

town's ordinance stands as an obstacle to the statute's goals of promoting pesticide regulation that is coordinated solely on the federal and state levels, that rests upon some degree of technical expertise, and that does not [*615] unduly burden interstate commerce. [***30] Each one of these assertions rests on little more than snippets of legislative history and policy speculations. None of them is convincing.

To begin with, FIFRA does not suggest a goal of regulatory coordination that sweeps either as exclusively or as broadly as Mortier contends. The statute gives no indication that Congress was sufficiently concerned about this goal to require pre-emption of local use ordinances simply because they were enacted locally. Mortier suggests otherwise, quoting legislative history which states that FIFRA establishes "a coordinated Federal-State administrative system to carry out the new program," and raising the specter of gypsy moth hordes safely navigating through thousands of contradictory and ineffective municipal regulations. H. R. Rep. No. 92-511, at 1-2. As we have made plain, the statute does not expressly or impliedly preclude regulatory action by political subdivisions with regard to local use. To the contrary, FIFRA implies a regulatory partnership between federal, state, *and* local governments. Section 136t(b) expressly states that the Administrator "shall cooperate with . . . any appropriate agency of any State or any political subdivision [***31] thereof, in carrying out the provisions of this [Act] and in securing uniformity of regulations." Nor does FIFRA suggest that any goal of coordination precludes local use ordinances because they were enacted independently of specific state or federal oversight. As we have also made plain, local use permit regulations -- unlike labeling or certification -- do not fall within an area that FIFRA's "program" pre-empts or even plainly addresses. There is no indication that any coordination which the statute seeks to promote extends beyond the matters with which it deals, or does so strongly enough to compel the conclusion that an independently enacted ordinance that falls outside the statute's reach frustrates its purpose.

FIFRA provides even less indication that local ordinances must yield to statutory purposes of promoting technical [*616] expertise or maintaining unfettered interstate commerce. Once more, isolated passages of legislative history that were themselves insufficient to establish a pre-emptive congressional intent do not by themselves establish legislative goals with pre-emptive effect. See, e. g., S. Rep. No. 92-838, at 16. Mortier nonetheless asserts that local ordinances necessarily [***32] rest on insufficient expertise and burden commerce by allowing, among other things, large-scale crop infestation. As with the specter of the gypsy moth, Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it. We are satisfied, however, that Congress has not done so yet.

IV

We hold that FIFRA does not pre-empt the town of Casey's ordinance regulating the use of pesticides. The judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

CONCURRY: SCALIA

CONCUR: JUSTICE SCALIA, concurring in the judgment.

I agree with the Court that FIFRA does not pre-empt local regulation, because I agree that the terms of the statute do not alone manifest a pre-emption of the entire field of pesticide regulation. *Ante*, at 611-614. If there *were* field pre-emption, 7 U. S. C. § 136v would be understood not as restricting certain types of state regulation (for which purpose it makes little sense to restrict States but not their subdivisions) but as *authorizing* certain types of state regulation (for which purpose it makes eminent [**2488] sense to authorize States but [***33] not their subdivisions). But the field-pre-emption question is certainly a close

one. Congress' selective use of "State" and "State and political subdivisions thereof" would suggest the authorizing rather than restricting meaning of § 136v, were it not for the inconsistent usage pointed to in Part I of the Court's opinion.

[*617] As the Court today recognizes, see *ante*, at 606-607, the Wisconsin justices agreed with me on this point, and would have come out the way that I and the Court do *but for* the Committee Reports contained in FIFRA's legislative history. I think they were entirely right about the tenor of those Reports. Their only mistake was failing to recognize how unreliable Committee Reports are -- not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not.

Consider how the case would have been resolved if the Committee Reports were taken seriously: The bill to amend FIFRA (H. R. 10729) was reported out of the House Committee on Agriculture on September 25, 1971. According to the accompanying Committee Report:

"The Committee rejected a proposal which would have permitted [***34] political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H. R. Rep. No. 92-511, p. 16 (1971).

Had the *grounds* for the rejection not been specified, it would be possible to entertain the Court's speculation, *ante*, at 609, that the Committee might have been opposing only *direct* conferral upon localities of authority to regulate, in contrast to state *delegation* of authority to regulate. But once it is specified that an excessive number of regulatory jurisdictions is the problem -- that "50 States and the Federal Government" are enough -- then it becomes clear that the Committee wanted localities out of the picture, and thought that its bill placed them there.

The House Agriculture Committee's bill was passed by the full House on November 9, 1971, and upon transmittal to the Senate was referred to the Senate Committee on Agriculture and Forestry, which reported it out on June 7, 1972. The accompanying Committee Report both clearly confirms the [*618] foregoing interpretation of the House Committee Report, and clearly endorses the disposition that interpretation [***35] produces.

"[We have] considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concur with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that section [136v], by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.*" S. Rep. No. 92-838, pp. 16-17 (1972) (emphasis added).

Clearer committee language "directing" the courts how to interpret a statute of Congress could not be [***36] found, and if such a direction had any binding effect, the question of interpretation in this case would be no question at all.

But there is still more. After the Senate Agriculture Committee reported the bill to the floor, it was re-referred to the Committee [**2489] on Commerce, which reported it out on July 19, 1972. The Report of that Committee, plus the accompanying proposals for amendment of H. R. 10729, *reconfirmed* the interpretation of the Senate and House Agriculture Committees. The Report said:

[*619] "While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." S. Rep. No. 92-970, p. 27 (1972).

The Court claims that this passage, plus the amendment that it explains, show that "the two principal Committees responsible for the bill [were] in disagreement over whether it pre-empted pesticide regulation by political subdivisions." *Ante*, at 610. I confess that [***37] I am less practiced than others in the science of construing legislative history, but it seems to me that quite the opposite is the case. The Senate Commerce Committee Report does not offer a different *interpretation* of the pre-emptive effect of H. R. 10729. To the contrary, it acknowledges that the Report of the originating Committee "states explicitly that local governments cannot regulate pesticides in any manner," and then proceeds to a statement ("Many local governments now regulate pesticides, etc.") which questions not the *existence* but the *desirability* of that restriction on local regulatory power. And since it agreed with the interpretation but did not agree with the policy, the Senate Commerce Committee proposed an amendment to H. R. 10729, whose purpose, according to its Report, was to "give local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities." S. Rep. No. 92-970, *supra*, at 27. In a supplemental Report, the Senate Agriculture Committee opposed the Commerce Committee's amendment, which it said would "give local governments the authority to regulate the sale or use of a pesticide, [***38] " thereby "vitiating" the earlier Agriculture Committee Report. S. Rep. No. 92-838, pt. 2, *supra*, at 46-47. This legislative history clearly demonstrates, I think, not (as the [*620] Court would have it) that the two principal Senate Committees disagreed about whether H. R. 10729 pre-empted local regulation, but that they were in complete accord that it *did*, and in disagreement over whether it *ought* to.

Of course that does not necessarily say anything about what Congress as a whole thought. Assuming that all the members of the three Committees in question (as opposed to just the relevant Subcommittees) actually adverted to the interpretive point at issue here -- which is probably an unrealistic assumption -- and assuming further that they were in *unanimous* agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House. It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill -- assuming (we cannot be sure) that the Reports were available before the vote. Those pertinent portions, though they dominate our discussion today, constituted less than [***39] a quarter-page of the 82-page House Agriculture Committee Report, and less than a half-page each of the 74-page Senate Agriculture Committee Report, the 46-page Senate Commerce Committee Report, and the 73-page Senate Agriculture Committee Supplemental Report. Those Reports in turn were a minuscule portion of the total number of reports that the Members of Congress were receiving (and presumably even writing) during the period in question. In the Senate, at least, there was a vote on an amendment (the Commerce Committee proposal) that would have changed the result of the supposed interpretation. But the full Senate could have rejected that *either* because a majority of its Members disagreed [**2490] with the Commerce Committee's proposed policy; *or* because they disagreed with the Commerce Committee's and the Agriculture Committee's interpretation (and thus thought the amendment superfluous); *or* because they were blissfully ignorant of the entire dispute and

simply thought that the Commerce [*621] Committee, by asking for recommittal and proposing 15 amendments, was being a troublemaker; or because three different minorities (enough to make a majority) had each of these respective reasons. [***40] We have no way of knowing; indeed, we have no way of knowing that they had any *rational* motive at all.

All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law. On the important question before us today, whether that law denies local communities throughout the Nation significant powers of self-protection, we should try to give the text its fair meaning, whatever various committees might have had to say -- thereby affirming the proposition that we are a Government of laws, not of committee reports. That is, at least, the way I prefer to proceed.

If I believed, however, that the meaning of a statute is to be determined by committee reports, I would have to conclude that a meaning opposite to our judgment has been commanded three times over -- not only by one committee in each House, but by *two* Committees in one of them. Today's decision reveals that, in their judicial application, Committee reports are a forensic [***41] rather than an interpretive device, to be invoked when they support the decision and ignored when they do not. To my mind that is infinitely better than honestly giving them dispositive effect. But it would be better still to stop confusing the Wisconsin Supreme Court, and not to use committee reports at all.

* * *

The Court responds to this concurrence in a footnote, *ante*, at 610-612, n. 4, asserting that the legislative history is [*622] really ambiguous. I leave it to the reader to judge. I must reply, however, to the Court's assertion that the "practice of utilizing legislative history reaches well into [our] past," *ante*, at 612, n. 4, for which proposition it cites an opinion written by none other than John Marshall himself, *Wallace v. Parker*, 6 Pet. 680 (1832). What the Court neglects to explain is that what it means by the "practice of utilizing legislative history" is *not* the practice of utilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text -- which is the only practice I object to. Marshall used factual statements in the report of an Ohio legislative committee "as part of the record" in the case, *id.*, [***42] at 689, 690, assuming that that was permissible "under the laws of Ohio," *ibid.* I do not object to such use. But that is quite different from the recent practice of relying upon legislative material to provide an authoritative interpretation of a statutory text. That would have shocked John Marshall. As late as 1897, we stated quite clearly that there is "a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 318, 41 L. Ed. 1007, 17 S. Ct. 540. And even as late as 1953, the practice of using legislative history in that fashion was novel enough that Justice Jackson could dismiss it as a "psychoanalysis of Congress," and a "weird endeavor." *United States v. Public Utilities Comm'n of Cal.*, 345 U.S. 295, 319, 97 L. Ed. 1020, 73 S. Ct. 706 (concurring opinion). It is, in short, almost entirely a phenomenon of this century -- and in its extensive use a very recent phenomenon. See, e. g., Carro & Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. Legis. 282 [**2491] (1982); Wald, *Some Observations [***43] on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 196-197 (1983).

I am depressed if the Court is predicting that the use of legislative history for the purpose I have criticized "will . . . [*623] reach well into the future." But if it is, and its prediction of the future is as accurate as its perception that it is continuing a "practice . . . reaching well into [our] past," I may have nothing to fear.

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831 F.2d 627, *; 1987 U.S. App. LEXIS 13648, **

In re Long Distance Telecommunications Litigation; Charles Kaplan, et al., Plaintiffs-Appellants, ITT-U.S. Transmission Systems, Inc., et al., Defendants-Appellees; Roger Lee, et al., Plaintiffs-Appellants, v. Western Union Telegraph Company, et al., Defendants-Appellees

Nos. 85-1684, 86-1599

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

831 F.2d 627; 1987 U.S. App. LEXIS 13648; 63 Rad. Reg. 2d (P & F) 1551

April 27, 1987, Argued
October 9, 1987, Decided
October 9, 1987, Filed

SUBSEQUENT HISTORY: PETITION FOR REHEARING GRANTED IN PART AND DENIED IN PART. As Amended December 1, 1987. Petition For Rehearing Granted In Part and Denied In Part.

PRIOR HISTORY:

[**1] On Appeal from the United States District Court for the Eastern District of Michigan.

CORE TERMS: primary jurisdiction, consolidated, state law, Communications Act, reasonableness, preempted, federal common law, regulation, common law, uniformity, preemption, customers, Aviation Act, transferred, savings clause, overbooking, expertise, referral, fraudulent misrepresentation, deceptive, uncompleted, administrative agencies, failure to disclose, administrative body, breach of contract, regulatory scheme, state common law, regulated, staying, issue preclusion

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JUDGES: Lively, Chief Judge; Guy and Boggs, Circuit Judges.

OPINIONBY: LIVELY

OPINION: [*628] LIVELY, Chief Judge

These consolidated appeals deal with the application of the doctrines of primary jurisdiction and preemption. The plaintiffs are customers of the defendants, which are companies engaged in providing long distance telephone services. The complaints charged violations of federal statutes and of state and federal common law based on the defendants' practice of charging for uncompleted calls, ring time and holding time, and failing to inform customers of [**2] this practice. The defendants are competitors of American Telephone & Telegraph Co. (AT & T) who advertise that their long distance rates are lower than those of AT & T, but do not reveal their practice of charging for uncompleted calls. AT & T does not charge for such calls. In order to frame the issues clearly, it is necessary to set forth the procedural history of

the litigation in some detail.

I.

Ten separate class actions were filed in various district courts setting forth the same general claims. The Judicial Panel on Multidistrict Litigation transferred these cases to the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. § 1407(a). Thereafter, as more complaints were filed, the Judicial Panel continued to transfer them to the district court. Seymour Lazar, a plaintiff in one of the transferred cases, moved to remand his case to state court, asserting that he had raised only state law claims. The district court denied the motion, finding that plaintiff's state law claims were preempted by the Federal Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*, and that this federal statute provided the exclusive remedy for the defendants' allegedly [**3] unlawful actions. The district court held that the defendants' alleged conduct was within the scope of activities governed by 47 U.S.C. § 201(b) which provides in part: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ." *Lazar v. MCI Communications, Inc.*, 598 F. Supp. 951 (E.D. Mich. 1984). The district court has [*629] subsequently denied similar remand motions brought by other plaintiffs in the consolidated proceedings. See *Solomon v. MCI Communications*, 640 F. Supp. 997 (E.D. Mich. 1986); *Sandler v. GTE Sprint*, 622 F. Supp. 282 (E.D. Mich. 1985).

After the *Lazar* decision, all of the plaintiffs filed a single amended consolidated complaint. n1 Count I of the consolidated complaint alleged that defendants' failure to disclose their billing policy was an "unreasonable" practice in violation of 47 U.S.C. § 201(b). Count III alleged that the same conduct was also violative of 47 U.S.C. § 207, which provides:

Recovery of damages. Any person claiming to be damaged [**4] by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

-----Footnotes-----

n1 *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, was transferred to the district court after the consolidated complaint was filed, and therefore Kaplan did not join in it. However, the Communications Act and the common law claims alleged in Kaplan's original complaint are identical, in all respects relevant to this appeal, to the claims made in the consolidated complaint.

Similarly, the complaint in *Lee v. Western Union Telegraph Co.*, which the district court dismissed on June 2, 1986 together with four other "tag-along" actions, is identical to the consolidated complaint. Plaintiffs in *Lee* appealed the order of dismissal, and this court consolidated that appeal as No. 86-1599 with the earlier appeal in No. 85-1684 from dismissal of the consolidated complaint.

-----End Footnotes-----

The district [**5] court ruled that this section merely outlines the concurrent jurisdiction of the federal district courts and the Federal Communications Commission (FCC) to hear claims alleging violations of other provisions of the Act and that section 207 does not, in and of itself, create a separate, independent cause of action. The plaintiffs have not appealed from this ruling. Counts II, IV, and V presented federal common law claims of fraud, breach of contract, and conversion. Finally, in Count VI of the consolidated complaint, plaintiffs alleged that defendants' conduct also violated the Racketeer Influences and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq.*

In granting the defendants' motion to dismiss, the district court found that it would be more appropriate for the FCC to make the initial determination regarding the reasonableness of the defendants' practices under 47 U.S.C. § 201(b). Therefore, relying on the doctrine of primary jurisdiction, the district court dismissed this statutory claim and referred the issue to the FCC. *In re Long Distance Telecommunication Litigation*, 612 F. Supp. 892 (E.D. Mich. 1985) (*Long Distance Litigation*). The plaintiffs' federal [**6] common law claims were dismissed because the court found that it was unnecessary to imply such claims where there was already a statute which was broad enough to address the issues and provide plaintiffs with the requested relief. Finally, with respect to plaintiffs' RICO claims, the court found that a determination of "unreasonableness" under § 201(b) was a necessary prerequisite to establishing the existence of "crime," "injury," or "liability" as required to state a RICO claim.

II.

We consider the appeal in No. 85-1684 first. In dismissing the consolidated complaint the district court invoked the doctrine of primary jurisdiction. This doctrine is based upon a principle described by Justice Frankfurter in *Far East Conference v. United States*, 342 U.S. 570, 574-75, 96 L. Ed. 576, 72 S. Ct. 492 (1952), as follows:

The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by [*630] specialized competence serve as a [**7] premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

The Supreme Court explained the difference between exhaustion and primary jurisdiction in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-65, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956):

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play [**8] whenever enforcement of the claim requires the resolution of issues

which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433, 84 L. Ed. 361, 60 S. Ct. 325.

* * *

The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the lawmaking power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations.

(Footnote omitted).

Justice Harlan, writing for the Court in *Western Pacific*, emphasized the necessity for applying the doctrine of primary jurisdiction on a case-by-case basis, and identified the two principal considerations to be taken into account:

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular [**9] litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference v. United States*, 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492.

Id. at 64.

The district court concluded that the claims of Count I, alleging that the defendants' charges and practices are unjust and unreasonable within the meaning of section 201(b) of the Communications Act, are within the primary jurisdiction of the FCC. In reaching this conclusion the district court considered the pervasive nature of the FCC's regulatory authority over the communications industry and the agency's long involvement in the process by which the defendants and other competitors of AT & T gained access to the long distance telephone market. The court specifically found that the question of reasonableness of the defendants' practices was well within the FCC's area of expertise [**10] and that "there is a genuine danger of inconsistent adjudications where, as here, numerous lawsuits have been brought by individuals and class action plaintiffs in different state [*631] and federal courts across the country." *Long Distance Litigation*, 612 F. Supp. at 898.

The district court was clearly correct in concluding that the claims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC. Section 201(b) speaks in terms of reasonableness, and the very charge of Count I is that the defendants engaged in unreasonable practices. This is a determination that "Congress has placed squarely in the hands of the [FCC]." *Consolidated Rail Corp. v. National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 612, 66 L. Ed. 2d 776, 101 S. Ct. 775 (1981) (citation omitted).

The plaintiffs argue that *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), requires reversal of the district court's application of the doctrine of primary jurisdiction in the present case. We disagree. In *Nader* the Supreme Court refused to require that a state law claim of misrepresentation be referred to the Civil Aeronautics Board (CAB). The plaintiff in *Nader* was "bumped" from an Allegheny [**11] flight, although he had a ticket and a confirmed reservation. The bumping resulted from the airline's practice of deliberately overbooking its flights. Nader sued for fraudulent misrepresentation based on the airline's failure to advise him in advance of its deliberate overbooking practice. The district court awarded damages on this claim, *Nader v. Allegheny Airlines, Inc.* 365 F. Supp. 128 (D.D.C. 1973), but the court of appeals reversed, holding that a determination by the Civil Aeronautics Board (CAB) that a practice is not deceptive within the meaning of the Federal Aviation Act of 1958 would, as a matter of law, preclude a common law tort action seeking damages for injuries caused by that practice. *Nader v. Allegheny Airlines, Inc.* 167 U.S. App. D.C. 350, 512 F.2d 527, 543 (D.C. Cir. 1975). The court of appeals then applied the doctrine of primary jurisdiction to hold that the district court should have stayed the common law tort action pending reference to the CAB for a determination of whether the challenged practice of failing to disclose the practice of overbooking was "deceptive." The court of appeals also found that the "savings clause" of the Aviation Act did not apply.

In reversing, [**12] the Supreme Court held that a violation of the Aviation Act's prohibition against deceptive practices "is not coextensive with a breach of duty under the common law." 426 U.S. at 302. While that provision gives the CAB a powerful weapon against practices that deceive the public, "it does not represent the only, or best, response to all challenged carrier actions that result in private wrongs." *Id.* at 303.

The Court discussed the origin and purpose of the doctrine of primary jurisdiction which requires district courts to refer specific issues properly within their jurisdiction to administrative agencies for initial determination in order to promote uniformity in the regulation of businesses entrusted to such agencies and to obtain the benefit of the expertise and experience of the agencies. Emphasizing that the tort claim sought damages for the airline's failure to disclose its practice of overbooking rather than the reasonableness of the practice of overbooking itself, the Court stated that the case did not involve considerations of uniformity in regulation or technical expertise. Thus, the court of appeals erred in ordering the fraudulent misrepresentation claim stayed under [**13] the doctrine of primary jurisdiction. That claim was within the jurisdiction of the district court and referral to the CAB was not required. "The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." *Id.* at 305-06 (footnote omitted).

Nader was not a case where there was a direct conflict between an agency's authority and that of a court adjudicating common law claims. In holding that the doctrine of primary jurisdiction did not apply, the Court pointed out that it was not "called upon to substitute its judgment for the [*632] agency's on the reasonableness of a rate -- or, indeed, on the reasonableness of any carrier practice." *Id.* at 299-300. Conversely Count I of the consolidated complaint in the present case did call on the district court to determine the reasonableness of the defendants' practices, and raised an issue properly referred to the FCC in the first instance. We distinguished *Nader* on identical grounds in *Detroit, Toledo & Ironton Railroad Co. v. Consolidated [**14] Rail Corp.*, 727 F.2d 1391, 1395-96 (6th Cir. 1984).

The plaintiffs also maintain that there is no reason to refer the claims under section 201(b) to the FCC because that agency has already applied its expertise to the question of the reasonableness of the defendants' notification practices in *Bill Correctors v. U.S. Transmission Systems, Inc.* FCC Docket No. E-84-6 (Nov. 5, 1984). A careful reading of the decision in *Bill Correctors* does not support the plaintiffs' position. The issue there was whether the defendants were required to disclose their practices in tariffs filed with the FCC pursuant to section 203 of the Communications Act; it did not involve a specific claim of

unreasonableness under section 201(b). The bulk of the *Bill Correctors* decision deals with the fact that the defendants lack "answer supervision" technology which would permit them to detect uncompleted calls. The decision requires them to advise the FCC within thirty days "of the notification method used or to be used to alert customers of the methods it employs to guard against erroneous overcharges." (Slip Op. at 7).

Finally, the plaintiffs contend that if primary jurisdiction required referral [**15] of the section 201(b) claim to the FCC, the district court erred in dismissing Count I rather than staying action on it until the agency has considered the claim. We agree. In *Far East Conference* the Supreme Court noted that uniformity and consistency in regulation can be secured by *preliminary* resort to the proper agency, and that this is a "mode of accommodating the complementary roles of courts and administrative agencies." 342 U.S. at 575. Similarly, in *Western Pacific* the Court described the operation of the doctrine of primary jurisdiction as a procedure where "the judicial process is *suspended* pending referral of such issues to the administrative body for its views." 352 U.S. at 63-64 (emphasis added) (citation omitted).

We note that some of the plaintiffs joined in a complaint before the FCC following dismissal of the consolidated complaint. The defendants argue that the plaintiffs cannot pursue this appeal while simultaneously seeking the same relief from the FCC. However, the district court's dismissing the action rather than staying it created a quandary for the plaintiffs. In dismissing on primary jurisdiction grounds, rather than staying judicial proceedings, [**16] the district court order could be construed as requiring the plaintiffs to raise the section 201 (b) claim with the FCC. At any rate, the FCC dismissed that complaint in *Certified Collateral Corp. v. Allnet Communication Services, Inc.*, FCC Docket No. 86-063 (April 14, 1987), for lack of specificity. The FCC also noted that its rules do not provide for class actions, (Slip Op. at 3) thus indicating that the district court may be required to deal further at least with remedy issues after the FCC has made a definitive determination of the reasonableness issue. Upon remand the district court will stay further proceedings on Count I pending action by the FCC pursuant to an order of referral.

III.

In separate opinions the district court held that both the state and federal common law claims were preempted by the comprehensive regulatory scheme of the Communications Act. *Lazar*, 598 F. Supp. at 954; *Long Distance Litigation*, 612 F. Supp. at 899-900. The plaintiffs assert that the district court erred in both rulings, and we consider them separately.

A.

The state law claims in the original *Lazar, Solomon and Sandler* [**17] complaints were not repeated in the consolidated complaint. The district court's conclusion that [**633] the state law claims were preempted by the Communications Act was the basis for denial of motions to remand, not dismissals. *Lazar*, supra. The denial of a motion to remand is not a final, appealable order under 28 U.S.C. § 1291. See *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 861 (7th Cir.), cert. denied, 469 U.S. 890, 83 L. Ed. 2d 201, 105 S. Ct. 265 (1984). Nevertheless, the preemption rulings had the effect of removing the state law claims from the cases. We do not believe plaintiffs abandoned their state law claims by failing to repeat them in the consolidated complaint, which superseded the various separate complaints. Since these claims had been rejected by the court in unappealable orders, the first opportunity to test the correctness of the district court's preemption ruling came following dismissal of the entire action. We conclude that the question of whether the state law claims were preempted by the Communications Act is properly before us.

B.

The district court cited the need for nationwide uniformity in regulation of the

telecommunications industry in concluding that the state [**18] law claims were preempted. *Lazar*, 598 F. Supp. at 953-54. Although the district court noted that the plaintiffs relied on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), it did not discuss or attempt to distinguish that decision, but appeared to follow an earlier court of appeals decision, *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). 598 F. Supp. at 953. The district court also held that the "savings clause" in the Communications Act, 47 U.S.C. § 414, is inapplicable since the complaint "effectively challenges practices expressly and exclusively regulated . . . in 47 U.S.C. § 201." *Id.* at 954. Section 414 provides:

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

We believe a closer examination of *Nader* is required. The court of appeals in *Nader* held that the Aviation Act did not preempt all common law remedies for misrepresentational torts. *Nader v. Allegheny Airlines, Inc.*, 167 U.S. App. D.C. 350, 512 F.2d 527, 543 (D.C. Cir. 1975). This holding was not an issue before the Supreme [**19] Court. The court of appeals did hold that the particular misrepresentational tort alleged by the plaintiff arose from conduct that is regulated by the Aviation Act, and the case was stayed until the Civil Aeronautics Board could determine whether Allegheny's reservation practices were deceptive. *Id.* at 544. Thus, *Nader* was actually decided on primary jurisdiction grounds, not on preemption grounds.

The Supreme Court also decided *Nader* on primary jurisdiction grounds, but reversed the court of appeals upon concluding it was not a proper case for application of that doctrine. 426 U.S. at 304-07. However, before reaching its conclusion that the state law claims need not be referred to the administrative agency for preliminary consideration, the Supreme Court held, at least implicitly, that the claims were not preempted by federal law. In doing so, the Court distinguished *Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907), the seminal case on preemption. In *Abilene* the remedy sought by the plaintiff placed the court's common law authority and the agency's ratemaking power into direct conflict. In *Nader*, on the other hand, the Court found [**20] no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." 426 U.S. at 299.

We believe the district court erred in holding that the state law claims for fraud and deceit, based on the defendants' failure to notify customers of the practice of charging for uncompleted calls, were preempted by the Communications Act. These claims, unlike those based on section 201 of the Act, do not require agency expertise for their treatment and are "within the conventional experience of judges." *Far East Conference*, 342 U.S. at 574. The claims in this case are more nearly like those in *Nader* than the [*634] ones considered by the court of appeals in *Ivy Broadcasting Co.* There the complaint charged negligence and breach of contract in the rendition of interstate telephone service. The *Ivy* court held that the claims were preempted by federal common law even though they did not charge violations of specific provisions of the Communications Act. However, the alleged torts involved the level of service provided by the defendants, not a failure to notify customers of a practice. Finding that there was an implied congressional purpose to require uniformity [**21] and equality of service as well as of rates by communications companies, the court concluded that state law could not apply. If the state law claims in the present case related to rates or service rather than the failure to disclose, *Ivy* would be more persuasive. See *Kellerman v. MCI Telecommunications Corp.* 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24 (1986), cert.

denied, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986), where the Supreme Court of Illinois reached the same conclusions as we do concerning preemption of state law claims in the light of *Nader*.

We also conclude that the district court incorrectly found that the savings clause of the Communications Act does not apply to the state law claims. The language in 47 U.S.C. § 414 is almost identical to that of 49 U.S.C. § 1506, the savings clause of the Aviation Act. The Supreme Court in *Nader* found that the common-law action for fraudulent misrepresentation and the Aviation Act, not being "absolutely inconsistent," could coexist, "as contemplated by § 1106 [of the Aviation Act, 49 U.S.C. § 1506]." 426 U.S. at 300. The same reasoning applies in the present case and we believe the savings clause of the Communications Act does give the plaintiffs [**22] the option of pursuing their remedy at common law.

C.

Since we have held that the plaintiffs may pursue their state common law claims in the district court, there is no need to fashion federal common law or to consider whether such a body of law would be inconsistent with the regulatory scheme of the Communications Act. The court in *Ivy Broadcasting* found it necessary to apply federal common law for two reasons. It held that the Communications Act did not deal with the particular claims of negligence and breach of contract asserted by the plaintiffs and that state law actions were preempted by federal law in all matters related to "the duties, charges and liabilities" of telecommunications companies. 391 F.2d at 486-87. We have held that *Nader* preserves state common law actions against regulated companies where the activity in question is a failure to inform customers of a practice, not an attack on the practice itself. Thus, the plaintiffs have an avenue for judicial determination of these issues under their state law claims, and there is no need to resort to federal common law. Dismissal of Counts II, IV and V is affirmed.

IV.

The district court dismissed Count VI, the [**23] RICO Count, on the assumption that the FCC's determination of the reasonableness of the defendants' conduct would establish whether the RICO requirements of "injury," "crime" or "liability" were satisfied. 612 F. Supp. at 900. Our decision that the state common law claims of fraud and deceit are not preempted undercuts this reasoning. The plaintiffs are not confined to proving illegal acts by the defendants in their failure to act reasonably within the meaning of section 201(b). With the reinstatement of the *Lazar* claims, the RICO allegations are sufficient to survive a motion to dismiss. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

The order dismissing Count VI is vacated. The district court is free to stay proceedings on this count pending determination by the FCC of the reasonableness of the defendants' practice of failing to advise their customers of overcharging, since this determination may bear on the ultimate decision of the RICO claims.

[*635] V.

In No. 86-1599, *Lee v. Western Union Telegraph Co.*, the plaintiffs appeal from dismissal of their case which was transferred from the Northern District of California to the Eastern District of Michigan as a "tag-along" action. [**24] The Lees' original complaint was dismissed by the district court in California on primary jurisdiction grounds. While the plaintiffs' appeal was pending in the Ninth Circuit, the FCC decided *Bill Correctors*. The Lees construed the decision in *Bill Correctors* as answering the questions referred to the FCC by the district court, and dismissed their appeal. They then filed a new complaint in the Northern District of California. This was the action that was transferred to the Eastern District of Michigan. As noted earlier, this complaint is identical in its operative features with the consolidated complaint.

The district court applied its earlier primary jurisdiction and preemption rulings, made in connection with the consolidated complaint, to the Lees' transferred complaint. In addition the district court held that the Lee action was subject to dismissal under principles of *res judicata*. The Lees contend that *res judicata* does not apply because dismissal of their first action on primary jurisdiction grounds was a ruling of law, and that no fact issues were involved.

The Lees' claim should be treated as the others. Rather than dismissing it, the district court should **[**25]** have stayed further proceedings pending completion of the FCC proceedings. Application of issue preclusion *res judicata* required this treatment rather than dismissal.

The original dismissal of the Lees' complaint by the district court in California, while "valid and final, . . . does not bar another action by the plaintiff on the same claim." *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 844 (9th Cir. 1979) (citation omitted). When a plaintiff seeks to refile a claim following a dismissal on primary jurisdiction grounds, the "issue preclusion" aspect of *res judicata* controls.

Issue preclusion, unlike bar, forecloses litigation only of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment between the parties, whether on the same or a different claim. *Lawlor v. National Screen Service*, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955); *Cromwell v. County of Sac*, 94 U.S.(4 Otto) 351, 24 L. Ed. 195 (1876); *Russell v. Place*, 94 U.S.(4 Otto) 606, 24 L. Ed. 214 (1876); Restatement 2d, Judgments, § 68 (T.D. No. 1 1973).

Id. at 845 (footnote omitted).

The order of dismissal in No. 86-1599 is vacated and the case is remanded **[**26]** to the district court with directions to stay further proceedings until the FCC has determined the issues raised in the Lees' case. The district court may join the Lees' case with those included in the consolidated complaints.

We neither express nor intimate any opinion as to the merits of any of the plaintiffs' claims, as our consideration of these appeals is limited to procedural issues.

The judgment of the district court is affirmed in part, vacated in part and reversed in part, and both cases are remanded for further proceedings consistent with this opinion. No costs allowed on appeal.

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787 F. Supp. 852, *; 1992 U.S. Dist. LEXIS 5452, **

AMERICAN INMATE PHONE SYSTEMS, INC., Plaintiff, v. US SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP, Defendant.

Case No. 91- C 5948

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION

787 F. Supp. 852; 1992 U.S. Dist. LEXIS 5452; 70 Rad. Reg. 2d (P & F) 1387

March 31, 1992, Decided

April 1, 1992, Filed

CORE TERMS: Communications Act, removal, preemption, state-law, federal question, federal law, preempted, duty, verbal contract, Deceptive Business Practices Act, breach of contract, causes of action, state law, subject matter jurisdiction, telephone, breached, diversity jurisdiction, federal claim, savings clause, original jurisdiction, distinguishable, citizenship, interstate, interfere, preempt, common carrier, partnership, surcharges, fraudulent, preserved

JUDGES: [**1] ALESIA

OPINIONBY: JAMES H. ALESIA

OPINION: [*853] **MEMORANDUM OPINION AND ORDER**

Now before the court is plaintiff's motion to remand this action to state court, pursuant to 28 U.S.C. § 1447(c). Plaintiff filed its two-count complaint in state court seeking relief based on Illinois law. Defendant removed the action to this court claiming that federal law preempts plaintiff's state-law claims. For the reasons set forth below, we hold that defendant's removal was improper because this court lacks subject matter jurisdiction. Plaintiff's motion to remand is granted.

I. FACTS

Plaintiff American Inmate Phone Systems, Inc. ("AIPS") filed a two count complaint in the Circuit Court of Cook County against defendant US Sprint Communications Company Limited Partnership ("Sprint"). AIPS provides pay phone services to prisons and Sprint provides long distance phone service throughout the U.S.

In Count I of its complaint, AIPS alleges that Sprint entered into a verbal agreement to provide long distance service to AIPS and breached that agreement. The terms of the alleged agreement included: Sprint would waive all phone card surcharges to AIPS; Sprint would provide AIPS with forward discounting; Sprint [**2] would introduce procedures to reduce the number of fraudulent [*854] phone calls; and Sprint would provide a written agreement including these terms. (Complaint, at 1-3) In Count II, AIPS alleges Sprint violated the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121-1/2, paras. 261 *et. seq.* (Complaint, at 3-5)

Sprint answered the complaint and filed a counter-claim alleging that AIPS entered into a written contract for tariffed phone service and subsequently breached that contract by failing to pay for the service provided. Sprint filed a petition to remove the action to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1446(b). Sprint asserted that the federal court had original jurisdiction over the case under the

Communications Act, 47 U.S.C. §§ 151 *et. seq.*, pursuant to 28 U.S.C. § 1331.

AIPS has now moved to remand this action to the Circuit Court of Cook County and requested attorney's fees and costs as a result of wrongful removal pursuant to 28 U.S.C. 1447(c).

II. DISCUSSION

A. Standard of Review

On a motion to remand, the question before the court is its authority to hear [****3**] a case pursuant to the removal statute. n1 *Commonwealth Edison Co. v. Westinghouse Elec. Co.*, 759 F. Supp. 449, 451 (N.D. Ill. 1991). Whether removal was proper is determined from the record as a whole. *Kennedy v. Commercial Carriers, Inc.*, 739 F. Supp. 406, 409 (N.D. Ill. 1990). The party seeking removal, and not the party moving to remand, has the burden of establishing that the court has jurisdiction. *Commonwealth Edison*, 759 F. Supp. at 452. If the district court finds that it has no jurisdiction, the district court must remand the case to state court. *Commonwealth Edison*, 759 F. Supp. at 452.

-----Footnotes-----

n1 The removal statute provides:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

28 U.S.C. § 1441(b).

-----End Footnotes-----

B. Subject [**4**] Matter Jurisdiction**

Federal district courts are courts of limited subject matter jurisdiction. In general, a civil action brought in state court may be removed to federal court only if it could have been originally brought in federal court. 28 U.S.C. § 1441. The federal courts have jurisdiction either when the parties to the lawsuit are of diverse citizenship or when the case involves a federal question. 28 U.S.C. §§ 1331, 1332. Sprint has not based its removal on diversity jurisdiction. n2 Therefore, the jurisdiction necessary for removal of this case must be based on a question of federal law. The appropriate inquiry is whether the AIPS' state-law claim arises under federal law. n3 *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 812-13 (N.D. Cal. 1991).

-----Footnotes-----

n2 Neither AIPS or Sprint has discussed the question of diversity jurisdiction. 28 U.S.C. § 1332. If AIPS and Sprint are of diverse citizenship and the amount in controversy exceeds \$ 50,000, this court might well have jurisdiction over this suit independent of federal question jurisdiction. AIPS is an Illinois corporation. Complaint, at 1. Sprint is said to be Delaware-based limited partnership. This, however does not settle the question of diversity of citizenship. For purposes of diversity citizenship, the citizenship of all a limited partnership's partners must be considered. *Carden v. Arkoma Assoc.*, 494 U.S. 185, 110 S. Ct. 1015, 1017-22, 108 L. Ed. 2d 157 (1990); *Market Street Assoc. Ltd. Partnership v. Frey*, 941 F.2d

588, 589 (7th Cir. 1991). In any event, Sprint has not pleaded diversity jurisdiction in its petition for removal and, therefore, we do not consider whether we have diversity jurisdiction. [**5]

n3 The federal question statute provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331 (1991).

- - - - -End Footnotes- - - - -

When deciding whether a case warrants removal because a federal question is involved, a federal court must principally determine if the federal question appears on the face of plaintiff's complaint. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 575 (7th Cir.), cert. denied, 459 U.S. 1049, 74 L. Ed. 2d 618, 103 S. Ct. 469 (1982). A defendant cannot create a federal [*855] question by asserting an issue of federal law in a pleading or in a petition for removal. *Kerr-McGee*, 677 F.2d at 575. On the other hand, removal is proper if the plaintiff has attempted to avoid a federal forum by drafting an essentially federal claim in terms of state law. *Kerr-McGee*, 677 F.2d at 575. To provide grounds for removal the federal question must be a key element of the plaintiff's complaint. *Kerr-McGee*, 677 F.2d at 575.

A [**6] federal question does not appear on the face of the plaintiff's complaint when a defense of federal preemption is raised. *Lister v. Stark*, 890 F.2d 941, 943 (7th Cir. 1989), cert. denied, 112 L. Ed. 2d 584, 111 S. Ct. 579 (1990). Therefore, a preemption defense does not authorize removal of a case to federal court. *Lister*, 890 F.2d at 943. The Supreme Court, however, has created an exception to this rule. *Lister*, 890 F.2d at 943 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)). Under this exception, removal is proper when Congress has completely preempted an area of state law. When the complete preemption exception applies, the plaintiff's state-law claim is recharacterized as a federal claim. *Lister*, 890 F.2d at 943. Whether a cause of action has been completely preempted depends on the intent of Congress. *Lister*, 890 F.2d at 943.

Two inquiries are necessary to resolve the jurisdictional question of this case. *Lister*, 890 F.2d at 944. The first inquiry is whether a federal question appears on the face of plaintiff's [**7] complaint. If so, then the removal was proper. If no federal question appears on the complaint, the second inquiry is whether removal is proper under the complete preemption exception. *Lister*, 890 F.2d at 944.

In this case, AIPS' complaint does not allege a federal claim and federal law has not completely preempted state law in this area. As a result, this court does not have subject matter jurisdiction and must remand the matter to state court.

1. AIPS' Complaint

In the present case, Count I of AIPS' complaint alleges breach of a verbal contract entered into on or about March 12, 1990. Count II alleges violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Sprint argues, however, that AIPS' complaint alleges a breach of a written contract for long distance service entered into by the parties on May 15, 1990. Sprint contends that a tariff is incorporated into this contract and, as a result, AIPS is alleging a breach of a tariff.

In fact, AIPS' complaint alleges breach of a verbal contract. Neither count alleges a violation of the Communications Act or any other federal law or of Sprint's tariff. A defendant cannot create [**8] a federal question by asserting an issue of federal law in a pleading or in a petition for removal. *Kerr-McGee*, 677 F.2d at 575. Therefore, no federal cause of action appears on the face of AIPS' complaint. As a result, the second inquiry is whether removal is proper under the complete preemption exception.

2. Preemption

To determine whether the complete preemption exception applies requires an inquiry into Congress' intent in enacting a statute. *Lister*, 890 F.2d at 943. A few courts have addressed preemption in the context of the Communications Act. In *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968), the Second Circuit Court of Appeals found that the Communications Act completely preempted state common law actions against a telephone carrier for negligence or breach of contract. *Ivy* involved claims against AT & T for negligence and breach of contract. The court held that issues of duties, charges, and liabilities of telephone companies with respect to interstate communications service were to be governed solely by federal law. *Ivy*, 391 F.2d at 491. [**9] The court found that the states were precluded from acting in this area. The *Ivy* court considered various provisions of the Communications Act and found a congressional purpose of uniformity and equality of rates and service. *Ivy*, 391 F.2d at 491. [*856] According to the *Ivy* court, this purpose could be achieved only by the application of uniform federal law.

The court declines to follow *Ivy* for a number of reasons. First, the *Ivy* court did not address the "savings clause" of the Communications Act. The savings clause provides:

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. Since *Ivy*, other courts have addressed the remedies Congress had in mind when enacting § 414. See *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701 (1st Cir. 1977). The *Comtronics*, court interpreted § 414 as preserving state court claims for breaches of duties which are distinguishable from duties created by the Communications Act, such as breach of contract claims. *Comtronics*, 553 F.2d at 708, n.6. [**10] Other courts have approved state-law claims for fraud and deceit as well. See *In Re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633 (6th Cir. 1987). n4

-----Footnotes-----

n4 The *In re Long Distance Telecommunications Litigation* court compared § 414 to an almost identical savings clause contained in the Aviation Act, 49 U.S.C. § 1506. The court noted that the Supreme Court, in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), which involved a common law action for misrepresentation, held the Aviation Act savings clause as not "absolutely inconsistent" with the common law action. *In re Long Distance Litigation*, 831 F.2d at 634 (quoting *Nader*, 426 U.S. at 300).

-----End Footnotes-----

A single court in this district has considered this question. In *Bruss Co. v. Allnet Communication Services, Inc.*, 606 F. Supp. 401, 411 (N.D. Ill. 1985), Judge Nordberg determined that a complaint which alleged violations of the Illinois Consumer Fraud [**11] and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act, was

saved from preemption by § 414. In *Bruss*, the plaintiffs, former subscribers to the defendants' long-distance service, brought state-law claims for common law fraud and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act. Defendants moved to dismiss, arguing that the Communications Act preempted the state-law claims. *Bruss*, 606 F. Supp. at 409. The court applied § 414 to preserve the state-law actions, reasoning that the duties owed by defendants under these causes of action were distinct from the duties created by the Communications Act. *Bruss*, 606 F. Supp. at 411. Moreover, the court reasoned that the state-law causes of action prohibited different conduct from that prohibited by the Communications Act. *Bruss*, 606 F. Supp. at 411. In addition, the causes of action did not conflict with the provisions of the Communications Act or interfere with Congress' regulatory scheme. *Bruss*, 606 F. Supp. at 411.

AIPS, like the plaintiff in [**12] *Bruss*, is alleging Sprint violated the Illinois Consumer Fraud and Deceptive Business Practices Act. In addition, AIPS alleges that the Sprint breached a verbal contract. We agree with the *Bruss* court that a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act is preserved by § 414 of the Communications Act. In addition, we are persuaded by the *Bruss* court's reasoning to conclude that the duties created by the verbal contract are distinct from the duties created by the Communications Act. We also find that the contract claim neither conflicts with the provisions of the Communications Act nor interfere with the regulatory scheme of the Act. The alleged verbal contract between AIPS and Sprint set up a business relationship whereby Sprint would sell long distance service under certain terms and that AIPS would buy the long distance service under the terms stated.

Sprint argues that the terms of the alleged contract, that Sprint would waive certain telephone surcharges, would provide forward pricing discounts and would protect AIPS from fraudulent telephone calls raise an issue of whether Sprint's charges are "fair and reasonable". Memorandum [**13] of Law in Support of Defendant's Petition for Removal, at 3. If this were true, then AIPS' suit would be specifically preempted [*857] by the Communications Act. 47 U.S.C. §§ 201(b), 207. n5 However, the duty set forth in § 201(b) requiring "just and reasonable" practices is different than the duty allegedly breached by Sprint. AIPS is not alleging that Sprint's verbal promises were not just and reasonable. AIPS is alleging that Sprint made the promises to provide forward discounting, to waive certain surcharges and to protect AIPS from fraudulent charges and then did not fulfill these promises. AIPS is not alleging Sprint breached its statutory duty to act in a just and reasonable manner. Rather, AIPS is alleging Sprint failed to abide by a verbal contract the parties allegedly entered into, a contract imposing duties different than those found in the Communications Act.

-----Footnotes-----

n5 Section 201(b) states:

All charges, practices, classifications and regulations for an in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . .

Section 207 states:

Any person claiming to be damaged by any common carrier subject to the

provisions of this chapter may either make complaint to the Commission . . . , or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

-----End Footnotes----- [**14]

While not controlling on us here, we note that the Illinois Supreme Court, in a case involving facts similar to *Bruss*, reached the same conclusion as that of the *Bruss* court. See *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24 (Ill.), cert. denied, 479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 434 (1986). In *Kellerman*, plaintiffs, who were subscribers to the defendant's long-distance service, brought action under the Illinois Consumer Fraud and Deceptive Practices Act and the Illinois Uniform Deceptive Trade Practices Act. The *Kellerman* plaintiffs charged that the defendant's advertising practices constituted breach of contract and common law fraud. *Kellerman*, 493 N.E.2d at 1045. The court found that § 414 indicated Congress' desire to preempt only those claims which interfered with the congressional objective, embodied in the Communication Act, of providing a national communication system with adequate facilities at reasonable charges. However, the Illinois Supreme Court concluded § 414 would not preempt state-law claims for breach of contract and fraud which were not contrary to the Act's objectives.

It is reasonable [**15] to presume that State laws which interfere with Congress' objective of creating "a rapid, efficient, Nation-wide, * * * communication service with adequate facilities at reasonable charges" (47 U.S.C. sec. 151 (1982)), such as State attempts to regulate interstate carriers' charges or services, would be preempted by the Act. (See, e.g. *Komatz Construction, Inc. v. Western Union Telegraph Co.* (1971), 290 Minn. 129, 186 N.W.2d 691 (action against telegraph company for damages caused by delay in transmission of telegram is governed by Federal law).) However, we believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act. . . ." State law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Kellerman, 493 N.E.2d at 1051 (ellipses original; some citations omitted). According to the court, claims involving the quality [**16] of the defendant's service or the reasonableness and lawfulness of its rates would be preempted, while actions relating to breaches distinguishable from the Act, in *Kellerman*, false advertising and breach of contract, could be pursued under state or federal law. *Kellerman*, 493 N.E. 2d at 1051-52.

AIPS' complaint does not allege that Sprint's charges are unreasonable or unfair. [*858] AIPS does not attack the quality of Sprint's services. AIPS seeks to demonstrate the existence of a verbal contract and to hold Sprint to the terms of the contract. Alternatively, AIPS seeks to recover for Sprint's alleged misrepresentation. Despite Sprint's status as a common carrier controlled in large measure by statute, Sprint is still held to the same duties as normal business entities when entering into contracts or when making business representations. The need for a nationwide system of rapid, efficient communication does not alone justify a federal court's determination of exclusive jurisdiction. *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 864-65 (2d Cir. 1986), cert. denied, 479 U.S. 1055, 93 L. Ed. 2d 981, 107 S. Ct.

929 (1987); *Kellerman*, 493 N.E.2d at 1052. [**17] Accordingly, AIPS' state-law contract claim is preserved by § 414.

The second reason the court declines to follow *Ivy* is because the analysis in *Ivy* predates relevant Supreme Court preemption analysis. The court in *Boyle v. MTV Networks, Inc.* analyzed the complete preemption exception in connection with the Communications Act. *Boyle*, 766 F. Supp. at 809. In *Boyle*, the district court held that plaintiff's claim under California's deceptive business practice act was not preempted by the Communications Act. n6 The court determined that the Supreme Court has found complete preemption only in limited circumstances. *Boyle*, 766 F. Supp. at 815 (primarily in cases raising claims preempted by § 301 of the Labor Management Relations Act). More importantly, in analyzing the complete preemption doctrine, the court noted that the Second Circuit's approach to preemption under the Communications Act, see *Nordlicht*, 799 F.2d at 864-65, following *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486 (2d Cir. 1968), predated the Supreme Court's complete preemption analysis in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987) [**18] and *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). *Boyle*, 766 F. Supp. at 816. The *Boyle* court stated:

Although jurisdiction for a suit under [Communications Act] section 202 is arguably contemplated by section 207, Defendants have not pointed to and the Court is not aware of any language in the statute or its legislative history to support the proposition that Congress has *clearly manifested an intent to make such causes of action removable to federal court.*

* * *

Defendants cite two Second Circuit cases for the proposition that Plaintiff's state law cause of action is pre-empted by the [Communications Act]. These cases, however, were decided before *Metropolitan Life and Caterpillar*. Additionally, *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 862-63 (2d Cir. 1986), held that *federal common law*, rather than section 207 of the [Communications Act], pre-empted the state law causes of action for fraud and for money had and received. In *Nordlicht*, the Second Circuit did not discuss the Supreme Court's "complete pre-emption" analysis, but instead followed its prior decision in *Ivy Broadcasting Co. v. AT & T*, 391 F.2d at 486, 489-91 (2d Cir. 1968). [**19] To the extent that the Second Circuit cases are inconsistent with the Supreme Court's analysis of "complete pre-emption," this Court respectfully declines to follow them.

Boyle, 766 F. Supp. at 816 (emphasis original). We agree that the Second Circuit's approach to preemption under the Communications Act should not be followed.

-----Footnotes-----

n6 The *Boyle* court was examining § 202(a) of the Communications Act which prohibits a common carrier from practicing "unjust or unreasonable discrimination in . . . practices . . . or services. . . ." 47 U.S.C. § 202(a); *Boyle*, 766 F. Supp. at 815. That the *Boyle* court was examining § 202(a), whereas here we are examining section 201(b), does not make the *Boyle* court's reasoning any less persuasive to us. Section 201(b) is similar to § 202(a) in that both sections prohibit unjust or unreasonable practices.

-----End Footnotes-----

We find that the AIPS' state-law claims for breach of a verbal contract and violation of the Illinois Consumer Fraud and [*859] Deceptive [**20] Business Practices Act are not

preempted by federal law.

C. Costs and Attorney's Fees

AIPS has requested payment of costs and attorney's fees as a result of improper removal of this case. Title 28, section 1447(c) of the United States Code provides that an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The present case involves complex issues and Sprint has presented a substantial jurisdictional question. *Boyle*, 766 F. Supp. at 817; *Turner v. Bell Federal Savings and Loan Association*, 490 F. Supp. 104, 105 (N.D. Ill. 1980). There is no indication that Sprint acted in bad faith. *Whitestone Savings and Loan Ass'n v. Romano*, 484 F. Supp. 1324, 1327 (E.D. N.Y. 1980).

AIPS is not entitled to costs and expenses incurred in responding to Sprint's petition for removal.

III. CONCLUSION

The court lacks federal question subject matter jurisdiction because AIPS' complaint does not state a federal claim and AIPS' state-law claim is not preempted by the Communications Act. AIPS' motion to remand this matter to [****21**] the state court is GRANTED. AIPS is not entitled to attorney's costs and expenses incurred in responding to Sprint's motion. AIPS' requests for costs and attorney's fees is DENIED. This matter is REMANDED to the Circuit Court of Cook County, Illinois, County Department, Chancery Division.

Date: March 31, 1992

JAMES H. ALESIA

United States District Judge

Service: LEXSEE®
Citation: 787 f.supp. 852
View: Full
Date/Time: Monday, January 3, 2000 - 11:21 AM EST

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606 F. Supp. 401, *; 1985 U.S. Dist. LEXIS 21022, **

THE BRUSS COMPANY, an Illinois corporation, and HINCKLEY & SCHMITT, INC., an Illinois corporation, individually and on behalf of all other persons similarly situated, Plaintiffs, v. ALLNET COMMUNICATION SERVICES, INC., an Illinois corporation, MICHAEL P. RICHER, MELVYN J. GOODMAN, ROBERT F. DOWNING, and JULIA A. VINSON, Defendants

No. 84 C 3611

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

606 F. Supp. 401; 1985 U.S. Dist. LEXIS 21022; 58 Rad. Reg. 2d (P & F) 84

April 4, 1985

CORE TERMS: Communications Act, tariff, carrier, common law, causes of action, et seq, cause of action, overcharge, preempted, primary jurisdiction, federal common law, savings clause, distance, entity, duty, particularity, plead, pattern of racketeering activity, regulatory scheme, person liable, state law, racketeering, interstate, indirectly, customers, Federal Communications Act, administrative agencies, motion to dismiss, common law fraud, foreign commerce

JUDGES: [**1]

Judge John A. Nordberg.

OPINIONBY: NORDBERG

OPINION: [*403]

Judge John A. Nordberg

MEMORANDUM OPINION AND ORDER

This action is before the court on joint motion of all defendants to dismiss plaintiffs' Second Amended Complaint. For the reasons set forth below, defendants' motion is granted in part and denied in part.

Facts

Defendant Allnet Communication Services, Inc. ("Allnet") is a provider of long distance telephone service. It is subject to the Federal Communications Act of 1934, 47 U.S.C. § 201 et seq., and to the rules, regulations, directions and orders of the Federal Communications Commission ("FCC"). The individual defendants, Michael P. Richer, Melvyn J. Goodman, Robert [*404] F. Downing, and Julia A. Vinson, are executives, officers and/or directors of Allnet. Plaintiffs, The Bruss Company and Hinckley & Schmitt, Inc., are both former subscribers to Allnet's long distance telephone service.

Plaintiffs have sued under various legal theories, on behalf of themselves and others similarly situated, for alleged overcharges by Allnet for long distance service. In Counts I and II, plaintiffs allege alternate violations of the Racketeer Influenced and Corrupt [*2] Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Count III alleges a cause of action under the Federal Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 201 et seq. The remaining counts allege state law claims for common law fraud (Count IV), violations of the Uniform Deceptive Trade Practices Act, Ill. Rev. Stat. ch. 121 1/2, § 311 et