SUPREME COURT OF THE UNITED STATES

No. 97–679

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER *v.* CENTRAL OFFICE TELEPHONE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 15, 1998]

JUSTICE STEVENS, dissenting.

Everyone agrees that respondent's tortious interference claim would be barred by the filed-rate doctrine if it is "wholly derivative of the contract claim for additional and better services." *Ante*, at 12 (majority opinion); *ante*, at 1 (REHNQUIST, C. J., concurring). Moreover, it is true that when the Magistrate Judge ruled that respondent's case would not support a punitive damages award as a matter of state law, he characterized the tort claim as "stem[ming] from the alleged failure of AT&T to comply with its contractual relationship." Tr. 2207. In my opinion, however, the jury's verdict on respondent's tort claim is supported by evidence that went well beyond, and differed in nature from, the contract claim.

If petitioner, in an effort to appropriate respondent's customers, had included with each bill sent to a customer a statement expressly characterizing respondent as an unethical, profit-hungry middleman, I would think it clear that the filed-rate doctrine would not constitute a defense to such tortious conduct. The evidence in the record indicates that a similar result was obtained by mailing bills to the customers that disclosed the markup that respondent obtained on their calls.

Respondent's tort claim was also premised in part on testimony that AT&T used a telemarketer to contact respondent's customers and, without their authorization, convert them to AT&T's own long-distance service. *Id.*, at 557–558. In rejecting AT&T's motion for a directed verdict on the tort claim, the Magistrate recognized that this practice of "slamming" customers could "easily be a case of intentional interference" that would not necessarily also constitute breach of contract. *Id.*, at 2166–2167. Slamming was clearly a part of the case presented in the District Court. There was an allegation of slamming in respondent's amended complaint;[1] in the District Court, AT&T's trial counsel took issue with respondent's effort to make slamming "a big part of this case," *id.*, at 2170, and said in closing argument that slamming "is the basis for this intentional interference" claim, *id.*, at 2921; and nothing in the jury instructions remotely suggested that the tort claim required proof of broken promises by AT&T to provide additional services. Respondent's evidence easily fits within the definition of intentional interference set forth in the jury charge:

> "COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the evidence, one, that COT had business relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper

[1] "[D]espite repeated requests by COT to AT&T, AT&T failed to rectify incidents of unauthorized changes made in the designated carriers ('slamming') of COT's customers." App. 28.

means. And, five, that COT suffered economic injury as a result of the interference." App. 71.

It may be the fact that the billing disclosures and slamming were the consequence of negligence rather than a deliberate plan to take over a network of customers that respondent had developed, but the jury concluded otherwise. It found that petitioner acted intentionally and willfully in interfering with respondent's business relations. See *ibid*.[2] That finding is doubly significant.

First, as the Court acknowledges, *ante*, at 13, the jury's finding precludes a defense based on the provisions of the tariff that purport to limit petitioner's liability. Second, and of greater importance, it determines that the most egregious tortious conduct was not merely derivative of the contract violations. Enforcement of respondent's state-law right to be free from tortious interference with business relations does not somehow award respondent an unlawful preference that should have been specified in the tariff (presumably in return for an added fee or higher rate); it instead gives effect to a generally applicable right that petitioner is required, by state law, to respect in dealing with all others, customers and non-customers alike. Thus, at least some of the tortious interference occurred independently of the customer-carrier relationship and would have been actionable even if respondent had never entered into a contract with AT&T.

The Court correctly states that the filed-rate doctrine will pre-empt some tort claims, but we have never before applied that harsh doctrine to bar relief for tortious conduct with so little connection to, or effect upon, the relationship governed by the tariff. To the extent respondent's tort claim is based on petitioner's billing disclosures and

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[2] The jury's $13 million damages award, reduced by the Magistrate Judge to $1.154 million, did not differentiate between the contract and tort claims.

slamming practices, it neither challenges the carrier's filed rates, as did the antitrust claim in *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922), nor seeks a special service or privilege of the sort requested in cases such as *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155 (1912), and *Davis* v. *Cornwell*, 264 U. S. 560 (1924). More akin to this case is *Nader* v. *Allegheny Airlines, Inc.*, 426 U. S. 290, 300 (1976), in which we held that a common-law tort action for fraudulent misrepresentation against a federally-regulated air carrier could "coexist" with the Federal Aviation Act. To a limited degree it may be said that here, as in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." *Ibid.* If the Communications Act's savings clause[3] means anything, it preserves state-law remedies against carriers on facts such as these.

The District Court and the Court of Appeals never considered whether respondent's tort claim is wholly derivative of its contract claim for purposes of the filed-rate doctrine, because those courts mistakenly believed that even the contract claim was not covered by the doctrine. On my own reading of the record, I think it clear that a portion of the tort claim is not pre-empted. The Court should therefore remand the case for a new trial rather than ordering judgment outright for AT&T.[4]

Although the Court holds broadly that respondent's tort

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[3] "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U. S. C. §414.

[4] Beyond the billing disclosures and slamming, respondent asserts that AT&T also misappropriated customer information from respondent's confidential database. Brief for Respondent 4. That basis for a tort remedy, if supported by sufficient evidence, would also appear not to be pre-empted by the filed-rate doctrine.

claim is totally barred, it declines to consider whether a portion of the claim might survive on remand because this issue was not part of the question presented in the petition for certiorari and was not specifically raised by respondent. *Ante*, at 12, n. 2. The latter point is wholly irrelevant, precisely because of the scope of the question presented. The only question that we agreed to decide was whether the filed-rate doctrine pre-empts "state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff." Pet. for Cert. i. The Court answers that legal question, and then decides an additional, factual one: whether respondent's tort claim is "based on" AT&T's "failure to honor an alleged side agreement," and thus is "wholly derivative" of the pre-empted contract claim. In resolving that issue, the Court cannot simply rely on AT&T's bald assertion, supported only by a statement of the Magistrate taken out of context, that the tort claim is "wholly derivative"; we have an obligation either to study the record or at least to remand and allow the lower courts to consider the proper application of the legal rule to the facts of this case.

I respectfully dissent.