

## Ninth Circuit Dismisses FTC's Throttling Suit Against AT&T

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In an [opinion](#) released today, the *Ninth Circuit* dismissed the *Federal Trade Commission's* ("FTC") lawsuit against **AT&T** for violating Section 5 of the FTC Act due to its throttling practices. AT&T's practice of throttling the speed of customers with unlimited data plans once they reached a certain data usage threshold had been challenged by the FTC as both unfair and deceptive under Section 5. The Ninth Circuit reversed the district court's prior ruling denying AT&T's motion to dismiss on the ground that AT&T was a common carrier and therefore exempt from Section 5 of the FTC Act.

The Ninth Circuit presented the issue as whether the common carrier exemption in Section 5 is status-based, as AT&T argued, or activity-based, as the FTC argued. According to the FTC, companies are only exempt from Section 5 liability to the extent the activity at issue is a "common carrier activity." The Ninth Circuit disagreed, finding that the statutory language "simply does not comport with an activity-based approach." The court also relied on the structure of the FTC Act, noting that the common carrier exemption is surrounded by other exemptions phrased in similar terms which the FTC acknowledges are status-based.

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