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AN EMPTY PROMISE:  
THE TELECOMMUNICATIONS INDUSTRY'S DECEPTIVE AND  
MANIPULATIVE BUSINESS PRACTICES IN THE  
GRANDFATHERING OF WIRELESS UNLIMITED DATA

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**I. INTRODUCTION**

For industries that provide everyday services to vast consumers, building and maintaining a loyal customer base is fundamental to the success of a business.<sup>1</sup> Over the years, many businesses have used the grandfathering of services and programs as a temporary strategy to achieve this objective of customer loyalty.<sup>2</sup> Grandfathering is the business practice of allowing preexisting customers to re-

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<sup>1</sup> See Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 38 (2008) (discussing the advantages of grandfathering services). “[A] policy of grandfathering--of allowing noncompliance for parties already participating in an activity and complying with rules in the past--should often be employed.” *Id.*

<sup>2</sup> See, e.g., Marguerite Reardon, *Verizon to kill unlimited data plans for existing subscribers*, CNET (May 16, 2012), *archived at* <http://perma.cc/3TEE-6S87> (observing the contentions of preexisting customers in trying to keep their grandfathered unlimited data plans); Karen Gullo & David McLaughlin, *AT&T Sued by FTC over ‘Throttling’ Smartphone Data Speeds*, BLOOMBERG BUSINESS (Oct. 28, 2014), *archived at* <http://perma.cc/U8KJ-NNX9> (exemplifying an issue with grandfathered unlimited data plans, in which network access and throughput speeds are reduced in an industry practice known as “data throttling”).

tain their previously subscribed services, which are no longer being offered to new subscribers.<sup>3</sup> With the turn of the twenty-first century, wireless service providers have adopted and practiced this business model by grandfathering unlimited data plans, giving rise to one of the most contentious consumer topics today.<sup>4</sup> Large telecommunications companies, such as AT&T and Verizon, have been phasing out their highly coveted unlimited data plans to the dismay of their preexisting customers, leading to much legal discourse.<sup>5</sup>

This Note will demonstrate how the business strategy of grandfathering services is achieved through the deceptive use of vague and ambiguous contractual language, which allows corporations to fluidly and unfairly manipulate their terms of service.<sup>6</sup> Part II of this Note first traces the general history of grandfathered services that lead up to the present grandfathering of wireless unlimited data plans.<sup>7</sup> Part II will then continue to explore the historical context of telecommunications corporations and its transformation from a monopolistic to an oligopolistic controlled industry.<sup>8</sup> Part II.C profiles case law that arises from disgruntled consumers in regards to their grandfathered services and programs, with a focus on consumer

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<sup>3</sup> See *Grandfather Clause*, BLACK'S LAW'S DICTIONARY (10th ed. 2014) (defining a 'grandfather clause' as "[a] provision that creates an exemption from the law's effect for something that existed before the law's effective date"); see also *Grandfather Clause*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (providing the definition of a 'grandfather clause' as "a clause creating an exemption based on circumstances previously existing").

<sup>4</sup> See, e.g., Marguerite Reardon, *Could Verizon nix unlimited data for everyone?*, CNET (Dec. 11, 2012), archived at <http://perma.cc/WUZ5-DYLW> (discussing the possibility of the largest wireless network ultimately terminating its unlimited data plans); *Wireless Customer Agreement*, AT&T MOBILITY LLC, archived at <http://perma.cc/J9W5-VFVG> (carving out special terms and conditions for grandfathered unlimited data plans).

<sup>5</sup> See Spencer E. Ante & Ryan Knutson, *Good Luck Leaving Your Wireless Phone Plan*, WALL ST. J. (July 31, 2013), archived at <http://perma.cc/7E6M-5GE4> (observing the telecommunications giants' gradual termination of unlimited wireless data plans).

<sup>6</sup> See discussion *infra* Parts II.A, II.C.1, IV.A (observing that wireless carriers deliberately choose certain words to create vague and ambiguous contractual language such that it enables telecommunications giants to bend the terms of agreement in their favor).

<sup>7</sup> See History *infra* Part II.A (tracing the legal background of unlimited data plans, from contract to the consequential consumer lawsuits that soon followed).

<sup>8</sup> See History *infra* Part II.B (observing how market pressures transformed the telecommunications industry from a monopoly to oligopoly).

protection issues that arise with the intervention of federal regulatory agencies on behalf of consumers.<sup>9</sup> Part III sets forth the circumstances that lead up to the current issue of the phasing out of grandfathered unlimited data plans discussed in this Note.<sup>10</sup>

By highlighting the manipulative and deceptive contractual language and service terms of agreements, Part IV demonstrates how the telecommunications industry unfairly phased out and/or terminated their grandfathered services and programs.<sup>11</sup> Part IV finds connections as to why businesses offered grandfathered services and programs by analyzing the business purposes as to marketing and strategy.<sup>12</sup> The analysis sheds light on the telecommunications industry's unfair and deceptive practices to phase out grandfathered services, which closely mirrors a bait and switch scheme.<sup>13</sup> Furthermore, the analysis examines how vague contractual language protects these companies but also renders them liable to their own terms and conditions, while observing consumer protection implications.<sup>14</sup> Part IV will then present proposals of possible solutions to these problems.<sup>15</sup> Part V advocates for a more progressive approach to protect consumers against corporate bullying with statutory governance of grandfathered services to eliminate the corporate manipulation of contractual language and deceptive business practices.<sup>16</sup>

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<sup>9</sup> See History *infra* Part II.C (outlining the legal ramifications of the telecommunications companies' phasing out of unlimited data plans through recent case law).

<sup>10</sup> See Premise *infra* Part III (laying out the facts that give rise to the issue of the phasing out of grandfathered unlimited data plans that this Note explores).

<sup>11</sup> See Analysis *infra* Part IV.A (focusing on contract law through the scope of ambiguous contractual language of the wireless carriers' terms of agreement and service).

<sup>12</sup> See Analysis *infra* Part IV.B (exploring the business purposes of offering grandfathered services, particularly wireless unlimited data plans).

<sup>13</sup> See Analysis *infra* Part IV.B (analyzing how grandfathering of unlimited data plans is a bait and switch scheme).

<sup>14</sup> See Analysis *infra* Parts IV.B, IV.C (assessing the telecommunications companies' outcomes of using vague contractual language in their terms of agreement).

<sup>15</sup> See Analysis *infra* Part IV.D (proposing possible solutions to the telecommunications industry's unfair and deceptive practices in phasing out grandfathered services).

<sup>16</sup> See Conclusion *infra* Part V (proposing that a progressive approach via statutory governance of grandfathered services is necessary to protect consumers).

## II. HISTORY

### A. General History of Grandfathered Services

Grandfathering is a common business practice used across various fields of industry.<sup>17</sup> A grandfather clause creates an exemption based on preexisting circumstances.<sup>18</sup> Formerly, however, the term ‘grandfather’ originated from late United States nineteenth-century legislation and constitutional amendments to voter registration requirements, which included literacy tests, poll taxes, and residency and property restrictions.<sup>19</sup> Some Southern states created exemptions, coined as ‘grandfather clauses,’ to these registration requirements for individuals whose ancestors or ‘grandfathers’ had the right to vote before the Civil War.<sup>20</sup> Today, statutory grandfathering continues to be utilized.

In healthcare law, the Patient Protection and Affordable Care Act of 2010 (“Affordable Care Act” and/or “ACA”) provided a “grandfather rule” for preexisting consumers to retain their current healthcare plans before the law took effect.<sup>21</sup> Experts and scholars in the field, however, have predicted that healthcare insurance plans are unlikely able to keep their grandfather statuses for much longer.<sup>22</sup> Federal regulations governing the Affordable Care Act establish strict

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<sup>17</sup> See *Grandfather*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining ‘grandfather’ as a verb meaning “[t]o cover (a person) with the benefits of a grandfather clause”).

<sup>18</sup> See BLACK’S LAW DICTIONARY, *supra* note 3 (defining ‘grandfather clause’ as “[a] provision that creates an exemption from the law’s effect for something that existed before the law’s effective date; specif., a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect”).

<sup>19</sup> See, e.g., *Guinn v. United States*, 238 U.S. 347, 358 (1915) (considering the constitutionality of voter registration requirements).

<sup>20</sup> See *id.* at 357-58 (addressing Fifteenth Amendment validity issues with an Oklahoma constitutional amendment fixing standards for suffrage).

<sup>21</sup> See Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001-18121 (2010) (mandating affordable health care for all Americans); see also Preservation of Right to Maintain Preexisting Coverage, 42 U.S.C. § 18011 (2010) (providing an exemption to buying into the Affordable Care Act and allowing individuals to grandfather their preexisting healthcare plans).

<sup>22</sup> See, e.g., Elizabeth Weeks Leonard, *Can You Really Keep Your Health Plan? The Limits of Grandfathering Under the Affordable Care Act*, 36 J. CORP. L. 753, 754 (2011) (concluding that the grandfathering of health insurance plans under the Affordable Care Act not only has limits, but will not last).

guidelines for healthcare plans to retain grandfathered status.<sup>23</sup> These unrealistic requirements are practically impossible to meet, such that most plans are likely to forfeit grandfathered status.<sup>24</sup> “The [Obama] Administration acknowledges that grandfathered plans will likely cease to exist within a few years of ACA’s enactment, but assures us that we will not notice the change or will prefer our new ACA plans anyway.”<sup>25</sup> The Affordable Care Act’s grandfather rule specifies that preexisting plans will not be terminated, but it does not guarantee that grandfathered plans will remain unchanged.<sup>26</sup> Beyond health insurance, grandfathering has extended from statutory to contractual implementation, such as is the case with wireless unlimited data plans.<sup>27</sup>

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<sup>23</sup> See *id.* at 756 (noting that the requirements of grandfathering are stringent and nearly impossible to meet).

<sup>24</sup> See *id.* (observing that most preexisting health plans are unable to meet these standards and are likely to forfeit grandfathered status).

<sup>25</sup> *Id.* at 756-57 (discussing phasing out of grandfathered healthcare plans under ACA). “But that was not the promise. The bait-and-switch approach to reregulation risks credibility and trust. Moreover, the Administration achieves its ends not through direct, accountable processes, but indirectly by establishing regulatory parameters that will all but force plans to give up grandfathered status and comply with ACA.” *Id.* at 757.

<sup>26</sup> See *id.* at 765 (noting that the Affordable Care Act expressly exempts grandfathered plans from some, but not all, new federal requirements for health insurance plans); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1251, 124 Stat. 119, 161 (2010) (exempting grandfathered plans from some requirements for health insurance); MARK MERLIS, HEALTH AFFAIRS, HEALTH POLICY BRIEF: “GRANDFATHERED” HEALTH PLANS 2 (2010) (commenting that grandfathered coverage would eventually change).

<sup>27</sup> See, e.g., *Wireless Customer Agreement*, *supra* note 4 (allowing preexisting customers with unlimited data to grandfather their wireless plans).

## **B. Historical Context of Telecommunications Corporations: Monopoly to Oligopoly**

The Telecommunications Act of 1996<sup>28</sup> deregulated markets that previously had largely been regulated by the government since the inception of the industry.<sup>29</sup> Prior to this shift in market structure in 1996, modern telecommunications networks had been heavily regulated by state and federal governments.<sup>30</sup> Although dually regulated, the pre-1996 telecommunications industry was a unified telephone market with only one major provider, the Bell System.<sup>31</sup> The interstate governance of telecommunications fell under the Communications Act of 1934.<sup>32</sup> Because of Bell System's monopoly over the industry, the Communications Act of 1934 did not foster competition in the market at the time.<sup>33</sup> This lack of governance over Bell System's monopolistic power led to federal antitrust laws, which were thus used to control the only telecommunications giant.<sup>34</sup>

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<sup>28</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C. (1996)); see also Ross Wecker, Note, *The Telecommunications Act of 1996 and the Internet: Reciprocal Compensation or Irreconcilable Compensation?*, 6 J. HIGH TECH. L. 291 (2006) (addressing creation of the modern telecommunications marketplace).

<sup>29</sup> See Seth A. Cohen, Note and Comment, *Deregulating, Defragmenting & Interconnecting: Reconsidering Commercial Telecommunications Regulation in Relation to the Rise of Internet Telephony*, 18 J.L. & COM. 133 (1998) (describing the market shift after the deregulation that resulted from the Telecommunications Act of 1996).

<sup>30</sup> See *id.* at 134 (explaining that before the Telecommunications Act of 1996, the industry was heavily regulated by the state and federal governments).

<sup>31</sup> See *id.* (identifying the structure of the telecommunications industry as a monopoly controlled by the Bell System).

<sup>32</sup> See Communications Act of 1934, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. § 151 (1988 & Supp. IV 1992)) (drawing attention to the Communications Act of 1934 and its interstate governance of the telecommunications markets). Passed by President Franklin Delano Roosevelt, the Communications Act of 1934 also established the Federal Communications Commission ("FCC"). See Robert Penchuk, Note, *Unleashing the Open Mobile Internet*, 10 J. HIGH TECH. L. 74 (2009).

<sup>33</sup> See Cohen, *supra* note 29, at 135 (noting that the Communications Act of 1934 did not encourage market competition since Bell System had a monopoly over the industry at the time).

<sup>34</sup> See Cohen, *supra* note 29, at 135 (describing the federal antitrust laws used to regulate Bell Systems); see also *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001,

In 1982, the communications market began to open up, splitting into two markets.<sup>35</sup> Shifting from a dependent subsidiary to standalone, the Regional Bell Operating Companies were spun off of the telecommunications giant AT&T.<sup>36</sup> This meant that AT&T now became a single competitor in the telecommunications market, in which it no longer held any competitive advantage over other interstate carriers.<sup>37</sup> After this initial split, the telecommunications market only continued to expand and diversify, gradually transforming into the highly competitive structure that exists today.<sup>38</sup>

With the advancement in technological capability and rise in popularity of smartphones in recent years, access to data has evolved from a privileged product to an everyday necessity.<sup>39</sup> To fulfill this

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1001 (1983) (discussing the need for regulation of the telecommunications monopoly with the aid of federal antitrust laws).

<sup>35</sup> See Cohen, *supra* note 29, at 135 (describing a change in market structure of the telecommunications industry).

<sup>36</sup> See Cohen, *supra* note 29, at 135 (explaining that Bell Operating Companies, which were subsidiaries of AT&T, were spun off as independent corporate entities).

<sup>37</sup> See Cohen, *supra* note 29, at 135 (noting that AT&T was no longer a monopoly and had to compete for customers in the open market).

<sup>38</sup> See Harry McCracken, *A Brief History of the Rise and Fall of Telephone Competition in the US, 1982-2011*, TECHNOLOGIZER (Mar. 20, 2011), archived at <http://perma.cc/2VD7-QFUN> (describing the transformation of the telecommunications market after the break-up of AT&T).

<sup>39</sup> See James E. Zino, *Can You Hear Me Now: Spectrum is Shaping the Telecommunication Industry in an Increasingly Connected America*, 30 SYRACUSE J. SCI. & TECH. L. REP. 131, 132 (2014) (commenting on the rise in consumer technology since the first iPhone created a new product market for smartphones in 2007); Nicholas Hasenfus, Note, *Unlocking Will Get You Locked Up: A Recent Change to the DMCA Makes Unlocking Cell Phones Illegal*, 15 J. HIGH TECH. L. 301, 301 (2015) (observing that “[a]s of January 2014, 90% of American adults own a cell phone with 58% of those being a smartphone”); cf. Daniel A. Lyons, *Internet Policy’s Next Frontier: Usage-Based Broadband Pricing*, 66 FED. COMM. L.J. 1, 3 (2013) (describing the Internet explosion and data consumption); Ivar A. Hartmann, *A Right to Free Internet? On Internet Access and Social Rights*, 13 J. HIGH TECH. L. 297, 347 (2013) (inferring that access to the Internet has evolved from a commodity to a necessity in today’s day and age).

In 2012 alone, Internet traffic in the United States grew thirty-six percent, reaching a volume sixteen times greater than that of the entire U.S. Internet in 2005. Peak-time traffic grew even faster, driven by the rising popularity of bandwidth-intensive real-time entertainment such as Netflix, which by itself generates nearly one-third of all downstream traffic during peak hours. And that growth will continue for the foreseeable future: network equip-

network demand of wireless data, telecommunications companies have had to compete against one another by offering appealing wireless data plans to attract consumers.<sup>40</sup> From this spur of competition, the “unlimited data plan” was born, quickly becoming the ultimate commodity in everyday technology.<sup>41</sup>

Currently, only Sprint and T-Mobile, out of the “Big Four” networks, still offer unlimited plans, which expand beyond data to include talk and text.<sup>42</sup> Sprint offers cheaper options between the two cellular service providers, with a monthly rate of either \$70.00 for unlimited access compared to T-Mobile’s \$80.00 monthly rate.<sup>43</sup> With the launch of the iPhone 6, however, T-Mobile bested its competitors and stole customers from all of its rivals.<sup>44</sup> Meanwhile, the

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ment giant Cisco Systems expects U.S. Internet traffic nearly to triple between now and 2017. Globally, more data will traverse the network in 2017 than in every year from 1984 through 2012 combined.

Lyons, *supra* note 39, at 3.

<sup>40</sup> See, e.g., *The Best Value in Wireless*, SPRINT, archived at <http://perma.cc/9VU5-J9LS> (advertising that Sprint is one of the only wireless carriers that still provides an unlimited data plan option); *Simple Choice Plan*, T-MOBILE, archived at <http://perma.cc/GVY6-583P> (offering unlimited wireless plans, including data, talk and text).

<sup>41</sup> See, e.g., *The Best Value in Wireless*, *supra* note 40 (meeting this demand and providing for unlimited data plans).

<sup>42</sup> See *The Best Value in Wireless*, *supra* note 40 (advertising that Sprint is one of the only wireless carriers that still provides an unlimited data plan option); see also *Simple Choice Plan*, *supra* note 40 (offering unlimited wireless plans, including data, talk and text). There are several much smaller wireless carriers that provide unlimited data plans, of which very few consumers actually switch to when leaving one of the “Big Four” telecommunications networks. See Ante & Knutson, *supra* note 5.; see, e.g., *No Contract Plans*, VIRGIN MOBILE, archived at <http://perma.cc/QT5Y-L4E9> (offering unlimited data plans starting at \$35.00 per month); *Shop Plans*, METROPCS, archived at <http://perma.cc/EA3Y-K2LV> (offering unlimited data plans starting at \$40.00 per month); *Make a Plan*, NET10 WIRELESS, archived at <http://perma.cc/M7LZ-ZNBG> (offering unlimited data plans starting at \$40.00 per month); *Service Plans*, STRAIGHT TALK WIRELESS, archived at <http://perma.cc/SU7C-7H7T> (offering unlimited data plans starting at \$45.00 per month). The “Big Four” networks refer to Verizon Wireless, AT&T, Sprint, and T-Mobile. See Zino, *supra* note 39.

<sup>43</sup> See Roger Cheng, *Sprint Will Hike its Unlimited Data Plan by \$10 to \$70 a Month*, CNET (Sept. 30, 2015), archived at <http://perma.cc/M363-9VME> (noting that Sprint’s recent unlimited data plan price increase is still cheaper compared to T-Mobile).

<sup>44</sup> See Joshua Brustein, *It’s Official: T-Mobile Won the iPhone 6 Launch*, BLOOMBERG BUSINESSWEEK (Oct. 28, 2014), archived at



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other two “Big Four” networks Verizon and AT&T have alternatively allowed preexisting customers to grandfather their unlimited data plans.<sup>45</sup>

### C. Current Case Law and Legal Discourse

Unfortunately, as all good things must come to an end, wireless carriers have begun to phase out these grandfathered services, leaving the few fortunate preexisting customers anxiously awaiting the seemingly inevitable termination of their unlimited data plan subscriptions.<sup>46</sup> The phasing out and termination of grandfathered unlimited data plans have left many loyal subscribers disgruntled, leading to numerous law suits.<sup>47</sup>

#### 1. Contractual Disputes

Upset over these wireless networks’ unfair terms, consumers have brought several lawsuits and class actions against telecommunications companies regarding the ambiguous contractual language used in their wireless service contracts.<sup>48</sup> In one such case, consumers filed action against Apple and AT&T involving misleading advertisements and service contracts of unlimited data plans that were specifically designed for Apple’s 3G-enabled iPads.<sup>49</sup>

In the case of *In re Apple and AT & T iPad Unlimited Data Plan Litigation*, the plaintiffs asserted several claims against the defendants for breach of contract, including: “intentional misrepresentation, false promise/fraud, negligent misrepresentation, and unjust en-

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4XH9 (concluding that T-Mobile offered the most appealing iPhone 6 deals to beat its competitors in the launch of the new iPhone).

<sup>45</sup> See *Wireless Customer Agreement*, *supra* note 4 (setting aside a set of provisions for preexisting customers to grandfather their unlimited data plans).

<sup>46</sup> See, e.g., Reardon, *supra* note 2 (analyzing the tech giant’s gradual transition and elimination of unlimited data plans).

<sup>47</sup> See, e.g., *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1073-74 (N.D. Cal. 2011) (discussing deceptive marketing of AT&T’s unlimited data plan for 3G-enabled Apple iPad products); *O’Conner v. AT&T Corp.*, No. 13-112-SDD-SCR, 2013 U.S. Dist. LEXIS 85623, at \*3 (M.D. La. June 18, 2013) (describing litigation over AT&T’s data throttling practices).

<sup>48</sup> See, e.g., *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d at 1078 (hearing one of the first cases of unlimited data disputes).

<sup>49</sup> See *id.* at 1075 (holding that Apple & AT&T wrongfully misled consumers about the unlimited data plans they offered for iPads in their advertising).

richment.”<sup>50</sup> Plaintiffs allege that the tech giant and wireless service provider perpetrated a classic “bait and switch” fraudulent scheme in their marketing and sale of the iPad tablet bundled with the select unlimited data plan.<sup>51</sup> In 2010, Apple began selling 3G-enabled iPads with AT&T as its exclusive 3G data provider, which offered two data plan options, including unlimited data for \$29.99 per month.<sup>52</sup> With Steve Jobs pushing consumers to subscribe to the unlimited data plan, Apple and AT&T teamed up to exclusively offer an attractive unlimited data plan for the new data-enabled iPad devices.<sup>53</sup>

The unlimited data plan, however, was only made available from April 30, 2010 to June 7, 2010, on which date the telecommunications company announced that it would no longer provide an unlimited data plan option.<sup>54</sup> This short time period reflects approximately only one month for consumers to subscribe to the unlimited

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<sup>50</sup> *Id.* at 1074 (omitting irrelevant claims in direct quote).

<sup>51</sup> *See id.* at 1072 (alleging that defendants Apple and AT&T implemented a fraudulent scheme in their marketing and offering of unlimited data plans for the data-enabled iPad products); *see also Bait and Switch*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining ‘bait and switch’ as “[a] sales practice whereby a merchant advertises a low-priced product to lure customers into the store only to induce them to buy a higher-priced product”).

<sup>52</sup> *See id.* (introducing AT&T’s exclusive unlimited data plan offering for the 3G-enabled iPads). The 3G-enabled iPads were priced \$130.00 more than the Wi-Fi only models. AT&T also offered another data plan option: 250 megabytes of data for \$14.99 per month, with additional data available at an additional charge. *Id.*

<sup>53</sup> *See In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d at 1073 (quoting the CEO’s announcement of the unlimited plan). The unlimited data plan was so heavily promoted that, during a presentation, Apple Chief Executive Officer Steve Jobs advocated:

Now, what does it cost for the data plans? Well, in the U.S., telecom companies usually charge about \$60 a month for a data plan for a laptop. We've got a real breakthrough here. We've got two awesome plans for iPad owners. The first one gives you up to 250 megabytes of data per month. That's a fair bit of data. Most people will get by on that. Up to 250 megabytes of data per month, just \$14.99. \$14.99. And if you feel you need more, we have an unlimited plan just for \$29.99. So these are real breakthrough prices. We've got a breakthrough deal with [AT&T]. It's providing the service. \$14.99 for up to 250 megabytes, \$29.99 for unlimited data . . . . And, there's no contract, it's prepay.

*Id.*

<sup>54</sup> *See id.* at 1072 (highlighting that the unlimited plan was only made available for approximately five weeks).

data plan.<sup>55</sup> With such a short time frame, it can be inferred that the second-largest telecommunications company only intended to offer the unlimited data plan temporarily to attract an influx of customers.<sup>56</sup> Once a quota was met, the wireless carrier suspended its offering of an unlimited data plan, but allowed preexisting customers to grandfather their current data plans.<sup>57</sup> These steps lend to the business strategy of implementing grandfathered services until their eventual termination for the purpose of retaining newly signed customers.

## 2. “Throttling” of Internet Access and Wireless Data

“Throttling” is the industry practice by which broadband companies reduce Internet access speeds.<sup>58</sup> Throttling of Internet access has expanded to the telecommunications industry in limiting wireless data network access speeds.<sup>59</sup> As a result, many consumers have grown angry with wireless carriers for throttling their data.<sup>60</sup>

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<sup>55</sup> See *id.* at 1073-74 (recognizing that there was only a short signup period for AT&T’s unlimited data plan coverage on 3G-enabled iPads).

<sup>56</sup> See *id.* at 1073 (inferring that AT&T had clear ulterior motives in offering its unlimited data plans).

<sup>57</sup> See *id.* (examining AT&T’s termination of unlimited data plan offerings but allowing preexisting customers to grandfather their unlimited data).

<sup>58</sup> See Gullo & McLaughlin, *supra* note 2 (defining “throttling” and explaining that broadband companies practice this tactic to relieve their overly encumbered and highly congested networks).

<sup>59</sup> See Gullo & McLaughlin, *supra* note 2 (describing the telecommunications industry practice of reducing throughput speeds and network data access); see also Eric Savitz, *The Future of Wireless: The Case for Spectrum Sharing*, FORBES (Jan. 21, 2013), archived at <http://perma.cc/ESP4-EECF> (describing the growing need for wireless network access); John Donovan, *Wireless Data Volume on Our Network Continues to Double Annually*, AT&T INNOVATION SPACE BLOG (Feb. 14, 2012), archived at <http://perma.cc/4BHD-NJN2> (quantifying the growth of wireless data consumers and its negative impact on telecommunications networks as they become overburdened).

<sup>60</sup> See, e.g., Jenna Wortham, *Customers Angered as iPhones Overload AT&T*, N.Y. TIMES (Sept. 2, 2009), archived at <http://perma.cc/W83J-98P8> (describing AT&T’s over encumbered wireless data networks, resulting in data throttling of select customers); see also Greg Risling & Peter Svensson, *Matt Spaccarelli, iPhone User, Awarded \$850 In AT&T Data Throttling Case*, HUFFINGTON POST (Feb. 24, 2012), archived at <http://perma.cc/8N27-V63B> (reporting a successful lawsuit brought by an iPhone user against AT&T). In 2012, a subscriber was able to successfully bring suit against AT&T, winning \$850.00 in damages for breach of contract. The court found for the plaintiff and held that the second-largest telecommunications

In *Fink v. Time Warner Cable*, Internet subscribers brought a putative class action pursuant to the Computer Fraud and Abuse Act (“CFAA”) under Title 18, Section 1030 of the United States Code against an Internet service provider (“ISP”) for allegedly throttling their Internet access.<sup>61</sup> The plaintiffs claimed that this practice of throttling is in violation of the CFAA and New York and California consumer protection statutes.<sup>62</sup> The plaintiffs, however, failed to substantiate their claims with any clear evidence and legal argument.<sup>63</sup> Therefore, the United States District Court for the Southern District of New York granted the defendant’s motion to dismiss.<sup>64</sup>

*O’Conner v. AT&T Corp.* describes a similar situation over throttling, but in the context of wireless mobile data.<sup>65</sup> In this case, plaintiffs filed a putative class action in Louisiana state court against Apple and AT&T.<sup>66</sup> The plaintiffs alleged that AT&T breached the wireless service agreements and violated the Lanham Act and the Louisiana Unfair Trade Practices Act.<sup>67</sup> They claim “the transfer speed of the internet connection to the users in excess of 3 gigabytes of the unlimited data plan were throttled down, effectively making

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corporation breached its contract in limiting the plaintiff’s unlimited data service of his iPhone. *Id.*

<sup>61</sup> See *Fink v. Time Warner Cable*, 837 F. Supp. 2d 279, 280 (S.D.N.Y. 2014) (bringing class action against the broadband company over Internet “throttling”); see also Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2008) (describing fraud and related activity in connection with computers and internet access).

<sup>62</sup> See *Fink*, 837 F. Supp. 2d at 280 (bringing several claims against Time Warner Cable for its practice of throttling plaintiffs’ Internet access). Plaintiffs asserted common law claims, including fraud and unjust enrichment against Time Warner Cable. *Id.*

<sup>63</sup> See *id.* at 283 (pointing to plaintiffs’ lack of evidence to go forward with their claims).

<sup>64</sup> See *id.* at 286 (dismissing plaintiffs’ case based on lack of evidence and legal argument to substantiate their claims).

<sup>65</sup> See *O’Conner*, No. 13-112-SDD-SCR, 2013 U.S. Dist. LEXIS 85623, at \*2 (describing data throttling as it pertains to wireless network access).

<sup>66</sup> See *id.* (claiming that an AT&T employee, another party to this case, made material misrepresentations that induced the plaintiffs to purchase the unlimited wireless data plans).

<sup>67</sup> See *id.* (alleging that the telecommunications giant was in breach of contract and violation of both federal and state legislations); see also 15 U.S.C. §§ 1051-1141 (2002) (indicating that this act is commonly known as the Lanham Act ); Louisiana Unfair Trade Practices Act, LA. R.S. §§ 51:1401-1430 (noting that this statute is referred to as the “Unfair Trade Practices and Consumer Protection Law” in Louisiana).

the unlimited data plan worthless for these users.”<sup>68</sup> The defendants removed this case to federal court, where they moved to compel arbitration under the Federal Arbitration Act as set forth in the arbitration provision within AT&T’s *Terms of Service Agreement*.<sup>69</sup> The United States District Court for the Middle District of Louisiana granted the motion to compel arbitration and stay litigation.<sup>70</sup> The case is now currently stayed pending resolution of the arbitration proceedings.<sup>71</sup> This case is among several brought against wireless service providers in regards to their unlimited data plans in the past few years.<sup>72</sup>

### 3. Federal Regulatory Agencies

In October 2014, the Federal Trade Commission (“FTC”) sued AT&T over “throttling” data speeds.<sup>73</sup> Allegedly violating the “transparency rule,” AT&T is accused of deceiving at least 3.5 million smartphone customers who pay for unlimited data plans but had

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<sup>68</sup> *O’Conner*, No. 13-112-SDD-SCR, 2013 U.S. Dist. LEXIS 85623, at \*2 (detailing how unlimited internet plans ultimately became worthless to AT&T subscribers).

<sup>69</sup> *See id.* (moving to compel arbitration); *see also* 9 U.S.C. §§ 1-16 (1947) (providing for contractual arbitration in lieu of court litigation).

<sup>70</sup> *See O’Conner*, No. 13-112-SDD-SCR, 2013 U.S. Dist. LEXIS 85623, at \*16 (granting the motion to compel arbitration and stay litigation).

<sup>71</sup> *See id.* (concluding that the litigation is stayed while pending resolution of arbitration).

<sup>72</sup> *See* Karl Bode, *Verizon Quietly Backs Off Throttling ‘Unlimited’ Wireless Customers, But Only After It No Longer Matters*, TECHDIRT.COM (Aug. 18, 2015), archived at <http://perma.cc/4AUW-2R9J> (noting that this issue has been recently litigated with Verizon customers). The industry practice of data throttling has gained the attention of both the Federal Trade Commission and the Federal Communications Commission (“FCC”), who also went after Verizon for data throttling. Created to protect consumers, these commissions have focused on the problem of wireless providers misleading consumers in their marketing of unlimited data. *Id.*

<sup>73</sup> *See* Gullo & McLaughlin, *supra* note 2 (commenting on the Federal Trade Commission’s suit against AT&T over data throttling). Just days after reaching a \$105 million settlement with the FTC among multiple U.S. government agencies over mobile cramming, AT&T once again finds itself in court with the FTC. On October 28, 2014, the FTC filed a federal court complaint against AT&T, charging the telecommunications giant for data throttling and misleading their mobile unlimited data plan customers. *Id.*; *see also* Lance Whitney, *AT&T to Pay \$105 Million to Settle Charges Over Mobile Billing*, CNET (Oct. 8, 2014), archived at <http://perma.cc/DPE9-4A44> (defining mobile cramming as an industry practice where a wireless carrier unlawfully bills its customers for services and subscriptions from other third-party companies).

their data throttled.<sup>74</sup> Primarily concerned with the transparency of AT&T's unlimited data plan, the FTC accuses AT&T of violating the Federal Trade Commission Act ("FTC Act") by changing the terms of service of its unlimited data plan without notice while its customers were still under contract.<sup>75</sup> AT&T, however, rebuts FTC's allegations as "baseless" and insists that it has been transparent about its network management policies.<sup>76</sup>

For the past few years, AT&T has claimed that its wireless network cannot handle the five percent (5%) of unlimited data customers who consume excessive data, which usually occurs by streaming video and music or by playing games.<sup>77</sup> In July 2011, AT&T placed speed limits on excessively used unlimited data plans, which slowed down the network connection from high-speed LTE to 2G, which is comparable to the speed of a dial-up modem.<sup>78</sup> At first, this form of network management only limited the top five percent (5%) of its heaviest users, but AT&T soon included any unlimited user

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<sup>74</sup> See Gullo & McLaughlin, *supra* note 2 (estimating that approximately 3.5 million unlimited data customers have had their data throttled). The FCC has also alleged that AT&T has violated the transparency rule, which was passed as part of its 2010 open-Internet rules, by advertising its unlimited data plan when it is not truly unlimited. Although a federal court struck down most of the FCC's rules in January 2014, the transparency rule was upheld. See Gautham Nagesh & Thomas Gryta, *FCC to Fine AT&T \$100 Million Over Capping Unlimited Data Plans*, WALL ST. J. (June 17, 2015), archived at <http://perma.cc/JP3Q-ACQL>.

<sup>75</sup> See Gullo & McLaughlin, *supra* note 2 (characterizing AT&T's violation of the FTC Act as an issue of sufficient notice). The FTC claims that AT&T emphasized "unlimited" in its marketing while failing to inform customers of data throttling, which results in an eighty percent (80%) to ninety percent (90%) reduction in network speeds. The commission estimates that AT&T has throttled at least 3.5 million customers, totaling more than 25 million times. See Gullo & McLaughlin, *supra* note 2; see also Federal Trade Commission Act, 15 U.S.C. § 53(b)(1) (1994) (authorizing the FTC to bring suit to enjoin and/or restrain defendant for false advertisement in cases of consumer protection); Complaint at 2, *FTC v. AT&T Mobility LLC* (citing the statute that gave the FTC ability to bring the suit).

<sup>76</sup> See Roger Cheng, *FTC sues AT&T for limiting speeds on unlimited-data customers*, CNET (Oct. 28, 2014), archived at <http://perma.cc/9V95-D7SS> (denying all of the FTC's claims).

<sup>77</sup> See *id.* (evaluating the wireless carrier's ability to provide quality data network access when a small percentage is excessively consuming data, which tends to occur during multimedia streaming and/or downloading).

<sup>78</sup> See *id.* (characterizing the speed limitations as data throttling).

who accessed five gigabytes (5 GB) of data within a billing cycle.<sup>79</sup> In June 2015, the FCC fined AT&T a record \$100 million “for allegedly deceiving millions of smartphone customers about unlimited wireless data plans”<sup>80</sup> and violating the FCC’s 2010 Open Internet Order.<sup>81</sup> The FCC alleges that the telecommunications giant misled consumers by advertising its unlimited data plans, but then capping data speeds for subscribers who reached five gigabytes (5 GB) of data during a billing cycle.<sup>82</sup> “Those capped speeds, the agency said, were more than 20 times slower than the normal network speeds advertised by AT&T, and hurt consumers’ ability to access the Internet or use applications.”<sup>83</sup> With increasing frustration over these wireless service terms and conditions, heavy litigation is foreseeable within the next several years to come.<sup>84</sup>

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<sup>79</sup> *See id.* (observing that the telecommunications company targeted heavy users of data beyond the top 5 percent to those who accessed 5 gigabytes of data within about a month).

<sup>80</sup> Nagesh & Gryta, *supra* note 74 (reporting the FCC’s plans to fine AT&T \$100 million for its deceptive data throttling practices against millions of unlimited data customers). “The proposed fine against AT&T is the FCC’s first enforcement case under the transparency rule. It is the largest proposed fine in FCC history, according to the agency. FCC officials said part of its purpose was to deter future violations.” *See* Nagesh & Gryta, *supra* note 74.; *see also In re AT&T Mobility, LLC*, 30 FCC Rcd. 6613 (2015) (disclosing FCC seeking fine for failure to follow its 2010 Net Neutrality Order); Press Release, Federal Communications Commission, FCC Plans to Fine AT&T \$100 Million for Misleading Consumers about Unlimited Data Plans, Violating Transparency Obligations (June 17, 2015) (on file with the Federal Communications Commission) (articulating reasons behind the fines AT&T faces).

<sup>81</sup> *See* Roger Yu, *FCC to Fine AT&T \$100M for Slowing Speeds*, USA TODAY (June 17, 2015), archived at <http://perma.cc/28VY-GZR5> (detailing AT&T’s violations of the FCC’s 2010 Open Internet Order).

<sup>82</sup> *See* Nagesh & Gryta, *supra* note 74 (observing that AT&T has been misleading consumers about its unlimited data plan by not outwardly disclosing its practice of data throttling).

<sup>83</sup> Nagesh & Gryta, *supra* note 74.

<sup>84</sup> *See* Yu, *supra* note 81 (reporting that the FCC has received thousands of complaints from AT&T unlimited data customers who have also complained about other issues that arise out of their unlimited data plan contracts); *see also* Nagesh & Gryta, *supra* note 74 (commenting that mobile broadband providers can expect this aggressive regulatory trend to continue).

### III. PREMISE

Pricing of wireless unlimited data plans mirrors the same flat-rate pricing model as that of Internet broadband subscriptions.<sup>85</sup> Although seemingly expensive at the inception of these plans, \$30.00 per month for access to unlimited wireless data is in actuality very affordable in comparison to the tiered data plan offerings.<sup>86</sup> Within a few short years, however, telecommunications giants, such as AT&T and Verizon, have ceased to offer unlimited data plans, but have allowed preexisting customers to “grandfather” their precious plans forward.<sup>87</sup> Since then, grandfathered customers have been holding on to their unlimited data plans for dear life.<sup>88</sup>

#### A. Phasing Out of Grandfathered Services and Unlimited Data Plans

Wireless service providers have employed several tactics to phase out costly grandfathered services and unlimited data plans, including data throttling and forfeiture of device upgrade subsidies.

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<sup>85</sup> See Lyons, *supra* note 39, at 3-4 (addressing the industry’s reconsideration of the flat-rate pricing model, which has been the standard since the 1990s). Consumers prefer this flat-rate pricing model simply because it provides predictability: consumers know how much they will be paying for Internet access each month, without worrying about excessive use of data, which would limit a household’s allotment or go over such data allocation. See Lyons, *supra* note 39, at 3-4.

<sup>86</sup> Cf. Lyons, *supra* note 39, at 4 (describing alternative pricing strategies to address broadband network congestion). “Tiered pricing has now become the norm in wireless broadband, where consumers can choose from several different pricing and service options. Many residential fixed broadband providers have also explored tiered service, monthly data caps, and overage charges.” Lyons, *supra* note 39, at 4.

<sup>87</sup> See, e.g., Roger Yu, *Verizon Wireless to end unlimited data plan*, USA TODAY (May 17, 2012), archived at <http://perma.cc/D5DW-8X2U> (highlighting Verizon’s termination of unlimited data plans, but allowing existing customers to retain their unlimited data as a grandfathered service).

<sup>88</sup> See, e.g., Phillip Dampier, *Verizon Wireless Closing Unlimited Data Plan Upgrade Loopholes: The Latest Party Ends 8/24*, STOP THE CAP! (Aug. 14, 2014), archived at <http://perma.cc/XL3J-23C4> (addressing Verizon’s new policies to terminate unlimited data plans, including any loopholes in retaining the grandfathered service).



### 1. "Data Throttling"

One tactic of phasing out unlimited data plans is an industry practice called "data throttling."<sup>89</sup> Public Knowledge Vice President of Government Affairs, Chris Lewis, defines data throttling as "when a wireless carrier or...broadband carrier...decides to slow down the transmission of the internet to its consumers."<sup>90</sup> Throttling occurs when data speeds suddenly slow down at the wireless provider's discretion for at least the rest of the billing cycle.<sup>91</sup> "The whole idea of... throttling is to relieve some of the stress on the [wireless service providers'] 'over-encumbered' networks."<sup>92</sup> Wireless carriers claim that throttling only affects the top five percent (5%) of data users, which makes up approximately two million customers who are subjected to throttled speeds every month.<sup>93</sup>

Folding under regulatory pressures, however, Verizon has recently announced a new compromise that allows grandfathered customers to access truly unlimited data.<sup>94</sup> Effective November 15, 2015, the largest telecommunications company has pioneered a solution to the industry's grandfathered unlimited data plan problem by increasing the price by \$20.<sup>95</sup> In an October 2015 interview, Chief

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<sup>89</sup> See *AT&T Sued by FTC over 'Throttling' Smartphone Data Speeds*, BLOOMBERG BUSINESSWEEK (Oct. 29, 2014), archived at <http://perma.cc/CUG4-3JBD> (observing that telecommunications giants use data throttling as a strategy to limit the data use of customers who still have unlimited data plans).

<sup>90</sup> See *id.* (defining 'data throttling' as a discretionary reduction of consumers' data speeds).

<sup>91</sup> See Taylor Martin, *Are You Frustrated by Carriers Throttling 'Unlimited' Plans?*, PHONEDOG (Feb. 23, 2012), archived at <http://perma.cc/JX6H-SPL9> (discerning that AT&T and T-Mobile customers are throttled for the remainder of the billing cycle, while Verizon customers are throttled for an additional following month). Data speeds eventually return back to normal after this period of time. *Id.*

<sup>92</sup> See *id.* (explaining wireless service providers' reasoning for throttling data speeds of consumers who over encumber their networks by accessing a 'large' amount of data). With AT&T, throttling occurs when customers who use "excessive" amounts of data have their data speeds suddenly slow down at AT&T's discretion for the remainder of the billing cycle. *Id.*

<sup>93</sup> See *id.* (estimating that nearly two million consumers are affected by data throttling).

<sup>94</sup> See Marguerite Reardon, *Verizon promises an open road for unlimited-data customers*, CNET (Oct. 20, 2015), archived at <http://perma.cc/UBW6-Q8UV> (reporting that Verizon is giving up its data throttling practices).

<sup>95</sup> See Roger Cheng, *Verizon's grandfathered unlimited data users face \$20 price hike*, CNET (Oct. 8, 2015), archived at <http://perma.cc/JU9D-F7LM> (announcing

Financial Officer Fran Shammo stated that preexisting customers will finally be able to access unlimited data without interruption: “For a customer who signed up for unlimited data, they’re going to get unlimited.”<sup>96</sup> Today, less than one-percent (1%) of Verizon customers have retained their grandfathered unlimited data plans.<sup>97</sup> As the company has discontinued to offer unlimited data since 2011, this solution comes all too late.<sup>98</sup>

## 2. Forfeiture of Device Upgrade Subsidy

Another recently adopted tactic is the forfeiture of device upgrade subsidies.<sup>99</sup> In the past few years, consumers faced the difficult decision of retaining their grandfathered unlimited data plans at the expense of sacrificing their upgrade discounts.<sup>100</sup> Available at the end of a two-year contract period, upgrade discounts make cellular devices affordable; for example, the starting price of the Apple’s iPhone 6 32 GB model costs \$199.00 with the upgrade discount compared to the whopping full retail price of \$649.00.<sup>101</sup> With Apple’s

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Verizon’s increase in price of its grandfathered unlimited data plans). This price hike will not affect business and government customers. *Id.*

<sup>96</sup> Reardon, *supra* note 94.

<sup>97</sup> See Cheng, *supra* note 95 (stating the number of Verizon customer who have kept their unlimited data plans).

<sup>98</sup> See Cheng, *supra* note 95 (mentioning that since 2011, Verizon has discontinued offering the unlimited data package).

<sup>99</sup> See, e.g., Crayton Harrison, *Verizon Offers iPhone 6 Free With Trade-In, Two-Year Contract*, BLOOMBERG BUSINESSWEEK (Sept. 9, 2014), archived at <http://perma.cc/4B7L-375G> (reporting that Verizon has discontinued to provide discounted mobile device upgrades for consumers who wish to retain their grandfathered unlimited data plans).

<sup>100</sup> See *id.* (describing how Verizon customers must purchase a mobile phone at full retail price in order to retain their grandfathered unlimited data plans when they are eligible for an upgrade discount); see also Reardon, *supra* note 4 (explaining that Verizon customers who want to keep their grandfathered unlimited data plans must forfeit the company’s subsidy for a new smartphone once their contract period ends and pay full retail price for the new device).

<sup>101</sup> See, e.g., *iPhone 6*, APPLE, archived at <http://perma.cc/TKM3-4C4M> (comparing the full retail price of an iPhone 6 starting at \$549.00 to the discounted upgrade starting price of \$199.00). *But see* Jeff Sommer, *\$199 Apple iPhone 6 Is Fiction, if Not Fantasy*, N.Y. TIMES (Sept. 27, 2014), archived at <http://perma.cc/BJR7-L9BZ> (indicating that Apple’s website implies that customers can get an iPhone 6 for \$199). In the late summer of 2015, Verizon announced that is doing away with its two-year service contracts, which in turn also meant that automatic device upgrade subsidies are no longer available. See Roger Cheng, *Verizon abandons contracts:*

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Fall 2014 release, Verizon had upped the ante by advertising an additional promotion for free iPhone 6s after a trade-in of an older iPhone model and two-year contract renewal.<sup>102</sup> To maintain a grandfathered unlimited data plan, a preexisting customer must pay the full retail price on a new cellular device.<sup>103</sup> This markedly expensive difference has pushed many subscribers to give up their unlimited data plans and to either switch to tiered data plans, with very limited data, or to other wireless carriers altogether.<sup>104</sup> This new method of device upgrade elimination has been very effective in achieving the wireless service providers' goal of phasing out grandfathered data plans.<sup>105</sup>

Disgruntlement over wireless service contracts has left consumers pining to switch to other telecommunications companies.<sup>106</sup> This dissatisfaction has also created a market for publications that guide customers in how to break their cell phone contracts.<sup>107</sup> Some

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*Everything you need to know (FAQ)*, CNET (Aug. 12, 2015), archived at <http://perma.cc/9VA2-RX9X>.

<sup>102</sup> See Harrison, *supra* note 99 (describing Verizon's marketing campaign of offering free iPhone 6s after a trade-in and two-year contract signing).

<sup>103</sup> See, e.g., Dampier, *supra* note 88 (allowing further grandfathering of unlimited data plans only with purchase of a new iPhone at full retail price).

<sup>104</sup> See Ante & Knutson, *supra* note 5 (observing the trend of consumers leaving their wireless service providers for another competitor).

<sup>105</sup> See Marguerite Reardon, *Verizon subscribers give 'Share Everything' plans a boost*, CNET (Oct. 18, 2012), archived at <http://perma.cc/4TNY-BYTN> (concluding that there has been a decline in subscribers to unlimited data plans).

<sup>106</sup> See Ante & Knutson, *supra* note 5 (observing customer dissatisfaction with current wireless service providers such that some switch to other companies).

<sup>107</sup> See LARRY JACOBS, CELL PHONE CONTRACT BREAKER: LEARN HOW TO BREAK YOUR CELL PHONE CONTRACT AND MOVE TO A BETTER CARRIER 21 (2014) (instructing consumers on how to legally break their cell phone contracts in their anticipation to move to another wireless service provider). Author Larry Jacobs analogizes the cell phone contract breaking process to a game of chess:

Breaking your cellphone contract is pretty much like playing a chess game with an opponent. You need a strategy just like in chess. You execute your strategy one step at a time. As in chess[,] your next move is up to what your opponent does. You really can't predict what your opponent will do. If you stick to your predefined rules[,] you can't lose on a technicality. If your opponent makes a strategic error[,] you can exploit it to your full advantage. Then you will have a victory.

*Id.* Jacobs analogizes the process of cell phone contract breaking to a strategic game of chess, in which the disgruntled customer must continue to abide by the contract while patiently waiting to exploit a provider-side breach. He guides consumers through the Federal Communications Commission ("FCC") steps of sub-

consumers are so desperate to get rid of their cellphone contracts that they will make rash decisions and may incur early termination fees.<sup>108</sup> Still yet, other customers have migrated to a tiered data plan structure without much complaint.<sup>109</sup>

#### IV. ANALYSIS

Temporarily grandfathering services is a common business strategy used to build and maintain a loyal customer base.<sup>110</sup> Within the past decade, wireless service providers have also practiced this business model by grandfathering preexisting customers' unlimited data plans.<sup>111</sup> Telecommunications companies, such as AT&T and Verizon, have been phasing out their unlimited data plans at the dismay of their preexisting customers, giving rise to much legal discourse in the protection of consumer rights.<sup>112</sup> This business strategy of grandfathering services is achieved through the use of vague and

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mitting a port request to keep an individual's cell phone number when initiating the switch to another carrier. Any such material changes without consent from the customer results in a breach of contract by the provider, to which the customer must communicate an objection. In filing a complaint, a consumer must "invoke some authority power over the carrier" with a consumer protection agency, such as the FCC, the Federal Trade Commission ("FTC"), the Better Business Bureau, or the State Attorney. *Id.*

<sup>108</sup> *See id.* (showing consumers how to avoid being charged with early termination fees); *see also* Jonathan Sallet, *The Technology of Privacy: The Creation of Value: The Value Circle and Evolving Market Structures*, 11 J. ON TELECOMM. & HIGH TECH. L. 185 (2013) (describing the consequences of breaching contractual terms in a wireless customer agreement).

<sup>109</sup> *See, e.g.,* Shara Tibken, *Verizon: 'Share Everything' going better than expected*, CNET (Sept. 20, 2012), *archived at* <http://perma.cc/8D9Z-QJHA> (observing that many customers with grandfathered unlimited data plans are moving to shared plans with a tiered data structure); *see also* Reardon, *supra* note 105 (evaluating the success of Verizon's 'Share Everything' plan, especially in migrating unlimited data customers over to the new tiered plan, where customers are able to share an allotment of data through multiple lines and devices).

<sup>110</sup> *See, e.g.,* Ante & Knutson, *supra* note 5 (describing the temporary business strategy of grandfathering services for the purpose of building and maintaining customer loyalty).

<sup>111</sup> *See, e.g.,* *Wireless Customer Agreement*, *supra* note 4 (carving out special terms and conditions for grandfathered unlimited data plans).

<sup>112</sup> *See* Ante & Knutson, *supra* note 5 (observing the telecommunications giants' gradual termination of unlimited wireless data plans).

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ambiguous contractual language, allowing companies to fluidly manipulate their terms of agreement and conditions of service.<sup>113</sup>

### **A. Corporate Use of Vague and Ambiguous Contractual Language to Deceive Consumers**

To phase out these grandfathered unlimited data plans, wireless service providers and their legal teams have had to get creative to work around their own contracts.<sup>114</sup> Their deliberate use of vague and ambiguous contractual language allows wireless carriers to easily manipulate the terms of service and agreement.<sup>115</sup>

For example, Section 6.2 of AT&T's "Wireless Customer Agreement" outlines the terms and conditions of its wireless data service.<sup>116</sup> The sub-section starts off with the following explanatory paragraph:

AT&T's wireless data network is a shared resource, which AT&T manages for the benefit of all of its customers so that they can enjoy a consistent, high-quality mobile broadband experience and a broad range of mobile Internet services, applications and content. However, certain activities and uses of the network by an individual customer or small group of customers can negatively impact the use and enjoyment of the network by others. Therefore, certain activities and uses of AT&T's wireless data service are permitted and others are prohibited . . .<sup>117</sup>

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<sup>113</sup> See, e.g., Reardon, *supra* note 4 (analyzing how telecommunications companies use vague and ambiguous contractual language to their advantage, such that they are able to easily manipulate their terms and conditions).

<sup>114</sup> See, e.g., Reardon, *supra* note 4 (observing that telecommunications companies often provide a modification clause within the terms of agreement).

<sup>115</sup> See, e.g., *Wireless Customer Agreement*, *supra* note 4 (exemplifying the vague contractual language used in wireless customer agreements and terms of service).

<sup>116</sup> See *Wireless Customer Agreement*, *supra* note 4 (outlining the terms and conditions of AT&T's wireless data service and including special provisions for grandfathered unlimited data plan customers).

<sup>117</sup> *Wireless Customer Agreement*, *supra* note 4. Wireless providers put forth their reasoning for the necessity of limiting data usage of certain customers who utilize substantial amounts of data, allegedly abusing their unlimited or high-allotted data plans, when their networks become overly congested. See *Wireless Customer Agreement*, *supra* note 4.

Beginning the subsection with such ambiguity, this paragraph is followed by two lists of permitted and prohibited activities, which do not offer much more clarification.<sup>118</sup> In the “Permitted Activities” subsection, customers agree to use AT&T’s wireless data services only for the listed activities, which include: web browsing, e-mail, uploading and downloading applications, and “using applications and content without excessively contributing to network congestion.”<sup>119</sup> This last provision, which is again listed in the “Prohibited Activities” subsection, is inherently vague, as it does not explain what would be deemed excessive use to cause network congestion.<sup>120</sup> Furthermore, customers are prohibited from any activity that “adversely impacts network service levels or legitimate data flows . . . [or] degrades network performance . . . ”<sup>121</sup> How are consumers to know whether they are violating such terms and conditions if they are not clearly defined?<sup>122</sup> Such contractual language is purposely overly broad, allowing wireless service providers to manipulate situations with flexibility to their advantage over consumers.<sup>123</sup>

Moreover, wireless service providers state within their service contracts that they may modify their terms and conditions without

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<sup>118</sup> See *Wireless Customer Agreement*, *supra* note 4 (listing permitted and prohibited activities within the service contract, but in an unclear fashion).

<sup>119</sup> *Wireless Customer Agreement*, *supra* note 4 (providing examples of activities allowed, which do not use large amounts of data such that usage does not overly encumber the wireless carrier’s data network).

<sup>120</sup> See *Wireless Customer Agreement*, *supra* note 4 (describing ambiguously what kinds of activities are prohibited as accessing large amounts of data without clarifying what constitutes excessive use to impact network congestion).

<sup>121</sup> *Wireless Customer Agreement*, *supra* note 4. Furthermore, AT&T prohibits any activity that negatively affects network service levels or legitimate data flows, which again is use of ambiguous contractual language in its *Wireless Customer Agreement*. What are the appropriate service levels, and what constitutes “legitimate data flows?” AT&T does not provide any definition or explanation of what these terms mean, giving the wireless carrier wide discretion in manipulating the ambiguous contractual language in their favor. See *Wireless Customer Agreement*, *supra* note 4.

<sup>122</sup> See Reardon, *supra* note 4 (discussing how consumers fall through the corporate pitfalls of their customer service agreements, not knowing when they are violating any terms or conditions).

<sup>123</sup> See Reardon, *supra* note 4 (analyzing how vague and ambiguous contractual language is used in the telecommunications company’s contract to manipulate the terms in their favor).

advance notice to consumers.<sup>124</sup> For example, Verizon sets forth the following provision in its Customer Agreement:

We may change prices or any other term of your Service or this agreement at any time, but we'll provide notice first, including written notice if you have Postpay Service. If you use your Service after the change takes effect, that means you're accepting the change. If you're a Postpay customer and a change to your Plan or this agreement has a material adverse effect on you, you can cancel the line of Service that has been affected within 60 days of receiving the notice with no Early Termination Fee if we fail to negate the change after you notify us of your objection to it.<sup>125</sup>

With such a provision in place, telecommunications companies are able to modify their terms and conditions of service as they see fit.<sup>126</sup> Thus, wireless carriers have no contractual obligation to continue to provide service to grandfathered unlimited data plan customers.<sup>127</sup> Although such material modifications allow consumers to cancel their contracts without being penalized with an early termination fee, very few are actually aware of this right.<sup>128</sup>

Consequences of violating these terms and conditions lead to disruption of services.<sup>129</sup> One consequence is a reduction in data throughput speeds at the wireless carrier provider's discretion, which

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<sup>124</sup> See, e.g., *Wireless Customer Agreement*, *supra* note 4 (providing that the wireless carrier reserves the right to change their terms of service without notifying consumers).

<sup>125</sup> Reardon, *supra* note 4.

<sup>126</sup> See Reardon, *supra* note 4 (exploring Verizon's terms of service and observing that the modification clause allows the telecom giant to manipulate the contract to its advantage).

<sup>127</sup> See Reardon, *supra* note 4 (inferring from the modification clause that wireless carriers may discontinue to provide service of grandfathered unlimited data plans).

<sup>128</sup> See Reardon, *supra* note 4 (responding that consumers have a right to cancel their cellphone contracts once the telecommunications company has materially breached the terms of agreement); see also JACOBS, *supra* note 107 (teaching readers that once the wireless carrier has materially breached the contract, consumers are allowed to legally unsubscribe without paying the early termination fee).

<sup>129</sup> See, e.g., *Wireless Customer Agreement*, *supra* note 4 (reserving the right to alter wireless data service when a customer violates a term and/or condition).

is a burdensome interference on data access.<sup>130</sup> More severely, wireless service providers may migrate a “violating” customer from the unlimited data plan to a tiered plan.<sup>131</sup> Ultimately, “AT&T may interrupt, suspend, cancel or terminate your wireless data services without advance notice.”<sup>132</sup> Due to the use of ambiguous and vague contractual language, the terms of service are largely favorable to wireless carriers such that they have an unfair advantage over consumers.<sup>133</sup>

## B. Unfair and Deceptive Industry Practices

Once a loyal customer base is established, businesses begin to phase out grandfathered services and programs with little backlash from consumers.<sup>134</sup> It can be inferred from this business model that the extended offering of grandfathered services is meant to be temporary as its purpose is to serve as an instrument of building and maintaining customer loyalty.<sup>135</sup> The extremely limited time offering of unlimited data plans closely mirrors a bait and switch scheme.<sup>136</sup> Thus far, telecommunications giants, such as Verizon and AT&T, are

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<sup>130</sup> See, e.g., *Wireless Customer Agreement*, *supra* note 4 (indicating that a consequence of a term violation is reduced data speeds and access); see also *AT&T Sued by FTC over ‘Throttling’ Smartphone Data Speeds*, *supra* note 2 (describing the industry practice of data throttling, which is the reduction of data and network speeds).

<sup>131</sup> See, e.g., *Wireless Customer Agreement*, *supra* note 4 (subjecting customers who engage in prohibited data activity to termination of their unlimited plan and migration to a tiered plan).

<sup>132</sup> *Wireless Customer Agreement*, *supra* note 4 (disclaiming any obligation of the wireless provider to notify a change in service to the affected customers).

<sup>133</sup> See Ante & Knutson, *supra* note 5 (observing that wireless service providers are overly successful in maintaining a loyal customer base even in the light of unfair terms).

<sup>134</sup> See Ante & Knutson, *supra* note 5 (analyzing that businesses often are successful in maintaining a loyal customer base, such that even subscribers who leave are likely bound to eventually return).

<sup>135</sup> See Ante & Knutson, *supra* note 5 (inferring that large telecommunications companies extend their offering of grandfathered unlimited data plans as a business strategy to build and maintain customer loyalty).

<sup>136</sup> See BLACK’S LAW DICTIONARY, *supra* note 51 (defining ‘bait and switch’ as “[a] sales practice whereby a merchant advertises a low-priced product to lure customers into the store only to induce them to buy a higher-priced product”).



getting exactly what they want in their blatant phasing out of grandfathered unlimited data plans.<sup>137</sup>

Causing network congestion, unlimited data plans have been costly to wireless carriers, especially with the enormous data consumption of smartphones.<sup>138</sup> “The [Federal Communications Commission (“FCC”)] found that the iPhone used 24 times as much data as a traditional cell phone, and AT&T noted that from the time of the release of the first iPhone through 2012, data consumption by consumers increased 20,000%.”<sup>139</sup> To phase out these grandfathered services, wireless providers had to be crafty to circumvent their own contracts.<sup>140</sup> Telecommunications companies have employed several tactics to this end, including “data throttling” and relinquishment of device upgrade discounts.<sup>141</sup>

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<sup>137</sup> See Shavell, *supra* note 1, at 50-51 (insinuating that when grandfathering is no longer cost effective, companies will phase grandfathered customers out); see, e.g., Tibken, *supra* note 109 (observing that many customers with grandfathered unlimited data plans are moving to shared plans with a tiered data structure); Reardon, *supra* note 109 (evaluating the success of Verizon’s ‘Share Everything’ plan, especially in migrating unlimited data customers over to the new tiered plan, where customers are able to share an allotment of data through multiple lines and devices).

<sup>138</sup> See Zino, *supra* note 39, at 150-51 (observing that as smartphones became increasingly mainstream, cellular networks began to show signs of performance problems). “The first major hint of cellular network performance concerns stemming from smartphones came from AT&T after the launch of the iPhone, when consumers reported slow data rates, dropped calls, and delayed text messages in major metropolitan areas like New York City.” See Zino, *supra* note 39, at 150-51; see also Wortham, *supra* note 60 (describing how wireless networks are unable to operate and function smoothly because their networks have become over encumbered by large amounts of data access by smartphones); cf. Lyons, *supra* note 39, at 4 (observing network congestion of broadband companies providing Internet access). “But flat-rate unlimited use can also create inefficient network operation. Because price is not tied to online use, consumers have little incentive to economize their bandwidth consumption. Moreover, network costs are spread evenly throughout the customer base, forcing light Internet users to subsidize heavier users’ data-intensive lifestyles.” Lyons, *supra* note 39, at 4.

<sup>139</sup> Zino, *supra* note 40, at 133.; see also Savitz, *supra* note 59 (observing the growth of wireless data consumption); Donovan, *supra* note 59 (approximating that AT&T’s wireless volume consumption continues to double annually).

<sup>140</sup> See, e.g., Reardon, *supra* note 4 (analyzing that wireless carriers usually leave an open provision in their contracts that allows the telecommunication companies to modify their terms of service at any given time).

<sup>141</sup> See Ante & Knutson, *supra* note 5 (describing two strategies used by wireless carriers to phase out grandfathered unlimited data plans).

### 1. Relinquishment of Smartphone Subsidies

When a preexisting wireless customer wants to retain his or her grandfathered unlimited data plan, he or she must make two important steps: (1) not sign a new two-year contract, and (2) forfeit the company's subsidy for a new smartphone and purchase the device at full retail price.<sup>142</sup> What many consumers do not realize, however, is that at this point, the wireless carrier is no longer under any obligation to continue offering a grandfathered customer an unlimited data plan.<sup>143</sup> In the absence of a new contract signing, "carriers can refuse to continue providing service of any kind to any customer once that customer is paying his bill on a month-to-month basis."<sup>144</sup> Because a wireless service provider is no longer bound by a contractual agreement, it may change its terms of service at any time.<sup>145</sup> Subsequently, the elimination of mobile device upgrades is an effective tool to terminate consumers' grandfathered unlimited data plans.<sup>146</sup>

Even within a binding contract, wireless service providers still reserve the right to change its policies at any given time, including the probable elimination of its unlimited data plans.<sup>147</sup> Telecommunications companies often include in their contracts a provisional clause that allows the wireless carriers to modify their terms and conditions of service.<sup>148</sup> Thus, wireless carriers may discontinue to provide service to grandfathered unlimited data plan customers, ulti-

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<sup>142</sup> See Reardon, *supra* note 4 (outlining the steps that customers who want to keep their grandfathered unlimited data plans must make once their preexisting contract period ends). Verizon no longer provides automatic device upgrade subsidies with a signing of a new two-year contract. The company now holds discretion over which products to market their discount offerings. See Cheng, *supra* note 101.

<sup>143</sup> See Reardon, *supra* note 4 (explaining that the wireless carrier is no longer bound under any contractual obligation to keep providing unlimited data service).

<sup>144</sup> Reardon, *supra* note 4.

<sup>145</sup> See Reardon, *supra* note 4 (noting that a wireless carrier is no longer contractually bound to its original terms of service as agreed upon between the company and the customer).

<sup>146</sup> See, e.g., Reardon, *supra* note 4 (observing that Verizon's tactic of forfeiting device upgrade discounts has been successful in strong-arming grandfathered subscribers to abandon their unlimited data plans).

<sup>147</sup> See Reardon, *supra* note 4 (addressing the real possibility that telecommunications companies may discontinue its unlimited data plan as it reserves the right to modify its terms and conditions of service).

<sup>148</sup> See Reardon, *supra* note 4 (highlighting that wireless service providers often include a clause that allows the companies to make any modifications to the terms and conditions within their contracts).

mately forcing all customers into a tiered data plan structure.<sup>149</sup> It is important to note that such material changes do render the telecommunications companies liable and vulnerable to un-subscription, in which case customers are not subject to early termination fees.<sup>150</sup>

## 2. Data Throttling

Most preexisting customers are unwilling to forfeit their device upgrade discounts and pay full retail price in order to retain their grandfathered unlimited data plans.<sup>151</sup> This mentality is especially true as wireless carriers have notoriously subjected grandfathered customers to data throttling.<sup>152</sup> These telecommunications giants have employed data throttling as a business tactic to push grandfathered unlimited data customers over to one of their more profitable tiered data plans with set allowances of data.<sup>153</sup> This industry practice is a façade for the networks' true purpose of grandfathered data plans as a vehicle in their temporary business strategy to build and maintain a loyal customer base.<sup>154</sup> Once customer loyalty is established, wireless service providers start to phase out these grandfathered plans with little backlash from their customers, who seldom stray to other carriers; and as the customers who do leave, a majority

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<sup>149</sup> See Reardon, *supra* note 4 (cautioning that wireless carriers may eventually discontinue service to its unlimited data plans and force the migration of grandfathered customers over to a tiered data plan).

<sup>150</sup> See Reardon, *supra* note 4 (notifying consumers that they may object to any such material changes to their contract and unsubscribe from their wireless service plans without paying early termination fees).

<sup>151</sup> See, e.g., Reardon, *supra* note 109 (reporting that most preexisting customers with unlimited data plans realize that they do not benefit from keeping their grandfathered plans, as they do not use much data, and would rather cash in on the company's subsidy on a new device upgrade). Fran Shammo, the Chief Financial Officer of Verizon, comments: "Most devices sold during the quarter had a subsidy." This proves that grandfathered customers would rather take the new device upgrade discount and/or subsidy than to pay full retail price on a smartphone just to keep their unlimited data plans. See Reardon, *supra* note 109.

<sup>152</sup> See Gullo & McLaughlin, *supra* note 2 (criticizing the industry practice of data throttling, used as a tactic to phase out grandfathered unlimited data plans).

<sup>153</sup> See, e.g., Cheng, *supra* note 76 (observing AT&T's data throttling of its unlimited data customers, forcing them to switch over to a tiered data plan structure).

<sup>154</sup> See, e.g., Reardon, *supra* note 4 (contending that Verizon allowed grandfathering of its unlimited data plans to keep preexisting customers happy).

eventually returns.<sup>155</sup> What is the point in having an unlimited data plan then when consumers do not actually have access to unlimited data?<sup>156</sup> Hence, these tactics have been overly successful in migrating preexisting customers off of their grandfathered unlimited data plans over to a tiered data plan structure.<sup>157</sup>

### C. Consumer Protection Considerations

Gaining the attention of the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”), this inherent unfairness brings about major consumer law concerns.<sup>158</sup> In an issued statement, FTC Chairwoman Edith Ramirez said, “AT&T promised its customers ‘unlimited’ data, and in many instances, it has failed to deliver on that promise. The issue here is simple: ‘unlimited’ means unlimited.”<sup>159</sup> Considering AT&T to have failed in being

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<sup>155</sup> See Reardon, *supra* note 4 (indicating that the grandfathered unlimited data plans will eventually be phased out and terminated, forcing customers to migrate to a tiered plan option); see also Ante & Knutson, *supra* note 5 (reiterating that consumers tend to stick with their current “Big Four” provider for the network quality in light of the unfairness).

<sup>156</sup> See Martin, *supra* note 91 (questioning the industry’s marketing of unlimited data plans when no such carrier actually offers truly unlimited data). Verizon, however, has recently pioneered a solution to the industry’s unlimited data problem by increasing the price of its grandfathered unlimited data plans by \$20, which took effect on November 15, 2015. CFO Fran Shammo confirmed that preexisting customers will finally be able to access unlimited data without the interruption of data throttling. See Martin, *supra* note 91. Although the largest wireless network has folded under federal regulatory pressures, this solution comes all too late as less than 1% of Verizon customers have retained their grandfathered unlimited data plans. See Reardon, *supra* note 94; Cheng, *supra* note 95.

<sup>157</sup> See Ante & Knutson, *supra* note 5 (observing that many disgruntled customers have switched to tiered data plans rather than trying to keep their grandfathered unlimited data).

<sup>158</sup> See, e.g., Cheng, *supra* note 76 (addressing the federal commission’s growing concerns with the unfair treatment of consumers with “unlimited” data plans); see also Nagesh & Gryta, *supra* note 74 (noting that although the agencies cooperated on the AT&T investigation, the FTC and FCC acted separately in their enforcement actions). “The FTC lawsuit, filed in federal court in San Francisco, seeks compensation for customers and to bar AT&T from misleading consumers with its advertising. The FCC fine, if upheld, would go to the U.S. Treasury.” Nagesh & Gryta, *supra* note 74.

<sup>159</sup> Cheng, *supra* note 76. FCC Enforcement Bureau Chief Travis LeBlanc has stated the same: “Unlimited means unlimited. As today’s action demonstrates, the

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transparent in carrying out its unlimited data plan, the FTC has accused the telecommunications company of violating the FTC Act by making material changes to the terms of its unlimited data plan without notice while its customers were still under contract.<sup>160</sup> AT&T has denied these allegations with the following response:

The FTC's allegations are baseless and have nothing to do with the substance of our network management program. It's baffling as to why the FTC would choose to take this action against a company that, like all major wireless providers, manages its network resources to provide the best possible service to all customers, and does it in a way that is fully transparent and consistent with the law and our contracts.<sup>161</sup>

The second-largest U.S. wireless provider argues that it announced the changes to its unlimited data plan in a national press release and sent customers bill notices to suffice the notice requirement.<sup>162</sup> But are these methods enough to put consumers on notice?

At present, the federal commissions' main concern with wireless carriers is their industry practice of data throttling, particularly against unlimited data plan consumers.<sup>163</sup> The FCC went after AT&T and Verizon, who profited billions of dollars from unlimited data plans, for data throttling.<sup>164</sup> Recently in February 2015, the FCC has reclassified wireless services as common carriers as part of the agency's net-neutrality rules, which expands the commission's authority over the industry to regulate wireless broadband providers and

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commission is committed to holding accountable those broadband providers who fail to be fully transparent about data limits." Nagesh & Gryta, *supra* note 74.

<sup>160</sup> See Cheng, *supra* note 76 (explaining the FTC's allegations of AT&T's failure to be transparent about its unlimited data plans to consumers by not notifying them of any material changes to the terms of service).

<sup>161</sup> Cheng, *supra* note 76.

<sup>162</sup> See Cheng, *supra* note 76 (arguing that AT&T had sufficiently fulfilled its notice requirement in letting customers know of its changes of service).

<sup>163</sup> See Cheng, *supra* note 76 (determining that data throttling is a priority on the federal commissions' consumer protection issues list).

<sup>164</sup> See Cheng, *supra* note 76 (noting that the FCC also similarly pursued this matter of data throttling against Verizon); see also Nagesh & Gryta, *supra* note 74 (reporting the FCC's plans on fining AT&T \$100 million for data throttling its unlimited data customers).

their deceptive practices, such as data throttling.<sup>165</sup> As long as these telecommunications companies are bullying consumers, the FTC and FCC will step in to protect them from such inherent unfairness.<sup>166</sup>

### **A. Proposals for Possible Solutions to End Deceptive Telecommunications Practices**

To eliminate corporate greed and protect consumers, telecommunications corporations must be heavily regulated.<sup>167</sup> Federal agencies such as the Federal Trade Commission and the Federal Communications Commission should be afforded more power to better enforce such regulations and hold companies in violation accountable.<sup>168</sup> Furthermore, the FTC and FCC should be authorized to legally define what constitutes deceptive practices.<sup>169</sup> A stringent notice requirement needs to be in place to put consumers on notice of any material changes to their service contracts, which should include releasing official statements and press releases disseminated across accessible forums.<sup>170</sup> This requirement should also provide remedies, such as allowing consumers to freely unbind themselves from their

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<sup>165</sup> See Nagesh & Gryta, *supra* note 74 (observing the FCC's expansion of authority over wireless service providers).

<sup>166</sup> See Nagesh & Gryta, *supra* note 74 (commenting on the aggressive approach of these federal commissions in protecting consumers from mobile broadband providers). "Consumers deserve to get what they pay for," FCC Chairman Tom Wheeler said in a statement. "Broadband providers must be up front and transparent about the services they provide. The FCC will not stand idly by while consumers are deceived by misleading marketing materials and insufficient disclosure." See Nagesh & Gryta, *supra* note 74.

<sup>167</sup> *Contra* The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C. (1996)) (deregulating the telecommunications market).

<sup>168</sup> See Federal Trade Commission Act, 15 U.S.C. § 53(b) (2) (1994) (authorizing the FTC to bring suit to enjoin and/or restrain defendant for false advertisement in cases of consumer protection); see also Nagesh & Gryta, *supra* note 74 (observing the agency's budding expansion of authority over the wireless broadband provider industry via net neutrality).

<sup>169</sup> See Federal Trade Commission Act, 15 U.S.C. § 53(b) (1994) (providing not enough authorization to regulate and oversee the telecommunications industry).

<sup>170</sup> See Gullo & McLaughlin, *supra* note 2 (characterizing AT&T's violation of the FTC Act as an issue of sufficient notice); see also Cheng, *supra* note 76 (commenting on whether AT&T had sufficiently fulfilled its notice requirement in letting customers know of its changes of service).

contractual agreements.<sup>171</sup> The courts cannot continue to reserve judgment and defer to corporations any longer.<sup>172</sup> The judiciary needs to scrutinize these deceptive corporate practices more narrowly to protect consumers.<sup>173</sup>

Taking it one step further, perhaps the process of grandfathering should be governed statutorily rather than contractually.<sup>174</sup> Accordingly, Congress and state legislatures need to pass new laws to regulate grandfathered consumer services.<sup>175</sup> This solution would close many loopholes and alleviate the disparate advantage that telecommunications companies have over consumers.<sup>176</sup> Although opponents would argue for a more laissez-faire capitalistic approach, a progressive method is necessary to protect consumers and the welfare of the U.S. economy.

Times are changing, however, and the telecommunications market is continuously evolving. A shift in the industry was initiated two years ago, when T-Mobile became the first and only one of the “Big Four” networks to abandon the practice of signing customers to two-year service contracts in exchange for mobile device subsidies.<sup>177</sup> The elimination of this program meant that customers had to pay full retail price for their cellphones, but were offered slightly

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<sup>171</sup> See Yu, *supra* note 81 (considering the option of allowing customers to abandon contracts without penalty); see also Cheng, *supra* note 76 (giving consumers a chance to free themselves of their contractual obligation once the company has materially changed a term in their service agreement).

<sup>172</sup> See, e.g., *O’Conner v. AT&T Corp.*, No. 13-112-SDD-SCR, 2013 U.S. Dist. LEXIS 85623, at \*16 (M.D. La. June 18, 2013) (granting a motion to compel arbitration and stay litigation).

<sup>173</sup> *Contra Fink v. Time Warner Cable*, 837 F. Supp. 2d 279, 280 (S.D.N.Y. 2014) (dismissing plaintiffs’ claims of deceptive business practices of data throttling).

<sup>174</sup> See, e.g., Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001-18121 (2010) (mandating affordable health care for all Americans); see also Preservation of Right to Maintain Preexisting Coverage, 42 U.S.C. § 18011 (2010) (providing an exemption to buying into the Affordable Care Act and allowing individuals to grandfather their preexisting healthcare plans).

<sup>175</sup> See, e.g., Preservation of Right to Maintain Preexisting Coverage, 42 U.S.C. § 18011 (2010) (allowing individuals to grandfather and maintain their health insurance plans).

<sup>176</sup> See Ante & Knutson, *supra* note 5 (noting the unfair advantage telecommunications companies have over consumers, limiting their options and controlling the market).

<sup>177</sup> See Cheng, *supra* note 95 (discussing that the smaller mobile companies are retaining customers by not forcing them into subsidized contracts).

cheaper plans.<sup>178</sup> Following in T-Mobile's stride, Verizon shockingly announced that it was getting rid of all of its long-term service contracts in August 2015.<sup>179</sup> Both T-Mobile and Verizon have failed to clarify, however, that the elimination of service contracts does not mean that there are no terms of service or customer agreements; in fact, other contracts may still exist.<sup>180</sup> Hence, clear definitions and notice requirements are necessary for consumers to understand what their wireless service entails so that they are able to make informed decisions.<sup>181</sup>

## V. CONCLUSION

Created to protect consumers, the Federal Trade Commission and Federal Communications Commission have focused their attention on the problem of wireless providers misleading consumers in their marketing of unlimited data. "Unlimited" means unlimited, and consumers have a reasonable expectation to data without any limitation to network access or speed. Ultimately, wireless carriers have materially misrepresented their unlimited data plan, such that the courts should rule in favor of the federal commissions. A much more progressive approach, however, is needed to protect consumers against corporate bullying. Federal and state legislation should be passed to statutorily govern grandfathered services to eliminate the corporate manipulation of contractual language and deceptive business practices.

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<sup>178</sup> See Cheng, *supra* note 95 (observing that monthly phone payments would ultimately be cheaper if customers use their smartphones for more than two years instead of upgrading).

<sup>179</sup> See Cheng, *supra* note 95 (finding Verizon's contract elimination surprising as it has the largest base of comfortable contract customers and as its installment plan is unpopular).

<sup>180</sup> See Cheng, *supra* note 95 (answering that other contracts may exist, such as a monthly installment contract for the full-retail priced phone).

<sup>181</sup> See *In re AT&T Mobility, LLC*, 30 FCC Rcd. 6613 (2015) (requiring a clearer criteria for use in the practice of identifying certain "management practices"); see also Nagesh & Gryta, *supra* note 74 (stating the FCC's position that it will intervene if it feels consumers are being deceived by companies); Gullo & McLaughlin, *supra* note 2 (reiterating that AT&T faced accusations from regulators of deceiving consumers); Cheng, *supra* note 76 (announcing action on behalf of the FTC to file a federal court complaint against AT&T for misleading consumers about network speeds).