

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

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

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**FEDERAL TRADE COMMISSION’S MEMORANDUM OF LAW AS AMICUS CURIAE**

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

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

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

#### I. THE FTC'S INTEREST IN THIS MATTER

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

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<sup>3</sup> FTC Docket No. C-4016 (Complaint and Consent Order June 25, 2001).

customers who registered on the local access plan between January and April 1999.<sup>5</sup>

## II. BACKGROUND

The plaintiff alleges that Ameritech, acting through various other parties, breached contracts

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

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<sup>6</sup> For service cost information,

conditions and welcome letter sent to customers), and to send a notice to all customer service

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

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

1. The Offered Compensation Has Little or No Value

The settlement offers injured class members a month of low-cost speed dial service where there is no reason to believe that a substantial number of class members even desire the offered service. Neither counsel for the class nor Ameritech has made any showing that class members desire the Speed-Dial 30 service or provided any estimate of the percentage of class members likely to accept the Speed-Dial 30 offer. There is no reason to believe that a consumer who subscribes to a voice mail service would want an entirely unrelated service. Many class members may already have a telephone with a speed dial function. As a result, many and perhaps most of the class members would receive nothing of value from the settlement. Even class members who desire the Speed-Dial 30 service would

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

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

class action settlement providing class members with a \$1,000 coupon, good for only 15 months, toward the purchase of a new GM truck or minivan. Although the settlement would have allowed class

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

offer.

The FTC has challenged deceptive free trial offers used to market various goods and services,

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

<sup>14</sup> No. 02 CV 1003 (S.D. Cal. Complaint May 22, 2002; Consent Decree May 24, 2002). *See* [www.ftc.gov/opa/2002/05/microstar.htm](http://www.ftc.gov/opa/2002/05/microstar.htm).

<sup>15</sup> America Online, Inc., 125 F.T.C. 403 (1998); Compuserve, Inc., 125 F.T.C. 451 (1998); and Prodigy Services Corp., 125 F.T.C. 430 (1998). *See* [www.ftc.gov/opa/1997/9705/online.htm](http://www.ftc.gov/opa/1997/9705/online.htm).

the respondents to make adequate disclosures.

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Dated: June 21, 2002

Respectfully submitted,

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