

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

MICHAEL ERIKSON, individually and on behalf of all others similarly situated,)	
)	
Plaintiff,)	No. 99 CH 18873
)	(Consolidated with 99 CH 11536,
v.)	00 L 011474, 00 L 00500, 01 CH 3373)
)	
AMERITECH CORPORATION,)	
)	
Defendant.)	

FEDERAL TRADE COMMISSION’S MEMORANDUM OF LAW AS AMICUS CURIAE

The Federal Trade Commission (“FTC”) opposes the class action settlement preliminarily approved by the court on February 28, 2002, because both the prospective conduct relief and the relief intended to compensate injured class members are inadequate. First, the prospective conduct relief is inadequate because it would not require Ameritech to disclose adequately, before a prospective customer agrees to purchase the voice mail service, that the consumer will be charged for local calls associated with his or her use of the voice mail service if his or her local service is billed on a per-call or per-minute basis. Instead, the settlement would only require Ameritech to provide this important disclosure on its website and *after* the consumer has agreed to purchase the service (*i.e.*, in the welcome letter and terms and conditions Ameritech sends to new subscribers). Second, the relief intended to compensate injured class members (*i.e.*, a month of free Speed-Dial 30 service) is inadequate because it would not fairly, reasonably, or adequately compensate class members who paid additional charges for local telephone calls as a result of Ameritech’s alleged deceptive practices in

connection with its voice mail subscription service. In addition, the notice of settlement distributed to the class members fails to disclose material terms of the Speed-Dial 30 service offered to class members, such as the cost of the service, the timing and manner of billing for the service, and how to cancel the service to avoid being charged after the free trial period ends. The failure to disclose material terms of the Speed-Dial 30 service prior to the class members' acceptance of the offer may result in further deception and injury to consumers. Third, in light of the settlement's shortcomings as described above, the settlement appears to authorize the payment of excessive and unreasonable fees to attorneys representing the class that are disproportionate to the benefits conferred on the class by the settlement.

Whatever the merits of the case against Ameritech, the settlement would be of very dubious value to class members and perhaps even contrary to the interests of class members who fail to opt out of the settlement and as a result will not be able to pursue their individual claims against Ameritech. Thus, the FTC opposes the settlement even if rejection of the settlement ultimately results in dismissal of the case.

I. THE FTC'S INTEREST IN THIS MATTER

The FTC is an independent law enforcement agency whose mission is to promote the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and to increase consumer choice by promoting vigorous competition. The FTC's primary legislative mandate is to enforce the FTC Act, which prohibits unfair methods of competition and unfair or

deceptive acts or practices in or affecting commerce.¹

Pursuant to this authority, the FTC routinely brings enforcement actions to further both its consumer protection and competition (antitrust) missions. FTC enforcement actions routinely seek monetary relief, including refunds for consumers. In fiscal year 2001, for example, the FTC obtained 80 administrative orders and federal district court judgments ordering the payment of over \$252 million in redress or disgorgement. The FTC and its contractors have extensive experience implementing redress programs, including the drafting and mailing of notices, the processing of consumer claims, and the payment of cash refunds to consumers. The FTC typically dispenses millions of dollars in redress to consumers each year.²

This *amicus* brief is based upon the FTC's experience prosecuting unfair and deceptive trade practices and in formulating restitution programs for injured consumers. If proven, the practices challenged by the plaintiff likely constitute unfair or deceptive acts or practices.

The FTC has challenged marketing practices similar to those at issue here in a number of recent law enforcement actions, all of which resulted in consent orders prohibiting the challenged conduct and

¹ The FTC Act provides the FTC with broad law enforcement authority over entities engaged in, or whose business affects, commerce. *See* 15 U.S.C. § 41 *et seq.* The statute provides the agency with jurisdiction over most of the economy. Certain entities, such as depository institutions and common carriers, are wholly or partially exempt from FTC jurisdiction, as is the business of insurance. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 statutes.

² The FTC has experience with non-pecuniary redress programs too, including programs involving product discounts and computer upgrades. *See, e.g., American Body Armor and Equipment, Inc.*, 118 F.T.C. 982 (1994) (respondent ordered to provide a 40% discount on replacement body armor); *Apple Computer, Inc.*, 124 F.T.C. 184 (1997) (respondent ordered to provide personal computer upgrade kits at less than half the original list price); and *Sharp Electronics Corp.*, Docket No. C-4002 (Order Mar. 7, 2001) (respondent ordered to upgrade handheld personal computers for a shipping and handling fee of \$10).

in some instances providing cash refunds for injured consumers. For example, in Juno Online Services, Inc.,³ the FTC alleged, among other things, that Juno misrepresented that consumers who used its Free Internet Service would incur no costs, and failed to disclose adequately that some subscribers to its Internet services would incur long distance telephone charges while connecting to the Internet. The FTC's Order provides that, if Juno makes a cost claim for Internet service advertised with another product or service, it must also clearly and conspicuously disclose possible long distance telephone charges. In advertising for its Internet service exclusively, the FTC's Order requires Juno to disclose prominently potential long distance telephone charges before consumers register for its service. It also requires Juno to reimburse certain former subscribers for long distance telephone charges they incurred within the first two months of using Juno's Internet service.

In Gateway, Inc.,⁴ the FTC alleged, among other things, that Gateway misrepresented the cost of its Internet access service and failed to disclose adequately that some consumers would incur significant long distance charges or charges for the use of Gateway's "toll-free" access number to use Gateway's services. The FTC's Order prohibits Gateway from misrepresenting the price or cost of any service to access the Internet or other electronic network, and requires Gateway to clearly and conspicuously disclose information regarding fees a consumer may incur to access such a service. The FTC's Order also requires Gateway to refund all charges for the so-called "toll free" numbers paid by

³ FTC Docket No. C-4016 (Complaint and Consent Order June 25, 2001). *See* www.ftc.gov/opa/2001/05/juno.htm.

⁴ FTC Docket No. C-4015 (Complaint and Consent Order June 22, 2001). *See* www.ftc.gov/opa/2001/05/gateway.htm.

customers who registered on the local access plan between January and April 1999.⁵

II. BACKGROUND

The plaintiff alleges that Ameritech, acting through various other parties, breached contracts with its voice mail subscribers and/or committed consumer fraud in connection with its sales of the voice mail service. Ameritech allegedly failed to disclose that some consumers would incur additional costs over and above the monthly subscription charge for the service (*i.e.*, those consumers who did not have unlimited local telephone service could incur local telephone usage charges for calls transferred from a customer's telephone to the customer's voice mailbox and for calls customers made to retrieve messages from the voice mailbox). Ameritech has denied all allegations of liability and of wrongdoing, asserted that the local usage charges at issue were fully disclosed to voice mail subscribers, and raised several defenses. The court dismissed the complaint on February 15, 2001, and the plaintiff's appeal of the dismissal is pending.

Under the terms of the settlement, Ameritech would, in the future, make certain disclosures regarding local telephone usage charges on its website and in the welcome letter and terms and conditions it sends to new subscribers. Ameritech also would send a one-time notice to customer

⁵ See also Value America, Inc., FTC Docket No. C-3976 (Complaint and Consent Order Sept. 5, 2000); Office Depot, Inc., FTC Docket No. C-3977 (Complaint and Consent Order Sept. 5, 2000); and BUY.COM, Inc., FTC Docket No. C-3978 (Complaint and Consent Order Sept. 5, 2000) (www.ftc.gov/opa/2000/06/comp629.htm). In these cases, the FTC alleged, among other things, that the companies offered computer system rebates conditioned on the purchase of three years of Internet service without disclosing adequately that consumers in some parts of the country had to pay long distance telephone charges, or expensive hourly surcharges, to connect to the Internet. All three orders prohibit any misrepresentation of price or cost to consumers of any computer, computer-related product or Internet access service and require clear and conspicuous disclosures of information regarding the possible long distance telephone charges.

service representatives reminding them to make disclosures regarding local telephone usage charges to prospective customers who call to inquire about or order the voice mail service.

In addition, the settlement would provide one free month of Ameritech's Speed-Dial 30 service to all class members who call in, certify that they are class members, and request Speed-Dial 30. Speed-Dial 30 is a service that enables subscribers to speed dial telephone numbers they program into their telephones. The cost of the service varies by state, but costs \$5 a month in Illinois.⁶ Any class member who requests Speed-Dial 30 would be charged for subsequent months of the service unless the class member cancels the service. Finally, Ameritech would pay class counsel a fee approved by the court, not to exceed \$971,000.

III. ARGUMENT

A. THE SETTLEMENT PROVIDES INADEQUATE PROSPECTIVE RELIEF BECAUSE IT DOES NOT REQUIRE AMERITECH TO DISCLOSE COSTS TO CONSUMERS BEFORE THEY AGREE TO PURCHASE VOICE MAIL SERVICE

The principal form of relief provided by the settlement is prospective relief regarding Ameritech's disclosures of the terms of voice mail services to prospective customers. The relief provided here is wholly inadequate because it would not require Ameritech to disclose, *before* a prospective customer agrees to purchase its voice mail service, that the consumer will be charged for local calls associated with his use of the voice mail service if his local service is billed on a per-call or per-minute basis. Instead, the settlement would require Ameritech to provide this important disclosure on its website and after the consumer has agreed to purchase the service (*i.e.*, in the terms and

⁶ For service cost information, see www1.ameritech.com.

conditions and welcome letter sent to customers), and to send a notice to all customer service representatives reminding them to inform customers who inquire about or order the service when the representatives disclose or confirm the price of the service.

Providing the disclosure on a website is inadequate because consumers may use the telephone to order the service without first checking the website. In addition, many consumers do not have access to the Internet. Requiring Ameritech to make the disclosure in the welcome letter and in the terms and conditions is inadequate because the consumer who receives these documents has already purchased the service. The settlement should require Ameritech to make the above disclosure to each prospective customer before he agrees to purchase the voice mail service.

In addition, requiring Ameritech to send a single reminder notice to customer sales representatives is inadequate because the representatives may disregard the notice, fail to make the disclosure in a clear and conspicuous manner, or simply forget to make the disclosure. The settlement does not require Ameritech to take any steps to ensure that the customer sales representatives make the necessary disclosure to each prospective customer before he agrees to purchase the voice mail service. At a minimum, the settlement should require Ameritech to establish internal procedures and training programs designed to ensure that customer sales representatives make the above disclosure to consumers before they purchase the voice mail service.

B. THE SETTLEMENT DOES NOT FAIRLY, REASONABLY, OR ADEQUATELY COMPENSATE INJURED CLASS MEMBERS⁷

⁷ A court should approve a class action settlement if it is fair, reasonable, and adequate. People ex rel. Wilcox v. Equity Funding Life Ins. Co., 61 Ill.2d 303, 335 N.E.2d 448, 455-56 (1975).

The only portion of the settlement that actually purports to confer a concrete benefit on the certified class members to compensate for their claimed past injuries is its provisions regarding a wholly separate product, Ameritech's speed-dial service. These provisions are inadequate because they: (1) offer injured class members compensation of little or no value; and (2) present the offer without disclosing material terms, and as a result may result in additional consumer deception and injury.

1. The Offered Compensation Has Little or No Value

The settlement offers injured class members a month of low-cost speed dial service where there is no reason to believe that a substantial number of class members even desire the offered service. Neither counsel for the class nor Ameritech has made any showing that class members desire the Speed-Dial 30 service or provided any estimate of the percentage of class members likely to accept the Speed-Dial 30 offer. There is no reason to believe that a consumer who subscribes to a voice mail service would want an entirely unrelated service. Many class members may already have a telephone with a speed dial function. As a result, many and perhaps most of the class members would receive nothing of value from the settlement. Even class members who desire the Speed-Dial 30 service would receive only one month of a service having a retail value of approximately \$5, and to use the service they would have to spend time and effort programming their telephones. Thus, the settlement would provide class members with compensation of little or no value.

Furthermore, experience with discount coupon programs and other class action cases involving non-pecuniary settlements suggests that the aggregate value of the Speed-Dial 30 offer is likely very low. The Speed-Dial 30 offer is in many respects analogous to a discount coupon offer, and coupon redemption rates are often very low. The average redemption rates in food and beverage coupons

have been between 2% and 6%.⁸ In an airline class action settlement, only about 3% of the plaintiff class ultimately redeemed their coupons for discounted air travel. See Buchet v. ITT Consumer Fin. Corp.⁹ (court rejected a settlement involving a discount coupon worth as much as \$39 for the purchase of property insurance or related products, citing actual redemption rates ranging from 0.002% to 0.11% for similar coupons).

The dubious track record of coupon settlements has led to increased scrutiny by courts of non-pecuniary settlements. For example, in In re Auctionhouse Litig.,¹⁰ a case involving price fixing between Sotheby's and Christies regarding buyer's premiums and seller's commissions, the court acknowledged criticism of coupon settlements generally. The court had rejected a previously proposed settlement with certificates redeemable only at the issuing auction house and no cash redemption. However, the court ultimately accepted a proposed settlement because compensation was to be paid predominantly in cash and required issuance of certificates having a fair market value of \$100,000 that could be used at either auction house.

In a widely cited example of a poor coupon settlement, the Third Circuit reversed a district court's approval of a settlement arising out of exploding side-saddle gas tanks on GM pickups. In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.¹¹ The Third Circuit rejected a

⁸ Dickerson, Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?, 12 *Advancing the Consumer Interest* No. 2 (Fall/Winter 2000).

⁹ 845 F. Supp. 684, 694-95, *modified*, 858 F. Supp. 944 (D. Minn. 1994).

¹⁰ No. 00 Civ. 0648, 2001 U.S. Dist. LEXIS 1713 (S.D.N.Y. Feb. 22, 2001).

¹¹ 55 F.3d 768 (3rd Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

class action settlement providing class members with a \$1,000 coupon, good for only 15 months, toward the purchase of a new GM truck or minivan. Although the settlement would have allowed class members to transfer the coupon to third parties, the transferred coupon was worth only \$500 and the restrictions on its use made it virtually worthless. The Third Circuit found the settlement unacceptable because it failed to provide adequate benefits to the class.

Settlements providing non-pecuniary redress in the form of discount coupons or 30 day free trial offers should only be considered where there is reason to believe class members are likely to use the coupons or the trial offer. As noted above, here there has not been any showing that class members will be likely to use the Speed-Dial 30 service. Thus, the settlement is not fair, reasonable, or adequate.¹² A settlement providing either cash refunds or a variety of free service options, including voice mail, would be more likely to provide meaningful compensation to class members.

2. The Notice of Settlement Fails to Disclose Material Terms of the Speed-Dial 30 Offer to Class Members

In addition to providing inadequate compensation for injured class members, the settlement is flawed because the notice of settlement fails to disclose all of the material terms of the Speed-Dial 30 offer. It is unclear from the notice of settlement the extent to which Ameritech plans to disclose fully the material terms of the offer when a class member calls to inquire about or order the service. The failure to disclose adequately all of the material terms of the Speed-Dial 30 offer may induce class members to accept the offer even though they would have rejected it had Ameritech disclosed fully the terms of the

¹² In addition, the free offer may potentially benefit the defendant more than the class members by generating sales of the Speed-Dial 30 service and thereby undermining any deterrence component of the settlement.

offer.

The FTC has challenged deceptive free trial offers used to market various goods and services, including buying club memberships, computer software, and Internet access services. In FTC v. Smoley,¹³ the FTC alleged, among other things, that the defendants failed to disclose adequately that a consumer who fails to contact the defendants within 30 days and cancel the trial membership is enrolled as a buying service member, and that the consumer's credit card is charged an annual fee. The FTC's Order provides injunctive relief and requires the defendants to pay \$8.3 million in consumer redress. In United States v. Micro Star Software, Inc.,¹⁴ the United States alleged, among other things, that the defendants failed to disclose adequately that a consumer who fails to cancel within the 30-day trial period becomes a member of a continuity club that ships additional software each month and that the consumer's credit card is charged a non-refundable membership fee. The Consent Decree provides injunctive relief and requires the defendants to pay a civil penalty of \$90,000. In America Online, Inc., CompuServe, Inc., and Prodigy Services Corp., the FTC alleged, among other things, that the respondents failed to disclose adequately that consumers had an affirmative obligation to cancel before the Internet service trial period ended to avoid charges, and as a result, consumers who failed to cancel were enrolled as members and began incurring unexpected monthly charges.¹⁵ The FTC orders require

¹³ No. 01-8922-CIV-ZLOCH (S.D. Fla. Complaint Oct. 23, 2001; Stipulated Order Nov. 27, 2001). See www.ftc.gov/opa/2001/10/triad.htm.

¹⁴ No. 02 CV 1003 (S.D. Cal. Complaint May 22, 2002; Consent Decree May 24, 2002). See www.ftc.gov/opa/2002/05/microstar.htm.

¹⁵ America Online, Inc., 125 F.T.C. 403 (1998); CompuServe, Inc., 125 F.T.C. 451 (1998); and Prodigy Services Corp., 125 F.T.C. 430 (1998). See www.ftc.gov/opa/1997/9705/online.htm.

the respondents to make adequate disclosures.

The settlement notice explains how class members can accept the Speed-Dial 30 offer by calling Ameritech. It also states that “Any class member who requests Speed Dial 30 will be charged for subsequent months of that service unless the class member cancels the service.” The notice fails to disclose the following material information regarding the Speed-Dial 30 offer:

(1) the cost of the Speed-Dial 30 service; (2) the manner and timing of billing (*e.g.*, a credit card charge or invoice from the local telephone company); (3) the deadline for canceling the service to avoid a charge; and (4) the procedure for canceling and contact information (*e.g.*, contacting a toll-free number or sending a written cancellation request).

Further deception and consumer injury would result to the extent Ameritech fails to disclose this information to class members before they accept the Speed-Dial 30 offer. Some consumers would likely accept the offer even though they would have rejected it had Ameritech disclosed the cost of the service and the steps consumers must take to cancel and avoid a charge. Fully informed consumers may reject the offer to avoid the hassle of canceling or the risk that they will forget to cancel and thereby incur charges for an unwanted service.

The risk of further deception and consumer injury stems in large measure from the failure to disclose adequately the details relating to the “negative option” feature of the Speed-Dial 30 offer. This problem could be addressed by improving the disclosures or by revising the offer so that Ameritech would not charge class members for the Speed-Dial 30 service unless they affirmatively request continuation of the service after the month of free service ends. This latter approach, often referred to as an “opt-in” approach, would best protect the class member who either does not receive adequate

disclosures or does not remember to cancel in time to avoid charges.

C. THE COURT SHOULD THOROUGHLY AND CAREFULLY REVIEW THE ATTORNEY FEE APPLICATIONS FILED BY CLASS COUNSEL

As explained above, the settlement's prospective conduct relief and the compensation for injured consumers is inadequate. The prospective conduct relief would not prohibit Ameritech from engaging in the same practices alleged in the complaint.¹⁶ Class members will not receive any cash refunds or free or discounted voice mail services, and it seems likely that many class members will place little, if any, value on the Speed-Dial 30 offer. Neither the court's order preliminarily approving the settlement nor the settlement itself represents or estimates the value of the Speed-Dial 30 service offered to class members. The settlement provides that Ameritech has agreed to pay class counsel's fees of up to nearly \$1 million.

The flaws in the prospective conduct relief and the dubious value of the proposed compensation for class members raise serious questions about the reasonableness and fairness of the fees sought by counsel for the class. Whatever the value of the settlement to class members, it seems likely that class counsel's fees would constitute a high percentage of that value. The FTC respectfully submits that this court should thoroughly and carefully examine the propriety of attorneys fees in this matter.

¹⁶ The FTC does not express any view about the merits of the case against Ameritech.

IV. CONCLUSION

For the foregoing reasons, the FTC respectfully submits that the settlement should not be approved.

Dated: June 21, 2002

Respectfully submitted,

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