

An appropriate Order follows.

JOEL A. PISANO

UNITED STATES MAGISTRATE JUDGE [***none**]

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in 165 F.R.D. 431.1

ORDER

JOEL A. PISANO, UNITED STATES MAGISTRATE JUDGE:

Before the Court are two motions: first, defendant Sprint Corporation has moved the Court for a stay pending resolution of its application for assignment of the case by the Judicial Panel for Multidistrict Litigation. Plaintiff Martin Weinberg has opposed this motion and moved the Court to remand the action to the New Jersey Superior Court, Bergen County, the court from which defendant removed the suit. Defendant has opposed this motion, and the Court heard oral argument [****34**] on March 25, 1996.

For the reasons set forth in the accompanying Opinion, and for good cause having been shown,

IT IS on this 9th day of April, 1996,

ORDERED that plaintiff Marvin Weinberg's motion to remand this action to New Jersey Superior Court is **GRANTED**; and it is further

ORDERED that defendant Sprint Corporation's motion to stay this proceeding is **DENIED** as moot.

JOEL A. PISANO

UNITED STATES MAGISTRATE JUDGE

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Service: **Get by LEXSEE®**
Citation: **831 f2d 627**

Case #4

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

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: [1]**

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:

On Appeal from the United States District Court for the Eastern District of Michigan.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff customers challenged the decision of the United States District Court for the Eastern District of Michigan, which dismissed their claim against defendant telephone companies under 47 U.S.C.S. § 201(b), part of the Federal Communications Act of 1934, 47 U.S.C.S. § 151 et seq., by relying on the doctrine of primary jurisdiction and dismissed their federal common law claims because they were preempted by federal statute.

OVERVIEW: Plaintiff customers charged violations of federal statutes and of state and federal common law based on the defendant phone companies' practice of charging for uncompleted calls, charging for ring time and holding time, and for failing to inform customers of this practice. In granting the telephone companies' motion to dismiss, the district court found that it would be more appropriate for the Federal Communications Commission (FCC) to make the determination regarding the reasonableness of the practices under 47 U.S.C.S. § 201(b). Therefore, relying on the doctrine of primary jurisdiction, the district court dismissed the statutory claim and referred the issue to the FCC. The customers' common law claims were dismissed because the court found that it was unnecessary to imply such claims where there was already a statute broad enough to address the issues and provide relief. The court affirmed in part, holding that claims based on § 201(b) were within the primary jurisdiction of the FCC. The court disagreed with the lower court on the issue of state common law claims of fraud and deceit. They were not preempted. They did not require agency expertise for their treatment.

OUTCOME: The judgment of the district court was affirmed in part, vacated in part, and reversed in part. The consolidated cases are remanded for further proceedings. No costs

were allowed on the appeal. Upon remand the district court was to stay further proceedings pending action by the Federal Communications Commission pursuant to an order of referral.

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, conventional

CORE CONCEPTS - ♦ Hide Concepts

 Communications Law : Federal Acts : Communications Act
 See 47 U.S.C.S. § 207.

 Antitrust & Trade Law : Industry Regulation : Jurisdiction

 Administrative Law : Judicial Review : Reviewability : Jurisdiction & Venue

 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 specialized competence serve as a 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.

 Antitrust & Trade Law : Industry Regulation : Jurisdiction

 Administrative Law : Judicial Review : Reviewability : Jurisdiction & Venue

 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" applies where a claim is originally cognizable in the courts, and comes into play 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.

 Antitrust & Trade Law : Industry Regulation : Jurisdiction

 Administrative Law : Judicial Review : Reviewability : Jurisdiction & Venue

 The doctrine of primary jurisdiction does more than prescribe the mere procedural timetable 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.

 Antitrust & Trade Law : Industry Regulation : Jurisdiction

 Administrative Law : Judicial Review : Reviewability : Jurisdiction & Venue

 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

litigation. These reasons and purposes have often been given expression by the Supreme 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. In the later cases, the expert and specialized knowledge of the agencies involved has been particularly stressed.

 Civil Procedure : Appeals : Appellate Jurisdiction : Final Judgment Rule

✦ The denial of a motion to remand is not a final, appealable order under 28 U.S.C.S. § 1291.

 Communications Law : Federal Acts : Communications Act

+ See 47 U.S.C.S. § 414.

 Civil Procedure : Preclusion & Effect of Judgments : Res Judicata

✦ 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 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.

COUNSEL: Fay Clayton, Carolyn Hope Rosenberg (argued) Safer Sachnoff, Weaver & Rubenstein, Ltd., Charles R. Watkins, Lawrence W. Abel, Esq., Greenfield & Chimicles, Mark F. Anderson, James A. Mangione, Margaret G. Dobies, Mitchell S. Golden (Allnet Comm.), Attorneys, for Appellant.

Richard J. Gray (MCI Telecom.) (argued), Howard G. Kristol, Wm. I. Sussman, Reboul, MacMurray, HeWitt, Maynard, & Kristol, Michael W. Ward, John F. Ward, Jr., Robert P. Hurlbert, Maureen H. Burke, Robert M. Chilvers, Robert L. Sills, Reboul, MacMurray, Hewitt, Maynard & Kristol, Attorneys, for Appellee.

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 [****2**] 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 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 **[**3]** 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 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. Sudd. 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 **[**4]** 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 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- ----- **[**5]**

The district 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).

[6]** (Long Distance Litigation). The plaintiffs' federal 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 **[**7]** passed over. This is so even though the facts after they have been appraised by **[*630]** specialized competence serve as a 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 **[**8]** 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 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.

* * *

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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: **[**9]**

✚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 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 **[**10]** 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 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." *Con9 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) **[**11]** (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 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 **[**12]** 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, 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 **[**13]** 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 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 **[**14]** 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 **1** 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 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. 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 **[**15]** 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 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 *Farfast* 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 **[**16]** 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, 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 **[**17]** 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* complaints were not repeated in the consolidated complaint. The district court's conclusion that **[*633]** the 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). **[**18]** 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 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). **[**19]** 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 Court. The court of appeals did 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 **[**20]** 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 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 **[**21]** 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 and equality of service as well as of rates by communications companies, the court concluded that state law could not apply. ¶The state law claims in the present **[**22]** 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 **[**23]** plaintiffs 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. **[**24]**

The district court dismissed Count VI, the 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. Sudd. 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 **[**25]** case which was transferred from the Northern District of California to the Eastern District of Michigan as a "tag-along" action. 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 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 resjudicata does not apply because dismissal of their first action on primary jurisdiction grounds was a ruling of law, and **[**26]** that no fact issues were involved.

The Lees' claim should be treated as the others. Rather than dismissing it, the district court should have stayed further proceedings pending completion of the FCC proceedings. Application of issue preclusion resjudicata 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 resjudicata 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); **[**27]** 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 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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606 F. Supp. 401, *, 1985 U.S. Dist. LEXIS 21022, **;
 58 Rad. Reg. 2d (P & F) 84

THE BRUSS COMPANY, an Illinois corporation, and HINCKLEY & SCHMITT, INC., an Illinois corporation, individually and on behalf of all other persons similarly situated, Plaintiffs
 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

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff subscribers, on behalf of themselves and others similarly situated, sued defendant telephone service and its directors (service) for overcharges for long distance service. Subscribers alleged alternate violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. §§ 1961-1968, the Federal Communications Act, 47 U.S.C.S. § 201 et seq., and various state counts. Service brought a motion to dismiss.

OVERVIEW: Subscribers alleged that service charged subscribers and other long distance subscribers rates in excess of the tariffs filed with the Federal Communications Commission. These overcharges were allegedly accomplished in three ways: (1) by inflating the distance in miles for "800 service" calls, (2) by inflating the mileage component for normal calls placed through new switching centers, and (3) by billing calls to cities in the service's systems, for which lower rates were to be charged, at the higher rates for cities not within the service's system. Plaintiffs alleged that all the defendants conspired together to conceive, and then implemented, the overcharge system as a scheme to defraud class members. The court dismissed all of the RICO allegations, except for subscribers' cause of action under 18 U.S.C.S. § 1962 against service only. The court denied the motion to dismiss the allegations for violating the Federal Communications Act, The court also denied service's motion to dismiss the state counts, which alleged common law fraud and violations of state consumer fraud acts.

OUTCOME: The court granted service's motion to dismiss in part and denied it in part.

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

CORE CONCEPTS - ♦ [Hide Concepts](#)

 [Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers : Motions to](#)

Dismiss

✚ In considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief requested. The court must accept as true all material facts well pleaded in the complaint, and must make all reasonable inferences in the light most favorable to the plaintiff. The court need not strain, however, to find inferences available to the plaintiff which are not apparent on the face of the complaint.

Torts : Business & Employment Torts : Deceit & Fraud

✚ Fed. R. Civ. P. 9(b) provides that: in all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally. This requirement of greater specificity is intended to protect defendants from the harm that results from charges of serious wrongdoing, and to give the defendants notice of the conduct complained of. Complaints alleging fraud should seek redress for a wrong, rather than attempt to discover unknown wrongs.

Torts : Business & Employment Torts : Deceit & Fraud

✚ Fed. R. Civ. P. 9(b) must be read together with Fed. R. Civ. P. 8, which requires a plain and concise statement of the claim. Therefore, although a plaintiff must allege with particularity the specific acts comprising the fraud, he need not plead detailed evidentiary matters. The allegations should describe the circumstances constituting the fraud, including the time, place and contents of the false representations, as well as the identity of the party making the misrepresentation. Moreover, when there are allegations of a fraudulent scheme with multiple defendants, the complaint must allege each defendant of the specific fraudulent acts which constitute the basis of the action against each particular defendant.

Torts : Business & Employment Torts : Deceit & Fraud

✚ The Seventh Circuit has relaxed the requirement of pleading fraud with particularity in cases where matters are particularly within the knowledge of the opposing party. In these circumstances, allegations based on information and belief may be sufficient, but the allegations must be accompanied by a statement of facts upon which the belief is founded. Thus, even when particular facts are solely within the knowledge of the defendant, the plaintiff must still make sufficient particular allegations based on information and belief, and submit a statement of the facts upon which the belief is based.

Antitrust & Trade Law : Private Actions : Racketeer Influenced & Corrupt Organizations

✚ See the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1962(c).

@ Antitrust & Trade Law : Private Actions : Racketeer Influenced & Corrupt Organizations

✚ For an action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1962(c), the "person" alleged to have violated the provision must be an entity separate and distinct from the "enterprise" through which commerce was affected.

Antitrust & Trade Law : Private Actions : Racketeer Influenced & Corrupt Organizations

✚ See the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1962(a).

Antitrust & Trade Law : Private Actions : Racketeer Influenced & Corrupt Organizations

+ See the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1962(b).

Antitrust & Trade Law : Industry Regulation : Communications

See 47 U.S.C.S. § 203(c).

Administrative Law : Judicial Review : Reviewability : Jurisdiction & Venue

"Primary jurisdiction" applies where a claim is originally cognizable in the courts, and comes into play 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.

Antitrust & Trade Law : Industry Regulation : Communications

Federal courts should decide issues relating to purely commercial transactions between regulated carriers and should perform their judicial function of interpreting and enforcing contracts between such parties except when such judicial action results in interference with the functions Congress has placed in the hands of the Federal Communications Commission.

Antitrust & Trade Law : Industry Regulation : Communications

See 47 U.S.C.S. § 414.

Antitrust & Trade Law : Industry Regulation : Communications

Where common law causes of action challenge conduct that is not contemplated by the Communications Act, 47 U.S.C.S. § 414 serves to preserve the common law actions alleged by a plaintiff.

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 seq.* (Count V), and violations of the Illinois Consumer Fraud & Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, § 261 *et seq.* (Count VI).

All six counts are based on the same principal allegations of overcharge and fraud. Plaintiffs essentially allege that defendants charged plaintiffs and other long distance subscribers rates in excess of the tariffs filed with the FCC. These overcharges were allegedly accomplished in three ways: (1) by inflating the distance in miles for "800 service" calls, for which charges are based on the distance between the network switching center and the place called; (2) by inflating the mileage component for normal calls placed through new switching centers, and (3) by billing calls to cities in the Allnet systems, for which lower rates were to be charged, at the higher rates **[**3]** for cities not within the Allnet system. Plaintiffs allege that all the defendants conspired together to conceive, and then implemented, the overcharge system as a scheme to defraud class members.

Motion to Dismiss

The defendants have moved to dismiss all six counts of the complaint on various grounds. ¶ In considering a Rule 12(b)(6) motion to dismiss, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief requested. *Cruz v. Beto*, 405 U.S. 319, 323, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). The court must accept as true all material facts well pleaded in the complaint, and must make all reasonable inferences in the light most favorable to the Plaintiff. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976). The court need not strain, however, to find inferences available to the plaintiff which are not apparent on the face of the complaint. *Coates v. Illinois State Board of Education*, 559 F.2d 445, 447 (7th Cir. 1977).

Counts I and II -- RICO

In their **[**4]** original motion to dismiss, filed before the 7th Circuit Court of Appeals issued its decision in *Haroco, Inc. v. American National Bank & Trust Company*, 747 F.2d 384 (7th Cir. 1984), defendants argued that plaintiffs' RICO counts were deficient for failure to allege a "RICO injury." The *Haroco* decision squarely rejected any requirement of alleging a "RICO injury," and defendants have since abandoned this argument.

Defendants also advance a number of other arguments for dismissal of the RICO counts. They assert that plaintiffs have failed to plead the fraud alleged against the individual defendants with sufficient particularity to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. ¶ Rule 9(b) provides that:

In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

This requirement of greater specificity is intended to protect defendants from the harm that results from charges of serious wrongdoing, and to give the defendants **[*405]** notice of the conduct complained of. *D & G Enterprises v. Continental* **[**5]** *Illinois National Bank*, 574 F. Supp. 263, 266-67 (N.D. Ill. 1983); *Todd v. Oppenheimer & Co., Inc.*, 78 F.R.D. 415,

419 (S.D.N.Y. 1978), citing *Segan v. Dreyfus Corp.*, 513 F.2d 695, 696 (2nd Cir. 1975). As the court in *D & G Enterprises* noted, complaints alleging fraud should seek redress for a wrong, rather than attempt to discover unknown wrongs. 574 F. Supp. at 266, citing *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977), affirmed, 636 F.2d 1201 (2nd Cir. 1980).

However, ¶Rule 9(b) must be read together with Rule 8, which requires a plain and concise statement of the claim. *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975). Therefore, although a plaintiff must allege with particularity the specific acts comprising the fraud, he need not plead detailed evidentiary matters. The allegations should describe the circumstances constituting the fraud, including the time, place and contents of the false representations, as well as the identity of the party making the misrepresentation. *D & G Enterprises*, 574 F. Supp. at 267.

Moreover, when there are allegations of a fraudulent scheme with multiple defendants, the complaint must [**6] inform each defendant of the specific fraudulent acts which constitute the basis of the action against each particular defendant. *Id.*; *Adair v. Hunt International Resources*, 526 F. Supp. 736, 744 (N.D.Ill. 1981); *Lincoln National Bank v. Lampe*, 414 F. Supp. 1270, 1279-79 (N.D. ILL. 1976).

In this case, plaintiffs have made specific allegations of the manner in which the alleged or overcharges were carried out by Allnet as a corporation. As noted above, the complaint specifies the three ways in which Allnet allegedly overcharged its customers. Viewing these allegations in light of the standards under Rules 9(b) and 8 discussed above, the court finds that these allegations plead fraud with sufficient particularity with respect to Allnet. However, with respect to the individual defendants, the complaint fails to include any allegation as to how any individual defendant participated in the fraud. The complaint merely alleges that Allnet and the individual defendants schemed to defraud customers by overcharging them, and then describes the types of overcharges. Nowhere does the complaint specify any act by any particular defendant through which the fraud was carried out. [**7] The individual defendants are merely "lumped" together with Allnet and accused of performing the same fraudulent acts. Under Rule 9(b) and the cases discussed above, these allegations are clearly insufficient to support claims of fraud against the individual defendants.

Plaintiffs' response to their failure to plead any individual acts by individual defendants is that defendants have destroyed documents which would support their claim of fraud, and otherwise hindered detection of their wrongdoing. These unsupported allegations are insufficient to withstand scrutiny under Rule 9(b). As the court in *D & G Enterprises* noted, plaintiff should not make serious accusations of fraud until they have ascertained what wrongs have been committed; fraud should not be alleged in the hope of later discovering some. 574 F. Sudd. at 266.

¶The Seventh Circuit has relaxed the requirement of pleading fraud with particularity in cases where matters are particularly within the knowledge of the opposing party. In these circumstances, allegations based "on information and belief" may be sufficient, but the allegations must be accompanied by a statement of facts upon which the belief is founded. *Duane [**8] v. Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962); *D & G Enterprises*, 574 F. Supp. at 267. Thus, even when particular facts are solely within the knowledge of the defendant, the plaintiff must still make sufficient particular allegations based "on information and belief," and submit a statement of the facts upon which the belief is based.

In this case, plaintiffs have failed to make any particular allegations of any individual defendant's conduct, even "on information [**406] and belief," and plaintiff has not, and apparently is unable to, proffer any statement of facts on which such allegations could be based. Plaintiffs have therefore failed to meet the standard of Rule 9(b) for pleading fraud against the individual defendants. Accordingly, plaintiffs' claims against the individual

defendants in Counts I and II must be dismissed.

In Count I, plaintiffs allege that Allnet and all the individual defendants together defrauded plaintiffs in violation of §§ 1962(a), (b), (c) and (d). In Count II, plaintiffs alternatively allege that only the individual defendants, and not Allnet, defrauded plaintiffs in violation of § 1962 (a), (b), (c) and (d). Since the allegations against [**9] all the individual defendants are fatally defective, Count II must be dismissed in its entirety. However, the analysis with respect to Count I is more complex.

Although the claims against the individual defendants in Count I must be dismissed, Allnet remains as a "person" alleged to have violated § 1962(a), (b), (c) and (d). The court must therefore address another argument raised by defendants: whether Allnet can be both the person who violates RICO and the enterprise through which the violation of RICO has been carried out.

The Seventh Circuit Court of Appeals has recently addressed this issue in *Haroco, Inc. v. American National Bank*, 747 F.2d 384 (7th Cir. 1984). In *Haroco*, the court considered both the statutory language and the legislative intent of section 1962(a) and (c). ¶ Section 1962 (c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The court first noted that [**10] a corporation satisfies the definitions of both a "person" and an "enterprise" under section 1961. 747 F.2d at 400. The court then considered whether the act nevertheless requires that the person and the enterprise be separate entities. Focusing on the language of § 1962(c), the court observed that the provision requires that the liable person be "employed by or associated with any enterprise" which affects commerce. The court reasoned that the use of the terms "employed by" and "associated with" appears to contemplate that the person be distinct from the enterprise. The court therefore concluded that, ¶ for an action under § 1962(c), the "person" alleged to have violated the provision must be an entity separate and distinct from the "enterprise" through which commerce was affected. *Id.*

Employing the same analysis to § 1962(a), however, the court reached the opposite result. ¶ Section 1962(a) provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within meaning of section 2, title [**11] 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

Once again, the court focused on the language of subsection (a), and determined that, in contrast to subsection (c), subsection (a) does not contain any language requiring that the "person" and the "enterprise" be distinct. It does not require that the person be employed by

or associated with, the enterprise, or contain any other language implying that the two entities must be distinct. The court also emphasized that subsection (a) prohibits the use of income from racketeering in the "operation" of the enterprise, implying that the legislature must have envisioned a corporation using the proceeds of racketeering activity in its own operations. The court therefore concluded that, in actions under **[*407]** subsection (a), the person liable and the enterprise may be the same entity, *i.e.*, "the person liable may be a corporation using the proceeds of a pattern of racketeering **[*12]** activity in its operations." *Id.* at 402.

The court found this interpretation of subsections (a) and (c) consistent with the idea that corporations should not be liable if they are merely victims of a fraud perpetrated by lower-level employees, but that a corporation should be held liable if it has itself been a perpetrator of the fraud. Thus, under subsection (a), a corporation can be held liable if it is a perpetrator, or the direct or indirect beneficiary of the pattern of racketeering, but under subsection (c), where the corporation is merely the "victim, prize, or passive instrument" of racketeering, the corporation cannot be liable. 747 F.2d at 402.

In this case, as noted above, plaintiffs have alleged in Count I violations of § 1962(a), (b), (c) and (d). Since Allnet is the only remaining entity in Count I, it must serve as both the person liable and the enterprise. Under Haroco, the claim under § 1962(c) must be dismissed for failure to allege an enterprise separate and distinct from the "person" liable. However, the claim under § 1962(a) cannot be dismissed on this basis, since, under Haroco, Allnet may serve as both the "person" and the "enterprise."

The **[*13]** Haroco court did not address whether the "person" and the "enterprise" must be distinct under § 1962(b). However, applying the same analysis, it appears that, as with subsection (c), the same entity may not serve as both "person" and "enterprise." ¶ Section 1962(b) provides:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Although this provision does not contain the language in subsection (c) requiring that the person be employed by or associated with the enterprise, it does require that the person "acquire or maintain" an "interest in or control of" any enterprise. Like the language in subsection (c), this language implies that the person acquiring an interest in or control of the enterprise must be separate from the enterprise itself. As with subsection (c), the language contemplates that the enterprise is the victim, not the perpetrator, of the crime. Separate entities must therefore fill the roles of the **[*14]** "person" and the "enterprise." And, unlike subsection (a), subsection (b) does not refer to the use of funds in the "operation" of the enterprise, making unlikely the inference that the legislature intended subsection (b) to cover a corporation using the proceeds of racketeering activities for its own operations. The court therefore concludes that, for a cause of action under § 1962(b), the person liable and the enterprise must be two distinct entities. In this case, since Allnet cannot serve as both "person" and "enterprise," plaintiffs' claim in Count I under § 1962(b) must also be dismissed.

The only remaining claim in Count I is under § 1962(d), which makes unlawful conspiracies to violate § 1962(a), (b) and (c). Since a conspiracy necessarily requires more than one person, and the allegations with respect to the individual defendants have been dismissed, plaintiffs' cause of action under § 1962(d) must also be dismissed.

Accordingly, the court dismisses all causes of action alleged in Count I, except for plaintiffs' cause of action under 18 U.S.C. § 1962(a) against Allnet only. Plaintiffs are granted leave to file an amended complaint within 21 days from the date of this **[**15]** order. If an amendment is filed, defendants are granted 21 days to answer or otherwise plead.

[*408] Count III - Federal Communications Act

In Count III, plaintiffs allege that defendants have violated section 203(c) of Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 203(c), by charging plaintiffs rates in excess of its rate schedules filed with the FCC. Section 203(c) provides:

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provision of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices **[**16]** affecting such charges, except as specified in such schedule.

Defendants assert that plaintiffs' claims under the Communications Act must be dismissed and referred to the FCC under the doctrine of primary jurisdiction. This doctrine requires courts to defer to administrative agencies issues intended by Congress to be within an agency's expert discretion. The Supreme Court described this doctrine in United States v. Western Pacific Railroad Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956), in which it stated:

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. . . . **[**17]** "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play 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. **[**17]** General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S. Ct. 325, 331, 84 L. Ed. 361.

Courts have applied this doctrine to require deferral to administrative agencies of matters that call for the exercise of an agency's discretion and expertise. For example, a dispute as to whether a carrier's rates or practices are reasonable has uniformly been deemed to be within the primary jurisdiction of the appropriate regulating agency. As the court held in Danna v. Air France, 463 F.2d 407, 409 (2nd Cir. 1972):

It is beyond dispute that claims that filed tariffs are either unreasonable in amount or unduly discriminatory in effect are questions that in the first instance must be determined by the agency with the tariffs are filed. Any attempt to sue in federal court or in state court on such claims without first obtaining an agency

determination of unreasonableness or undue discrimination fails to state a cause of action.

See also *Montana-Dakota Utility Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251, 71 S. Ct. 692, 695, 95 L. Ed. 912 (1951); *Detroit, Toledo and Irontown-Railroad Co. v. Consolidated Rail Corp.*, 727 F.2d **[**18]** 1391, 1394-95 (6th Cir. 1984); *Booth v. American Telephone and Telegraph Co.*, 253 F.2d 57 (7th Cir. 1958).

However, when a party before a court challenges not the reasonableness of a tariff but only whether the carrier has failed to abide by the tariff, no issues requiring agency discretion or expertise are raised. As the court in *Danna v. Air France*, **[*409]** *supra*, noted, quoting from *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 131-32, 35 S. Ct. 484, 488, 59 L. Ed. 867 (1915):

But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts.

463 F.2d at 410.

The court in *Detroit, Toledo, supra*, recently succinctly summarized the law on this matter, stating:

¶

The rule which emerges from an examination **[**19]** of representative decisions is that federal courts should decide issues relating to purely commercial transactions between regulated carriers and should perform their judicial function of interpreting and enforcing contracts between such parties except when such judicial action results in interference with the functions congress has placed in the hands of the commission.

727 F.2d at 1396.

In this case, plaintiffs allege only that Allnet filed tariffs with the FCC, and then charged plaintiffs rates in excess of those stated in the tariffs. Thus, plaintiffs challenge only whether the tariff has been violated by Allnet, not whether the rates set were reasonable. The court is not called upon to set or in any way alter a tariff filed with the FCC. A decision in the merits in this case therefore requires no exercise of an administrative discretion, nor would it affect the overall regulatory scheme. The court need only decide whether the tariffs were in fact violated, a matter clearly within the province of the federal courts. The doctrine of primary jurisdiction is therefore inapplicable to this case. Accordingly, defendants' motion to dismiss Count III is denied.

*Counts IV, **[**20]** V and VI - State Law Claims*

The remaining counts, Count IV, V and VI, allege common law fraud (Count IV), violations of the Uniform Deceptive Trade Practices Act, Ill. Rev. Stat. ch. 121 1/2, § 311 et seq. (Count

V), and violations of the Illinois Consumer Fraud & Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2 § 261 et seq. (Count VI). Defendants have moved to dismiss all three state law claims on the basis that they are preempted by the FCC Act.

Defendants rely primarily on *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2nd Cir. 1968). In *Ivy*, the court addressed whether, in the absence of diversity jurisdiction, a federal court has jurisdiction over a claim for negligence and breach of contract in connection with telephone services provided by carrier regulated by the Communications Act. Although the court found that the remedy sought by plaintiffs was not available under the Act, it held that federal jurisdiction could be based on federal common law emanating from the act. The court observed that the broad statutory scheme embodied in the Act indicates a Congressional intent to occupy the field to the exclusion of **[**21]** state law. 391 F.2d at 490. The Court then concluded that:

Questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communication service are to be governed solely by federal law and . . . states are precluded from acting in this area. Where neither the Communications Act 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.

391 F.2d at 491.

Relying on this language, defendants assert that all state law claims relating to **[*410]** matters governed by the Communications Act are preempted by the Act. Defendants ignore, and the *Ivy* court did not address, however, the "savings clause" embodied in section 414 of the Act, **¶47 U.S.C. § 414**, which 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.

The Supreme Court interpreted an identical "savings clause" in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1975), in which **[**22]** the Court upheld the plaintiffs common law claim for fraudulent misrepresentation against an air carrier subject to regulation by the Civil Aeronautics Board under the Federal Aviation Act of 1958, 49 U.S.C. § 1381. Quoting from *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907), the court noted that a common law right is not abrogated, even without a savings clause, "unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." 426 U.S. at 299, 96 S. Ct. at 1984. The Court in *Nader* concluded that the common law remedy was not preempted because "the common law action and the statute are not 'absolutely inconsistent' and may coexist." 426 U.S. at 300, 96 S. Ct. at 1985,

More recently, however, in *City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), the Supreme Court took a more restrictive view of the preemption question, holding that the previously created federal common law action for nuisance was preempted by amendments to the **[**23]** Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq. The savings clause in the Water Pollution Act provided that "nothing *in this section*" (emphasis added) precluded other common law and statutory remedies. Siezing upon this limiting language, the Court held that, although nothing in that particular section of

the act, the citizen-suit provisions, 33 U.S.C. § 1365, precluded common law remedies, the pervasive regulatory scheme of the act as a whole did preclude other remedies. 451 U.S. at 327-29, 101 S. Ct. at 1797-98. The Court may therefore be retrenching somewhat from its expansive view in *Nader* of savings clauses and common law remedies in highly regulated fields. n l

-----Footnotes-----

n l It should be noted that the alternate remedies sought in *City of Milwaukee* were under federal common law, not state common law, and the court discussed the vague and indeterminate nature of federal common law remedies, in contrast with the comprehensive regulatory program supervised by an expert administrative agency established under the 1972 Amendments to the Federal Water Pollution Control Act. The decision may therefore be distinguished from the instant case on this basis, and more importantly, because the savings clause in the instant case is not limited to preserving causes of action in a particular section of the Act, but instead expressly applies to the entire Act.

-----End Footnotes----- **[**24]**

Few courts have specifically addressed the question of preemption with respect to the Communications Act. One court, in *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701 (1st Cir. 1977), interpreted § 414 in a manner consistent with the Supreme Court decisions discussed above. In *Comtronics*, the court held that the plaintiff had no cause of action under the Communication Act because "connecting carriers" such as the defendant in that case were explicitly exempted from its coverage. The court also dismissed the plaintiffs constitutional claims, stating that the "precisely drawn, detailed statute preempts more general remedies." 553 F.2d at 707, quoting *Brown v. G.S.A.*, 425 U.S. 820, 834, 96 S. Ct. 1961, 1968, 48 L. Ed. 2d 402 (1976). In reaching this result, the court interpreted § 414 as follows:

Because we hold that Congress withheld a damages remedy under the Act against connecting carriers . . . , we think it would make little sense to hold that a damages remedy exists against them under **[*411]** § 1983 for violations of the very same Act. The "existing" remedies Congress had in mind under § 414 would scarcely be remedies so closely dependent **[**25]** upon the Act itself; rather we read § 414 as preserving causes of action for breaches of duty distinguishable from those created under the Act, as in the case of a contract claim. . . .

553 F.2d at 707-08, n.6 (citations omitted). This ruling is consistent with *Nader*, because the court recognized causes of action outside the act only when they do not conflict with express provisions of the act. The decision in *City of Milwaukee* does not impact on this interpretation of § 414, because § 414 applies specifically to the entire Communications Act, not only to a particular provision of the Act.

The same conclusion was recently reached by the court in *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984). In *Kaplan*, the plaintiff alleged that the defendant charged customers for unanswered long distance calls without disclosing this fact to the customers. Plaintiffs sued under § 201(b) of the Communications Act, 47 U.S.C. § 201 (b), as well as under the New York Deceptive Acts and Practices, General Business Law § 349 (*McKinney's*), and for fraud, misrepresentation, and breach of agreements embodied in defendant's advertisements.

In **[**26]** a well-reasoned decision, the court applied the test set forth in *Comtronics*,

supra, and concluded that the common law claims asserted by plaintiffs are not preempted by the Communications Act. The court reasoned that the breaches of duty alleged under the common law claims are markedly different from the statutory claims. 589 F. Supp. at 735. For example, to prove fraud and misrepresentation, the plaintiff must establish a breach of a duty to disclose information, as well as scienter, reliance, and damages. *Id.* at 736. The court concluded that, since the common law causes of action challenge conduct that is not contemplated by the Communications Act, under *Comtronics*, § 414 serves to preserve the common law actions alleged by plaintiff in this case. n2

-----Footnotes-----

n2 See also *Ashley v. Southwestern Bell Telephone Co.*, 410 F. Supp. 1389, 1392-93 (W.D. Tex. 1976) (action for invasion of privacy not preempted by Communications Act); *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1120-21 (3rd Cir. 1979) and *Sound, Inc. v. American Telephone & Telegraph Co.*, 631 F.2d 1324, 1329 (8th Cir. 1980) (Communications Act held not to preempt actions under antitrust laws).

-----End Footnotes----- **[**27]**

This court finds the reasoning in *Comtronics* and *Kaplan* persuasive, and reflective of current legal analysis of the preemption issue. Under these decisions, § 414 must be applied to preserve the common law actions alleged by plaintiffs in this case. As in *Kaplan*, the plaintiffs here allege common law fraud, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act. The duty owed by defendants under each of these causes of action is distinct from the duties created by the Communications Act; each is intended to prohibit different types of wrongs distinct from those prohibited by the Communications Act. None of these causes of action conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies to preserve these causes of action.

Accordingly, defendants' motion to dismiss Count IV, V and VI is denied.

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112 Ill. 2d 428, *, 493 N.E.2d 1045, **;
1986 Ill. LEXIS 265, ***; 98 Ill. Dec. 24

Case # 6

S. KELLERMAN. et al., Appellees, v. MCI TELECOMMUNICATIONS CORPORATION, Appellant. -
- PHYLLIS HESSE, Appellee, v. MCI TELECOMMUNICATIONS CORPORATION, Appellant

No. 62132

Supreme Court of Illinois

112 Ill. 2d 428; 493 N.E.2d 1045; 1986 Ill. LEXIS 265; 98 Ill. Dec.

May 21, 1986, Filed



PRIOR HISTORY: [***1]

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Albert Green, Judge, presiding.

DISPOSITION: Judgment affirmed

CASE SUMMARY

PROCEDURAL POSTURE: Defendant, communications company, sought review of a decision of the Appellate Court for the First District, Illinois, which affirmed the trial court's denial to stay or dismiss the plaintiffs customers' cause of action and held that the customers' state law claims were not preempted by the Federal Communications Act of 1934 (Act), 47 U.S.C.S. § 1.51 et seq.

OVERVIEW: The customers brought an action against the communications company under the Act and alleged violations of state laws. The communications company filed motions to stay or dismiss the proceedings and argued that the customers' state law claims were preempted by the Act. The lower court denied the communications company's claims and the court affirmed the findings. The court held that the action did not violate the federal policy of promoting a rapid, efficient communications service with adequate facilities at reasonable charges under the Act. The court held that no federal statute or regulation expressly prohibited the actions. Therefore, Congress did not intend to occupy the field of interstate telephone service to the extent of barring the state-law claims. The court held that the considerations of comity, multiplicity, and res judicata did not persuade it that the customers' actions should be stayed. The court held that the legal and factual issues involved were within the conventional competence of the courts and therefore, rejected the communications company's argument that the actions should be referred to the Federal Communications Commission.

OUTCOME: The court denied the communications company's motion to stay or dismiss the customers' proceedings and held that federal law did not preempt their state law claims.

CORE TERMS: preempted, Communications Act, interstate, telephone, carrier, regulation, telephone service, customers, long-distance, breach of contract, deceptive, advertisements,