrier service, the potential reach of the decision is broader than it would have been in the past. As a result, the Ninth Circuit's decision could push any company that provides consumer Internet access outside of the FTC's authority, leaving it subject only to the FCC's rules and limited authority.

What's next?

The FTC has stated that it is "disappointed with the ruling and [is] considering [its] options for moving forward." The FTC could seek to have the case reheard by the entire Ninth Circuit, or could ask the Supreme Court to review the decision. Given the potential conflict between this decision and other Circuit decisions on the scope

of the Section 5 exemptions, this case may be attractive to the Supreme Court.

Whether or not the FTC seeks additional court review, it seems likely that it will, as it has been doing for several years, press for Congress to repeal the common carrier exemption. Such a legislative effort may heighten conflicts in Congress about the relative roles of the FTC and the FCC in consumer protection. In particular, it could bring to the fore questions in Congress about whether the FCC should have authority over consumer protection issues affecting broadband Internet access.

In the meantime, the FTC's role in the regulation of common carriers will remain severely restricted.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Dee Bansal Washington, DC	dbansal@cooley.com +1 202 728 7027
Parker Erkmann Washington, DC	perkmann@cooley.com +1 202 776 2036
J.G. Harrington Washington, DC	jgharrington@cooley.com +1 202 776 2818

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.