F.2d 845, 854, 174 U.S. App. D.C. 1 (D.C. Cir. 1976)).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 See e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981) (applying doctrine to natural gas companies); Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 59 L. Ed. 853, 35 S. Ct. 494 (1915) (applying doctrine to railroads); Massaponax Sand & Gravel Corp. v. Virginia Elec. & Power Co., 166 Va. 405, 186 S.E. 3 (Va. 1936) (applying doctrine to electric companies).

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Marco Supply Co. v. AT&T Communications, Inc., 875 F.2d 434 (4th Cir. 1989), is illustrative of the typical application [**19] of the filed tariff doctrine in the telecommunications industry. In that case, Marco Supply Company ("Marco") allegedly had contracted with AT&T for installation of a computer-telephone network, but discovered that it was being charged more than the prices stated in the contract. The Fourth Circuit held that section 203 of the Communications Act required AT&T to charge all of its customers only those rates established in the tariffs filed with the FCC. The court stated:

> The general case law is that a regulated carrier must charge the tariff rate established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to its customer.

Id. at 436. The court also noted, generally, that "the aggrieved customer cannot assert that the carrier is estopped to charge the actual tariff rate because customers are presumed to know what the applicable tariff is." Id. Further, the court explained that the purpose of the doctrine is to prevent discrimination between customers, so Marco could not enforce the contract rates which were different from the filed tariffs. Id.

In the instant case, AT&T points out that section 203 [**20] of the Act requires filing of tariffs not only as to the rates to be charged, but also with regard to the classifications, regulations, and practices affecting such charges. AT&T asserts that CCI's claims pertain to AT&T's business practices in providing telecommunications services, and therefore, inasmuch as CCI's claims against AT&T are based upon the alleged misrepresentations by AT&T regarding its rates, practices, or services, those claims are barred by the filed tariff doctrine. This Court declines to read the word "practices" so broadly. AT&T [*1519] has cited no case law in support of such a reading. n3

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n3 The majority of cases interpreting or applying section 203 pertain to rates and not practices. See, e.g., Marco, 875 F.2d at 436 (holding that accidental or intentional misquotation of rate governed by filed tariff could not alter terms of parties' contract); MCI Tel. Corp. v. TCI Mail, Inc., 772 F. Supp. 64 (D.R.I. 1991) (same).

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Additionally, [**21] CCI is quick to point out a major difference between typical filed-tariff cases and the case at bar: CCI is not seeking to enforce the misrepresentations. Unlike the plaintiff in Marco, who was attempting to enforce a contract containing rates below the tariff rates, CCI is not seeking to enforce AT&T's alleged misrepresentations. Rather, CCI claims that AT&T made fraudulent representations to CCI's customers regarding the rates that CCI would charge and the dealings between AT&T and CCI. CCI is seeking damages for

intentional interference with prospective economic relations and business disparagement resulting from those alleged misrepresentations. Allowing CCI to proceed with its state law claims will not result in discrimination against other AT&T customers in favor of CCI. Therefore, this Court holds that the filed tariff doctrine does not act to bar CCI's state law claims against AT&T.

V. APPLICATION OF COMMUNICATIONS ACT STATUTE OF LIMITATIONS TO STATE LAW CLAIMS

Finally, AT&T moves this Court to strike from CCI's complaint all allegations regarding alleged wrongful acts by AT&T that occurred more than two years prior to the filing of the complaint, based on the two-year [**22] statute of limitations in the Communications Act, 47 U.S.C. § 415(b). However, this Court has held supra that CCI's state law claims do not arise under the Communications Act, but stand alone as separate state law claims. Accordingly, the state law claims are not governed by the statute of limitations contained in the Federal Communications Act.

Based on the foregoing, it is hereby

ORDERED, that AT&T's motion to dismiss CCI's state law claims on grounds of preemption is DENIED; it is further

ORDERED, that AT&T's motion to dismiss CCI's federal claim and any state law claims not preempted as being barred by the filed tariff doctrine is DENIED; it is further

ORDERED, that plaintiff is granted leave to amend and reassert the Seventh Cause of Action within 15 days from the date of this Order; it is further

ORDERED, that AT&T's motion to strike allegations regarding acts occurring more than two years prior to the filing of the complaint as being outside of the Communication Act's statute of limitations is DENIED.

DATED: November 15, 1994

J. THOMAS GREENE

UNITED STATES DISTRICT JUDGE

Service: **LEXSEE®**
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*1995 U.S. Dist. LEXIS 4798, **

CELLULAR DYNAMICS, INC., Plaintiff, v. **MCI TELECOMMUNICATIONS CORPORATION,** Defendant.

Case No. 94 C 3126

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

1995 U.S. Dist. LEXIS 4798

April 6, 1995, Decided
April 12, 1995, DOCKETED

CORE TERMS: customer, Communications Act, tariff, cellular, pre-empted, motion to dismiss, carrier, consumer fraud, promotion, Illinois Consumer Fraud Act, federal law, primary jurisdiction, telephone, state law, telecommunication, interfere, data base, consumers, specialized knowledge, federal common law, regulatory scheme, telephone service, false advertising, savings clause, common law, regulation, marketing, station, duties, breach of contract

COUNSEL: [*1] For CELLULAR DYNAMICS, INC., an Illinois corporation, plaintiff: Nathan H. Dardick, Arnold A. Pagniucci, Michael David Richman, Sachnoff & Weaver, Ltd., Chicago, IL.

For MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation, defendant: Brian W. Lewis, Lauren Smith Tashma, Wildman, Harrold, Allen & Dixon, Chicago, Il. Robin L Redfield, MCI Telecommunications Corporation, Washington, D.C.

JUDGES: Ann Claire Williams, Judge, United States District Court

OPINIONBY: Ann Claire Williams

OPINION: MEMORANDUM OPINION AND ORDER

On May 19, 1994, Cellular Dynamics, Inc., an Illinois based reseller of cellular telephone services, brought suit against MCI Telecommunications Corp. ("MCI"), a carrier of long distance telephone services, for damages following MCI's cancellation of the planned transfer of Cellular Dynamics' more than 5,300 customers to MCI. Cellular Dynamic alleges breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. (1993). MCI has moved to dismiss both counts pursuant to Fed. Rule Civ. P. 12(b)(6). For the reasons stated below, the motion is granted in part and denied in part.

Background n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 For purposes of this motion to dismiss, the court accepts all of the facts alleged in Cellular's complaint as true. Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992).

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As a reseller of cellular services, [*2] Cellular Dynamics purchases cellular air-time from cellular providers and resells that time to consumers at retail. (Compl, P 6). As of January

1994, Cellular Dynamics had at least 5,300 cellular customer lines. (Id.).

In December 1993, Greg Chatfield, an MCI sales representative, first contacted Cellular Dynamics' President, Steven DeMar, regarding the transfer of Cellular Dynamics' long distance cellular business to MCI. As Chatfield explained to DeMar, Cellular Dynamics would receive $ 50 from MCI for each cellular customer line that Cellular Dynamics could transfer to MCI. (Complaint, P 9). Chatfield and his supervisor, Dayle Thomas, later confirmed these terms in a brief memo they sent to DeMar the following month. (Id.).

On January 26, 1994, DeMar responded. DeMar wrote a letter to Chatfield explaining that he was interested in transferring his customer base to MCI, but had certain conditions that first needed to be met:

> Just to reiterate Cellular Dynamics [sic] position. We are willing to move our long distance business to M.C.I. given the following representations we have received from M.C.I.
>
> 1) A magnetic billing tape sent to our billing vendor.
>
> 2) [*3] A direct response check for $ 50 per customer, sent to Cellular Dynamics upon changing service.
>
> 3) MCI Preferred Benefits...
>
> 4) Pic fee switching credit of $ 5.00 per line.
>
> 5) M.C.I. lifetime satisfaction guarantee.
>
> If this is what you can deliver...Lets [sic] do business.

(Compl., P 10). Along with the letter, DeMar sent Chatfield a one-page print out from a 200-page customer data base of its cellular customer list, purportedly as an example of the information that would be provided in exchange for the conditions outlined above. (Id.).

The next day, DeMar telephoned Chatfield to confirm that the conditions were acceptable. Chatfield assured him that they were. The bargain was struck. (Compl., P 11). DeMar immediately sent MCI all 200 pages of Cellular Dynamics' data base, containing all of the information MCI needed to effect the transfer. (Id., P 12). After receiving the materials, Chatfield telephoned DeMar to let him know that the 200-page data base was satisfactory. (Id., P 14).

A few weeks later, MCI decided not to pay Cellular Dynamics the promised $ 50 per line, and attempted to cancel the deal. After its demands that MCI comply [*4] with the terms of the parties' agreement were rebuffed, Cellular Dynamics filed this suit seeking $ 265,000 in damages.

Standard of Review

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. Triad Assocs. v. Chicago Housing Authority, 892 F.2d 583, 586 (7th Cir. 1989). Thus, when ruling on a motion to dismiss, the court will "take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiff[s]." Ellsworth v. City of Racine, 774 F.2d 182, 184 (7th Cir. 1985). A complaint should not be dismissed "if relief is possible under any set of

facts that could be established consistent with the allegations." Bartholet, 953 F.2d at 1078.

Discussion

I. Preemption

Defendant MCI moves to dismiss Cellular Dynamics' claims on the ground that they are pre-empted by the Federal Communications Act (the "Communications Act"), 47 U.S.C. §§ 151-613 (1991 & Supp. 1994). Passed in 1934, at a time when AT&T held a virtual monopoly over the nation's telephone service, the Communications Act was expressly enacted [*5] to "make available, as far as possible, to all the people of the United States a rapid, efficient, Nationwide and worldwide wire and radio communications service with adequate facilities at reasonable charges...." 47 U.S.C. § 151. The Act requires carriers to provide telephone service when presented with a reasonable request. 47 U.S.C. § 201(a). Carriers must also file tariffs containing a charge schedule and any classifications, regulations, or practices affecting charges. §§ 203(a),(c). The rates must be reasonable, and carriers cannot engage in unreasonable or discriminatory practices. §§ 201(b), 202(a), 202(c).

Congressional purpose is "the ultimate touchstone" in any federal pre-emption analysis. Cipollone v. Liggett Group, Inc., 120 L. Ed. 2d 407, 112 S. Ct. 2608, 2617 (1992). In cases like this one, where Congress has not explicitly stated its intention to supersede state law, the court looks to the structure and purpose of the statute. Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law [*6] so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Cipollone, 112 S. Ct. at 2617.

This case is not the first time a court has been asked to examine the pre-emptive reach of the Communications Act. In Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968), one of the first cases to address the issue, the Second Circuit held that federal common law emanating from the Act pre-empted plaintiff's state law negligence and contract law claims. Plaintiff, a radio broadcasting station operator, had sought to hold AT&T liable for the negligent installation and operation of telephone lines over which its stations' broadcasts were transmitted. Id. at 488. After noting the broad scope and comprehensive nature of the Communication Act, the court found that Congress intended to preempt the entire field:

> Questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area. Where neither [*7] the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law.

Id. at 491.

As numerous courts have since noted, the Ivy court failed to discuss the Communications Act's "savings clause" which provides:

> § 414 Exclusiveness of Chapter
> 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. Courts to address this issue since Ivy have generally held that Congress' decision to include a savings clause in the Act evidences its desire to preserve those state court claims for breaches of independent duties that neither conflict with specific provisions of the Act, nor interfere with its regulatory scheme. See Bruss Co. v. Allnet Communication Services, Inc., 606 F. Supp. 401, 410-11 (N.D. Ill. 1985) (preserving plaintiff's Illinois common law and statutory fraud claims); Kellerman v. MCI Telecommunications Corp., 112 Ill. 2d 428, 493 N.E.2d 1045, 1051, 98 Ill. Dec. 24 (Ill. 1986) (fraud claims [*8] arising out of defendant's allegedly false advertising practices not pre-empted); American Inmate Phone Systems, Inc. v. US Sprint Communications Co., 787 F. Supp. 852, 856-59 (N.D. Ill. 1992) (contract and consumer fraud claims preserved); Cooperative Communications v. AT&T Corp., 867 F. Supp. 1511, 1515-17 (D. Utah 1994) (intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing and unfair competition). Applied properly, this rule harmonizes Congress' obvious desire to preserve certain state court claims with its clear purpose in enacting the Communications Act of ensuring reasonable, non-discriminatory telecommunications service for all Americans. Persuaded by the balanced rationale set forth in these post-Ivy cases, the court rejects defendant's suggestion that Congress has pre-empted all state claims affecting telecommunication services, and will instead examine each of Cellular Dynamics' claims individually to determine whether the requested relief conflicts with any specific provisions of the Act or interferes with its regulatory scheme.

The court has little [*9] trouble finding that plaintiff's consumer fraud claim is not pre-empted by the Communications Act. Like the false advertising practices challenged in Kellerman and Bruss, supra, the wrong complained of here does not implicate MCI's rates or service, but rather the manner in which MCI markets its services. As broad as it is, the Communications Act does not purport to regulate specific sales strategies and marketing devices employed by telecommunication carriers. As noted above, the Communications Act is primarily concerned with the quality, price, and availability of the underlying service. Because allowing Cellular Dynamics to recover damages for any injuries it suffered as a result of MCI's allegedly fraudulent marketing strategies neither conflicts nor interferes with any provision, regulation, or policy underlying the Act, the court finds that plaintiff's consumer fraud claim is not pre-empted.

Cellular Dynamics' breach of contract claim raises different concerns. As defendant MCI notes in its reply brief, MCI's tariff on file with the Federal Communications Commission ("FCC") specifically addresses, and critically, limits, promotions similar to the one MCI offered plaintiff. [*10] n2 Section C.10(c) of the tariff states:

> From time to time, MCI will offer one or more of the following promotions to customers responding to media advertising, direct mail materials, telemarketing promotions and/or personal sales presentations, which offer such promotions.... The benefits will be provided . . . (2) by issuing to the customer a check, coupon, or certificate redeemable by, or payable to, the customer, MCI, or a cooperating LEC or other promotional benefit including goods or services delivered to the Subscriber or coupons, upgrades or discounts on goods or any award under this promotion shall not exceed one full month's usage (including monthly recurring charges) charges and access charge or its equivalent . . . or $ 300.00, whichever is greater.

(MCI Tariff F.C.C. No. 1, § C.10(C). This information was properly included in MCI's tariff under section 203 of the Communications Act as a practice affecting the rates for its services.

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n2 The court takes judicial notice of the tariff as a matter of public record. See United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991); Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1357 (1990).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*11]

In seeking expectation damages, as opposed to consequential damages, for MCI's breach of the contract, plaintiff, in effect, seeks the benefits of a bargain that is not available to the public at large under MCI's tariff. Yet, as courts have held again and again, a regulated carrier's actual rates and related practices must be consistent with the tariff rates and practices established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to its customer. See Marco Supply Co. v. AT & T Communications, Inc., 875 F.2d 434, 436 (4th Cir. 1989); MCI Telecommunications Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387-388 (8th Cir. 1992); Louisville & N. R. Co. v. Maxwell, 237 U.S. 94, 59 L. Ed. 853, 35 S. Ct. 494 (1915). To permit otherwise would allow carriers to discriminate among customers, and frustrate one of the central purposes of the Communications Act generally and section 203 in particular. Accordingly, the court holds that Cellular Dynamics' contract claim, through which it seeks to secure benefits unavailable to other MCI customers under the tariff, is pre-empted by federal law. MCI's motion to dismiss this claim is granted. [*12]

II. Primary Jurisdiction

In the alternative, MCI seeks to have this case referred to the FCC under the doctrine of primary jurisdiction. Under this doctrine, courts may refer matters within the special expertise of an administrative agency to that body for its review. United States v. Western P. R. Co., 352 U.S. 59, 63-64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). Cases that require a specialized knowledge of specific economic or technical or uniformity in outcome are often the best candidates for referral under the primary jurisdiction doctrine. Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976). In the case at hand, the only remaining claim arises under the Illinois Consumer Fraud Act. The proper resolution of this claim requires no specialized knowledge of the telecommunications industry nor any administrative expertise. MCI's motion to dismiss under the doctrine of primary jurisdiction is therefore denied.

IV. Standing under the Illinois Consumer Fraud Act

Finally, MCI challenges Cellular Dynamics' standing to bring its consumer fraud claim, arguing that the Illinois Consumer Fraud Act was never designed to reach the type [*13] of "purely private wrong" plaintiff seeks to redress here. Despite its intuitive appeal, defendant's argument simply does not hold up under the most recent Illinois case law interpreting the statute.

As defendant recognizes, the Illinois legislature recently clarified the broad scope of the *Illinois Consumer Fraud Act, adding a provision stating that: "Proof of a public injury, a* pattern or an effect on consumers generally shall not be required." 715 ILCS 505/10(a). Under recent Illinois case law interpreting the Act, plaintiffs no longer need to prove a pattern of deceptive acts affecting consumers generally. See Breckenridge v. Cambridge Homes, 246 Ill. App. 3d 810, 616 N.E.2d 615, 622-23, 186 Ill. Dec. 425 (Ill. App. 1993); Rubin v. Marshall Field & Co., 232 Ill. App. 3d 522, 597 N.E.2d 688, 694, 173 Ill. Dec. 714 (Ill. App. 1992). "A single deceptive act is sufficient to support recovery under the Act." Breckenridge, 616 N.E.2d at 623. Thus, plaintiff's failure to allege a public wrong is not fatal to its claim. MCI's motion to dismiss Cellular Dynamics' consumer fraud claim for lack of standing is denied.

Conclusion

For the foregoing reasons, MCI's motion [*14] to dismiss is granted with respect to Count I and denied with respect to Count II. A settlement conference will be scheduled in this case with the entry of this order. The parties shall fully explore the settlement of this case well before the scheduled conference.

ENTER:

Ann Claire Williams, Judge

United States District Court

Dated: APR - 6 1995

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