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# The FTC and Modern Common Carrier Regulation in the Telecom Context

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# THE FTC AND MODERN COMMON CARRIER REGULATION IN THE TELECOM CONTEXT

*Cody Lee Shubert\**

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## I. INTRODUCTION

In *Federal Trade Commission v. AT&T Mobility, LLC*,<sup>1</sup> the Ninth Circuit recently ruled that common carriers, whether or not they are acting in their common carrier capacity, are exempt from regulation under the Federal Trade Commission Act (FTC Act).<sup>2</sup> The case concerned whether or not AT&T was liable, under the unfair and deceptive practices prong of the statute, for slowing down data services to customers who used too much data, even though many of these customers were under contract for “unlimited data” plans.<sup>3</sup>

Although AT&T has long been recognized as a common carrier in actions pertaining to its landline services, its mobile services were not considered a common carrier at the time that the case was filed.<sup>4</sup> Reversing the District Court’s denial of AT&T’s motion to dismiss, the Ninth Circuit ruled that the statute’s plain language and legislative history suggested that the exception was intended to apply to all actions by a common carrier.<sup>5</sup> Thus, common carriers are no longer subject to Federal Trade Commission (FTC) regulation for unfair and deceptive practices.<sup>6</sup>

Until the Ninth Circuit’s decision, courts and the FTC have interpreted this exception oppositely, i.e., to apply only when the common carrier was acting in its capacity as a common carrier.<sup>7</sup> This Note argues that the Ninth Circuit decision is both wrong and will lead to bad results. The decision is wrong because the court assumes that the plain language of the statute unambiguously closes the door to the FTC argument, which it does not. The Ninth Circuit also said that even if the statute’s language was ambiguous, the legislative history suggests a ruling in AT&T’s favor.<sup>8</sup> A closer look at the legislative history reveals that this is also untrue. Because the statute is ambiguous and the legislative history is not clear, the FTC’s interpretation of the statute should win the day.

## II. BACKGROUND

### A. FTC ACT GENERALLY

In order to respond to the growing concern over monopolies and their effect on consumers, competitors, and the marketplace as a whole, Congress

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<sup>1</sup> 835 F.3d 993 (9th Cir. 2016), *reh’g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

<sup>2</sup> Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).

<sup>3</sup> *AT&T*, 835 F.3d 993.

<sup>4</sup> *Id.* at 996.

<sup>5</sup> *Id.* at 998–1003.

<sup>6</sup> *Id.* at 1003.

<sup>7</sup> *See, e.g., id.* at 996.

<sup>8</sup> *Id.* at 999–1003.

passed the FTC Act<sup>9</sup> in 1914.<sup>10</sup> Of particular import in Congress's decision to enact the statute was to create an administrative agency powerful enough to handle regulation of large corporations after the consolidation and merger wave of the late nineteenth and early twentieth centuries.<sup>11</sup>

The Act, among other things, allows the FTC to regulate “unfair or deceptive acts or practices in or affecting commerce,”<sup>12</sup> and gives the FTC the power to enforce this provision through administrative proceedings, cease and desist orders subject to judicial review, and injunctive relief in federal courts.<sup>13</sup> The FTC uses § 45 of the Act to regulate a variety of business activities affecting commerce. These activities range from violations of antitrust laws under the “unfair” prong<sup>14</sup> to misrepresentation in advertising to consumers under the “deceptive acts or practices” prong.<sup>15</sup> In the intellectual property context, the FTC has used § 45 to regulate things like the deceptive use of trademarks<sup>16</sup> and patents.<sup>17</sup>

To prevent the FTC from stepping on other regulating agencies' toes, Congress inserted a provision exempting a number of different kind of institutions from regulation under the FTC Act. The Act exempts:

banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921.<sup>18</sup>

This was not the original language in the Act's exception. Congress later added the “insofar as” language to the Packers and Stockyards exception.<sup>19</sup> As will be discussed later, Congress's intent in amending the Act and the ramifications that

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<sup>9</sup> FTC Act, *supra* note 2.

<sup>10</sup> See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 98 (2003) (discussing the history and motivations behind the passage of the FTC Act and creation of the Federal Trade Commission).

<sup>11</sup> *Id.* at 6.

<sup>12</sup> 15 U.S.C. § 45(a)(1) (2012).

<sup>13</sup> 1 WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 10:1 (2017).

<sup>14</sup> *Id.*

<sup>15</sup> See *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992) (FTC seeking cease and desist against Kraft for advertisements that misrepresented the quality and content of their cheese slices).

<sup>16</sup> See *Niresk Indus., Inc. v. FTC*, 278 F.2d 337 (7th Cir. 1960).

<sup>17</sup> *Decker v. FTC*, 176 F.2d 461 (D.C. Cir. 1949).

<sup>18</sup> 15 U.S.C. § 45(a)(2) (2012).

<sup>19</sup> *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

this amendment may have are in debate.<sup>20</sup> The language of the Packers and Stockyards exception is important for this Note because it helps color how the common carrier exception should be interpreted. Some courts and commentators have said that Congress added this language to make a change in the way that those subject to the Packers and Stockyards Act were regulated,<sup>21</sup> while others argue that Congress was simply ensuring that lower courts were interpreting its existing intent correctly.<sup>22</sup>

## B. COMMUNICATIONS REGULATION

Generally, a common carrier is a business that holds itself out to the public as one that will carry goods or services indiscriminately so long as the person attempting to use the common carrier pays the going rate.<sup>23</sup> Because the businesses hold themselves out to the public in such a way, they are generally regulated to a much higher degree, and they generally must do business on “just and reasonable terms.”<sup>24</sup> Because of this, they must refrain from discriminating, for any reason, against those who want to use their services.<sup>25</sup>

Although this distinction originally applied only to businesses engaged in transportation, Congress began treating communications companies as common carriers in 1910.<sup>26</sup> Because of neglect by the Interstate Commerce Commission, the federal agency tasked with common carrier regulation at the time, Congress created the Federal Communications Commission (FCC) with the Communications Act of 1934<sup>27</sup> and tasked it with regulating the communications industry.<sup>28</sup> Many types of communications entities are implicated by the definition because they generally reward the carriage of the communication so long as the customer pays for the service. This may include entities carrying radio, television, and cellular services.<sup>29</sup> Recently, the FCC has reclassified broadband services as common carrier services. Thus, many of the large corporations that consumers have the most contact with offer some form of common carrier services.

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<sup>20</sup> Compare 835 F.3d 993, at 999–1000, with *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087, at 1097–99 (N.D. Cal. 2015), *rev'd*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, 864 F.3d 995 (9th Cir. 2017), and *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600, 604–05 (4th Cir. 1959).

<sup>21</sup> 835 F.3d 993, at 999–1000.

<sup>22</sup> 262 F.2d 600, 604–05.

<sup>23</sup> *Common Carrier*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>24</sup> *FTC v. Verity Intern. Ltd.*, 443 F.3d 48, 58 (2d Cir. 2006) (quoting James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 255–57 (2002)).

<sup>25</sup> Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 878 (2009).

<sup>26</sup> *Id.* at 879.

<sup>27</sup> 47 U.S.C. §§ 201–231 (2000).

<sup>28</sup> Crawford, *supra* note 25, at 880.

<sup>29</sup> See generally James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225 (2002).

In an effort to reduce regulation and barriers to competition in the telecommunications industry, Congress passed the Telecommunications Act of 1996.<sup>30</sup> The main effect of the Act was to eliminate many of the cross-ownership rules previously promulgated by the FCC.<sup>31</sup> Under the previous regime, telephone and cable providers could not be owned by the same entity, nor could cable providers and broadcasting companies. The Act has been heavily criticized as producing results that are adverse to its stated goals and furthering an antiquated regulatory framework in a rapidly changing telecommunications industry.<sup>32</sup>

### C. RECENT DECISIONS IN AT&T CASES

Recently, the FTC attempted to use its § 45 regulation powers to punish “data throttling” by AT&T.<sup>33</sup> In 2007, AT&T became the sole provider of Apple’s iPhones and began to offer unlimited data plans.<sup>34</sup> Under these plans, customers could pay a higher rate for their plan but be able to use as much data as they wanted without worrying about overage charges.<sup>35</sup> In 2010, AT&T stopped offering these plans for unlimited data usage and began forcing customers to purchase “tiered plans,” where customers must pay a certain amount per month for a plan with a fixed data cap and extra charges for those who go over the cap.<sup>36</sup>

When AT&T did so, it informed its customers that those who had previously purchased an unlimited data package would be able to keep their unlimited data plan, even after they renewed their contract.<sup>37</sup> AT&T claims this excessive data usage harmed its overall network and in 2011 began “throttling,” or reducing data speed, of those on the unlimited data plan after the customer

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<sup>30</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Preamble of the statute states that it is “[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”

<sup>31</sup> Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 COMMONLAW CONSPECTUS 771, 789–91 (2009). The Act also reduced restrictions on local telephone companies providing video services and increased the percentage of households that an individual broadcaster could reach.

<sup>32</sup> See *id.* (arguing that the FCC’s regulatory framework is outdated and not suitable for the modern telecommunications industry); see also Scott Cooper, *Technology and Competition Come to Telecommunications: Re-Examining Exemptions to the Federal Trade Commission Act*, 49 ADMIN. L. REV. 963 (1997) (arguing that the combination of deregulation in the telecommunications industry under the Telecommunications Act, along with the increasing assumption of common carrier regulation by the FCC, could harm consumers).

<sup>33</sup> *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 995 (9th Cir. 2016), *reh’g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

had used more than a specified amount of data in any given month.<sup>38</sup> The FTC's complaint against AT&T states that AT&T's existing agreements with the unlimited data customers did not mention reduced speeds, AT&T did not inform unlimited data users of the data throttling at the time of renewal, and AT&T's data throttling was not tied to any existing network conditions.<sup>39</sup> In other words, customers who had gone over their data cap were throttled no matter if there was ample room on the network to support their use or not.<sup>40</sup>

Although AT&T did tell its customers about the data throttling program, the FTC contended that its disclosures were inadequate to support its later actions.<sup>41</sup> AT&T informed its customers through monthly bills sent prior to renewal, along with text messages and e-mails.<sup>42</sup> According to the FTC, these disclosures were inadequate because the monthly bill disclosures did not inform customers of the degree of data speed reduction or the fact that the reduction would be imposed after the customers had exceeded their data limits, regardless of data congestion on the network.<sup>43</sup> Furthermore, only a few customers received the e-mails and text messages.<sup>44</sup>

Because of this, the FTC contended that AT&T engaged in both unfair and deceptive practices.<sup>45</sup> This was unfair because AT&T "entered into numerous mobile data contracts that were advertised as providing access to unlimited mobile data, and that do not provide that [AT&T] may modify, diminish, or impair the service of customers who use more than a specified amount of data for permissible activities."<sup>46</sup> The practice was deceptive for much of the same reason, i.e., AT&T failed to tell its customers that it would effectively limit the use of their unlimited data plans.<sup>47</sup>

This case presents an interesting question for the court because, although AT&T was and is considered a common carrier for much of its activity, its mobile services were not regulated by the FCC as a common carrier at the time.<sup>48</sup> Since the language of § 45 states that the exemption applies to "common carriers subject to the Acts to regulate commerce,"<sup>49</sup> it was not entirely clear whether the FTC had jurisdiction to bring such an action against

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<sup>38</sup> *Id.*

<sup>39</sup> *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087, 1089 (N.D. Cal. 2015), *rev'd*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1090.

<sup>46</sup> *Id.* (quoting the FTC's Complaint).

<sup>47</sup> *Id.*

<sup>48</sup> *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 996 (9th Cir. 2016), *reh'g en banc granted*, 864 F.3d 995 (9th Cir. 2017). The FCC has since reclassified AT&T solely as a common carrier. *Id.*

<sup>49</sup> 15 U.S.C. § 45(a)(2) (2012).

AT&T. The court had to choose between a “status-based interpretation,” meaning that the common carrier exemption applies regardless of its capacity during the conduct complained of, so long as the entity is considered a common carrier in another context, or an “activity-based approach,” which means that the entity is only exempt from regulation when it is acting in its capacity as a common carrier.<sup>50</sup> In ruling for the FTC, the district court used the statutory language, legislative history before the Act, and subsequent amendments.<sup>51</sup>

First, the court examined the statutory language.<sup>52</sup> It looked at the meaning of the term “common carrier” at the time of the statute’s passage.<sup>53</sup> Common law only regulated entities as common carriers when they were acting in their capacity as a common carrier.<sup>54</sup> The Court cited *Santa Fe, Prescott & Phoenix Railway Co. v. Grant Brothers Construction Co.*,<sup>55</sup> which articulated a policy reason for this. The court in *Santa Fe* stated that the purpose of regulating common carriers more closely is because the service that they provided as a common carrier was important to the public.<sup>56</sup> Thus, regulating their activities outside of this context was unnecessary.<sup>57</sup>

Furthermore, courts also chose the activity-based approach in the context of the Interstate Commerce Act,<sup>58</sup> which was “Acts to regulate commerce” that § 45 was referring to at passage.<sup>59</sup> The court also determined that the “subject to” language in § 45 suggests that an activity-based approach was contemplated by those who drafted the act.<sup>60</sup>

The court also took the legislative history of the FTC Act to suggest an activity-based approach.<sup>61</sup> The court rejected AT&T’s argument that the common carrier exception was proposed to prevent regulatory overlap generally, pointing to Congressional debate at the time of passage suggesting that the purpose of the exception was to prevent overlap between common carrier regulations.<sup>62</sup> This was also the approach taken by the Second Circuit in *Federal Trade Commission v. Verity International, LTD.*<sup>63</sup>

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<sup>50</sup> See 87 F. Supp. 3d at 1091.

<sup>51</sup> See *id.* at 1091–98.

<sup>52</sup> *Id.* at 1091.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 228 U.S. 177 (1913).

<sup>56</sup> 87 F. Supp. 3d at 1092 (quoting 228 U.S. 177).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1092–93.

<sup>59</sup> *Id.* at 1091. The Communications Act of 1934, which created the FCC, was not passed until 1934. *Id.*

<sup>60</sup> *Id.* at 1093.

<sup>61</sup> *Id.* at 1093–94.

<sup>62</sup> Representative Stevens, when discussing what entities would fall under the regulation, said [t]hey ought to be under the jurisdiction of this commission in order to protect the public . . . just the same as where a railroad company engages in work outside of that of

Next, the court considered which interpretation of the statute “illuminate[s] the meaning of the plain language.”<sup>64</sup> Considering this, the court preferred the FTC’s interpretation because of the giant loophole that AT&T’s preferred interpretation would open.<sup>65</sup> Simply put, AT&T’s interpretation would make no sense for Congress to create such a regulatory gap when enacting regulation to control the market power of large corporations. Thus, this could not have been its intent when drafting the statute.

It was of no consequence to the court that the FCC had taken full control over AT&T’s regulation because AT&T was not the only common carrier, and AT&T did nothing to show how that gap would be filled in other instances.<sup>66</sup> This would allow businesses to structure themselves in a way that would escape FTC regulation.<sup>67</sup> The court referenced the FTC’s brief to note that this was not just a wild academic concern.<sup>68</sup> Businesses could introduce small elements of common carrier activity and escape the FTC’s data and privacy regulation.<sup>69</sup> Google has expressed an intention to do just that.<sup>70</sup>

The court says that, although it is clear that the activity-based solution is correct, the FTC’s continued insistence on this approach entitles it to *Skidmore* deference.<sup>71</sup> Under this approach, an agency’s interpretation of its own statute is entitled to deference when the thoroughness of the agency’s consideration, validity of its reasoning, consistency with prior interpretations, and its persuasive power suggest its proposed interpretation.<sup>72</sup> The FTC has fought for the activity-based approach at congressional hearings and in cases whenever the issue has been presented.<sup>73</sup> The only possible interpretations to the contrary have actually been the FTC arguing that the entity being regulated was simply not a common carrier.<sup>74</sup> Thus, the FTC’s consistency in this interpretation would likely entitle it to *Skidmore* deference.

On appeal, the Ninth Circuit took a different view of the statute’s language and history. The court dismissed the pre-Act history cited by the district court, ruling that it did nothing to show how Congress intended to use the words

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*a public carrier. In that case such work ought to come within the scope of this commission for investigation.*

*Id.* at 1094 (quoting 51 Cong. Rec. 8996 1914).

<sup>63</sup> 443 F.3d 48 (2006).

<sup>64</sup> 87 F. Supp. 3d at 1094.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1096.

<sup>67</sup> *Id.* at 1094–95.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1095.

<sup>71</sup> *Id.* at 1101.

<sup>72</sup> *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 1003 (9th Cir. 2016), *reh’g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

<sup>73</sup> *See id.* (collecting instances when the FTC had demonstrated this view).

<sup>74</sup> *Id.*

common carrier when it drafted the statute.<sup>75</sup> The court ruled that the language of the other exceptions surrounding the common carrier exceptions were clearly status-based, which suggested that this exception should also be viewed as status-based.<sup>76</sup>

The court noted that, considering the amendment to the Packers and Stockyard exemption in the Act, this recognition may cut away from the FTC's proposed interpretation.<sup>77</sup> Before the amendment, the common carrier and Packers and Stockyards exceptions contained the same language.<sup>78</sup> By later adding the words "insofar as," Congress clearly expressed intent to regulate corporations subject to the Packers and Stockyards Act with an activity-based approach.<sup>79</sup> If it had this intent, why did it not add the same language to the common carrier exception?<sup>80</sup> Furthermore, the court questioned why Congress even added the extra language to the Packers and Stockyards exception if the "subject to" language already indicated an activity-based approach.<sup>81</sup>

The court of appeals also did away with the district court's *Skidmore* deference conclusion. Because of its interpretation of the Act's language and the legislative history, the FTC's consistent interpretation is erroneous and unable to overcome the doubt cast on it by the other factors.<sup>82</sup>

### III. DISCUSSION

The court of appeals' opinion was wrong, both as a matter of law and policy. As to the law, the text of the statute is at best ambiguous and likely leads to a conclusion that an activity-based approach was contemplated by Congress. Although the legislative and subsequent history does not exclusively point to an activity-based approach, *most of it does, especially when one takes into context the understanding of common carrier regulation at the time of passage.* As a policy matter, a status-based interpretation would lead to a large loophole in the law that would allow corporations to structure themselves to get around FTC regulation. There are likely instances where other agencies either cannot or will not take up the slack; and even in the event that another agency literally exists to regulate, the FTC's broad regulatory power lends support to the proposition that it is *best* suited to regulate these non-common carrier activities.

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<sup>75</sup> *Id.* at 999. The court noted, "While these cases recognize a distinction between common carrier and non-common carrier activit[y] . . . they do not show that when Congress used the term 'common carrier' . . . it could only have meant 'common carrier to the extent engaged in common carrier activity.'" *Id.*

<sup>76</sup> *Id.* at 998.

<sup>77</sup> *Id.* at 999.

<sup>78</sup> *Id.* Both exceptions contained only the "subject to" language.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1003.

## A. LEGAL CONCLUSIONS

The district court's opinion is more persuasive because it properly weighs the common carrier exception's text and history. As a preliminary matter, the court of appeals' reasons for rejecting the FTC's proposed interpretation do not mean much. It claims that the fact that the status-based interpretations in the exceptions for banks, savings and loan institutions, and federal credit unions suggests that the common carrier exception should be construed as status-based as well. The language in these exceptions, however, may lead to the opposite conclusion. The language in those exceptions contains no qualifying language like the "subject to" language before the common carrier exception. The fact that Congress drafted these exceptions differently suggests that it meant for these exceptions to work differently.

The court's argument about the addition of the "insofar as" language before the Packers and Stockyards exception, though slightly more persuasive, also falls short of the mark. The appeals court ruled that the addition of this language closed the door on the FTC's interpretation because Congress clearly meant to add an activity-based status to businesses subject to the Packers and Stockyards Act.<sup>83</sup> By not adding this language to the common carrier exception, it implicitly expressed an intention to regulate common carriers by the status-based approach. This does suggest that AT&T's interpretation is correct, but it should not be considered dispositive.

First off, just a year after the addition of the "insofar as" language to the Packers and Stockyards exception, the court decided *Crosse & Blackwell Co. v. Federal Trade Commission*.<sup>84</sup> This case ruled that the language in the Packers and Stockyards exemption (the same language currently in the common carrier exemption) suggested an activity-based approach before the amendment.<sup>85</sup> There were problems with businesses structuring themselves to get around the Packers and Stockyards exemption, and some lower courts were erroneously using a status-based approach.<sup>86</sup> Congress added this language to ensure that this would not be possible.<sup>87</sup>

There is, however, a decent argument that this should not matter. The court may only move on to other interpretational techniques if the statute is ambiguous. As the court correctly states in the *AT&T* Ninth Circuit decision, "[i]t is unnecessary to rely on legislative history to construe unambiguous statutory language."<sup>88</sup> Thus, even if Congress did not intend to create a status-

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<sup>83</sup> *Id.* at 999–1003.

<sup>84</sup> 262 F.2d 600 (4th Cir. 1959).

<sup>85</sup> *Id.* at 605.

<sup>86</sup> *Id.* at 604–05.

<sup>87</sup> *Id.* at 605.

<sup>88</sup> *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 1000 (9th Cir. 2016), *reh'g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

based approach for the common carrier exception, it may have created one by adding the “insofar as” language to the Packers and Stockyards exception.<sup>89</sup>

Considering the structure of the statute, however, the language here is ambiguous. The fact that the banks, savings and loan institutions, and federal credit unions exceptions do not contain any qualifying language means that the exact same argument can be made for why this exception should be read as suggesting an activity-based approach. If Congress clearly intended a status-based approach, why did it add the “subject to” language to the common carrier exception?<sup>90</sup> This creates ambiguity in the statute and allows the court to look at things like purpose and legislative history to determine how the exception should work.

Once we turn to purpose and legislative history, it is clear that the activity-based approach should win the day. The best historical argument that those wanting a status-based approach have is the later addition of the “insofar as” language to the Packers and Stockyards exception.<sup>91</sup> The history suggesting the FTC’s suggested interpretation, however, is more convincing. When the Act was passed, courts used an activity-based approach when regulating common carriers under the Interstate Commerce Act.<sup>92</sup> Furthermore, there is Congressional testimony from the floor of the House when the Act was passed suggesting an activity-based approach.<sup>93</sup> Thus, the legislative history is more suggestive of an activity-based approach than a status-based approach.

#### B. POLICY RESULTS

Another way that the Ninth Circuit decision may be criticized is because of the incentive that it creates for businesses to structure themselves in a way that escapes FTC regulation. As noted in the FTC’s complaint, this is not an airy, academic concern.<sup>94</sup> Google, for example, has already expressed an interest in becoming a virtual wireless carrier, which would exempt it from FTC regulation under the status-based approach.<sup>95</sup>

Although there is no indication that Google has done so solely to escape FTC regulation, a look at the implications of status and activity-based

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<sup>89</sup> *Id.* at 997.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087, 1091 (N.D. Cal. 2015), *rev’d*, 835 F.3d 993 (9th Cir. 2016), *reh’g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

<sup>93</sup> *Id.* at 1094 (quoting Rep. Stevens “[w]here a railroad company engages in work outside that of a public carrier. In that case such work ought to come within the scope of this Commission for investigation.”).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1095. Since the court ruling, Google has actually enacted this plan, offering cellular service under Google Project Fi. See PROJECT FI-, <https://fi.google.com/about/> (last visited Nov. 19, 2017). See also Brian X. Chen, *While Limited, Wi-Fi-First Phones Are a Good, Frugal Bet*, N.Y. TIMES (June 29, 2016) (explaining, among other things, how Google-Fi works).

approaches is useful in showing the negative consequences of solely status-based regulation. Google has been investigated numerous times by administrative agencies (both foreign and domestic) for violations of antitrust and consumer protection laws.<sup>96</sup> It has had particular trouble with the FTC. For example, Google is currently under investigation by the FTC for possible antitrust violations stemming from its ownership of Android.<sup>97</sup> In 2012, Google was fined over \$20 million by the FTC for misrepresenting in its privacy policy the way in which it would use “cookies” to track internet data.<sup>98</sup> Making matters worse, the reason that the fine was so large was because this was an express violation of a previous settlement with the FTC.<sup>99</sup> Thus, Google has shown a proclivity for activity that the FTC deems worthy to regulate.<sup>100</sup> If the status-based approach were chosen, Google would be exempt from FTC regulation. Even though agencies like the FCC may literally have the power to pick up the slack, it will neither have the experience or the tenacity that the FTC does in regulating many of these consumer protection and anti-trust issues.

It is true that the appeals court decision leaves the question of whether an entity may be exempt from FTC regulation when only a miniscule portion of its business derives from common carrier activities. Practically, however, this does not soften the blow to consumers, especially in the telecommunications context. Since a considerable infrastructure is required to carry out telecommunications services, it is unlikely that any entity could incorporate an insubstantial amount of a telecommunication common carrier service into its business.

Companies that are already classified as common carriers will also be able to escape this kind of regulation. Many of these companies have also had similar

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<sup>96</sup> See generally Jack Nicas & Brent Kendall, *FTC Extends Probe Into Google's Android*, WALL ST. J. (Apr. 26, 2016, 3:33 PM), <http://www.wsj.com/articles/ftc-extends-probe-into-googles-android-1461699217> (examining the FTC's current antitrust investigation of Google and a similar investigation in the past).

<sup>97</sup> *Id.*

<sup>98</sup> Press Release, Federal Trade Commission, *Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser* (Aug. 9, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>.

<sup>99</sup> Agreement Containing Consent Order, *In re Google Inc.*, <https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330googlebuzzagreement.pdf>.

<sup>100</sup> Google has been in trouble with the FTC a number of other times not mentioned in the Note. See Press Release, Federal Trade Commission, *Google to Refund Consumers at Least \$19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges* (Sept. 4, 2014), <https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it>; Press Release, Federal Trade Commission, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search* (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

kinds of trouble that Google has had with the FTC. Take, for example, AT&T, who was forced to settle for over \$100 million with the FTC in 2014 for overbilling its customers.<sup>101</sup> Verizon has also been investigated by the FTC for § 5 violations resulting from the issuance of unsecure internet routers.<sup>102</sup>

Many other large and growing corporations could easily incorporate common carrier services into their businesses. Amazon, for example, could get status as a common carrier by registering its Amazon Prime delivery trucks as common carriers. Thus, a status-based interpretation of the exemption could provide companies with an incentive to add small elements of common carrier activity to exempt themselves from FTC regulation. Given the FTC's current ability to regulate these businesses, many of which are the large corporations that consumers have the most direct contact with, that could have large effects on the type of protection that consumers get from these corporations.

Furthermore, although the FCC may regulate telecommunications common carriers, it does not have an important regulatory tool that the FTC does: the ability to order consumer refunds.<sup>103</sup> The FTC has used its ability to order refunds as a powerful tool to regulate harm to consumers by telecommunications common carriers.<sup>104</sup> Although the FCC has the ability to make consumer refunds a part of any settlement agreement,<sup>105</sup> its inability to order the refund gives it less bargaining power required to enter the settlement agreement. Since class action arbitration waivers will generally be upheld by courts<sup>106</sup> and most telecommunications common carriers are large corporations that will generally have these provisions in their consumer contracts, consumers seeking redress for small wrongs will be largely out of luck.

Aggregation of claims may make it cheaper for individual consumers to bring their claim. For consumers seeking small amounts of redress, arbitration costs will sometimes outweigh the harm to the consumer, making it useless for consumers to bring small claims unless they are able to lump their claim together with others who have similar small claims. Since many consumers have signed agreements with the corporations precluding them from aggregating their claims, they may not be able to get redress without FTC enforcement.

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<sup>101</sup> Press Release, Federal Trade Commission, AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case (Oct. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case>.

<sup>102</sup> Closing Letter from FTC to Dana Rosenfeld, Counsel for Verizon Communications, Inc. (Nov. 12, 2014), [https://www.ftc.gov/system/files/documents/closing\\_letters/verizon-communications-inc./141112verizonclosingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/verizon-communications-inc./141112verizonclosingletter.pdf).

<sup>103</sup> 47 U.S.C.S. § 503 (2010).

<sup>104</sup> Federal Trade Commission, *supra* note 101.

<sup>105</sup> Press Release, Federal Communications Commission, AT&T to pay \$7.75 million for letting scammers bill consumers for sham 'directory assistance' services (Aug. 8, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-340650A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-340650A1.pdf).

<sup>106</sup> AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

## IV. CONCLUSION

The Ninth Circuit's recent ruling in *Federal Trade Commission v. AT&T Mobility, LLC* was legally wrong and will produce negative policy results. Legally, the decision was wrong as a matter of statutory interpretation. The Ninth Circuit ruled that the text of the FTC Act's § 5 unambiguously points to a status-based regulation of common carriers. The statute, however, is ambiguous in light of other exclusions. Thus, the court should look at the history and purpose of the statute to discern the common carrier exception's meaning. When history and purpose are considered, it is clear that an activity-based regulatory approach was meant at the Act's passage.

As a policy matter, this decision would lead to a loophole in common carrier regulation. Corporations will be able to add elements of common carrier services into their business and escape regulation from the FTC. This will lead to significant effects on consumers, since the FTC is now tasked with carrying out much of consumer protection law. Furthermore, common carriers such as telecommunications and internet service providers are almost necessary for daily American life and almost all consumers interact with these businesses in one way or another. Although other agencies like the FCC legally have the authority to pick up the slack, the FTC is the proper agency to undertake this role because of its immense experience in the consumer protection arena.