Loyola Consumer Law Review

Volume 10 | Issue 4 Article 7

1999

Filed Tariff Doctrine Allows Sprint's Unilateral Amendment to Fridays Free Agreements

Juliette Luther

Filed Tariff Doctrine Allows Sprint's Unilateral Amendment to Fridays Free Agreements

by Juliette Luther

"I know I agreed to do this and you are paying the agreed upon price, but it is too difficult for me to deliver so I am just going to deliver 25% of what I agreed to deliver. God speed and good luck to you."

Introduction

Suzanne Cahnmann's class action against Sprint Corporation appeared to be a relatively straightforward consumer claim, brought in Illinois state court, for breach of contract, fraud and injunctive relief. The complaint, after all, followed Sprint's enactment of unilateral changes to contracts entered into with long-distance customers; changes which drastically reduced promised savings on calls. On January 7, 1998, however, the Seventh Circuit affirmed the ruling of the United States District Court for the Northern District of Illinois, in *Cahnmann v. Sprint Corp.*, reinforcing long-distance telephone carriers' right to unilaterally amend any offered calling rates. Though the court explicitly placed the burden on the consumer to ensure the rates offered are true prior to entering into any contract, long distance carriers are still left with the power to unilaterally amend any rates, at any time they desire.[1] In short, no matter how much investigating the customer does on a carrier's filed rate prior to contracting for service, all agreements are subject to unilateral changes by the carriers. As a result of this filed tariff doctrine, the court refused to grant injunctive relief from Sprint's deceptive advertising practices.

This Note addresses the reasonings employed by the district and appellate courts that led to their rulings in favor of Sprint. Part I explains the factual background of the case leading to this litigation, and the arguments presented to the district court. Part II first reviews the ruling of the district court, which established Sprint's power to unilaterally amend tariffs filed with the Federal Communications Commission ("FCC"). Part II then also discusses the Seventh Circuit's rationale in affirming the district court's holding. Part III analyzes the split among the federal circuit courts of appeals with regard to the question of federal jurisdiction over federally-regulated common carriers and whether the states possess the power to enjoin carriers from fraudulent and deceptive marketing practices. Part IV reviews the impact resulting from the Seventh Circuit's affirmation of the district court's holding in favor of Sprint, and the adverse effect this ruling has on consumers. Part V concludes, however, that until the issues surrounding the filed tariff doctrine are resolved by the United States Supreme Court, customers are left powerless to enforce terms embodied in agreements entered into with long distance carriers.

Background[2]

This class action was originally brought in Illinois state court by the plaintiff, Suzanne Cahnmann, when Sprint unilaterally changed the terms of its "Fridays Free" long-distance calling promotion. The "Fridays Free" advertisement was offered in January 1996 to small businesses only. It provided that, upon subscribing to Sprint for at least $50 worth per month of long distance calls, customers could make free long-distance calls on Fridays, up to $1,000 worth per month, to anywhere in the world for one year. Just prior to offering this promotion, Sprint filed a tariff with the FCC, as required by the Federal Communications Act. This tariff, as with any tariff filed with the FCC, set forth the terms of the long-distance calling promotion. Approximately nineteen countries were originally included in the promotion. Sprint's intention in offering these free Friday calls was to attract customers from other long-distance carriers with its special low calling rates.

Only four short months after the introduction of its "Fridays Free" calling plan, and without the consent of any of its customers, Sprint removed ten countries from the tariff filed with the FCC. These included Israel, Bolivia, China, Ecuador, India, Iran, Myanmar (formerly Burma), Pakistan, Thailand and the Dominican Republic. In an attempt to compensate for this alteration, Sprint offered a 25% discount from its regular long distance rate for calls made on any day of the week to nine of the remaining countries, except the Dominican Republic.

Consequently, this class action was instituted in Illinois state court. The complaint alleged purely state law-based claims for breach of contract and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. In addition, the class sought to enjoin Sprint from continuing its deceptive advertising practices, to recover monetary damages resulting from long distance calling charges incurred as a result of Sprint's amendment, and enforcement of all of the terms contained in Sprint's "Fridays Free" contracts.

In response to Cahnmann's state law-based allegations, Sprint employed a procedural tactic that had proven successful in identical lawsuits brought against it in other states. It simply removed the case to federal court, contending that Cahnmann's claims were actually grounded in federal law, not state law. Cahnmann responded with an unsuccessful motion to remand the action to state court, but Sprint ultimately filed a motion for judgment on the pleadings, which was granted by the District Court and affirmed by the Seventh Circuit.

The District Court's Ruling, and the Seventh Circuit's Affirmation

The district court began by examining the propriety of Sprint's removal of the case from state to federal court. In its notice of removal, Sprint maintained that the action belonged in federal court based on federal question jurisdiction and diversity jurisdiction. Sprint's ground for federal question jurisdiction was actually premised on two conditions: that Cahnmann's complaint was a federal claim "artfully pleaded" as a state law claim, and that Cahnmann's claims were completely pre-empted by federal common law and the Federal Communications Act. The district court dismissed Sprint's diversity jurisdiction argument, but readily held that removal was proper on both grounds of federal question jurisdiction. Without addressing the question of complete pre-emption, the court held that the complaint presented federal claims artfully pled as state law claims, making removal proper.

Once it was determined that the issue at hand presented a federal question, the court entered a judgment on the pleadings in favor of Sprint. In its analysis, the court explained that, because Sprint is a long-distance carrier regulated under the Federal Communications Act, it is required to file its tariffs with the FCC and charge its customers in accordance with the terms set forth therein. Specifically, the "core" of the Federal Communications Act demands that telecommunications providers inform the FCC of the rates they intend to charge for each of their services. The providers fulfill this requirement by filing tariffs with the FCC, setting forth the terms of the rates to be charged by the carrier to its long-distance customers. Only the FCC has the power to determine the reasonableness of the rates, and the carriers are not permitted to deviate from the filed rates. Any agreement entered into between the carrier and a customer which states a rate different from that stated in the filed tariff, therefore, has absolutely no legal effect. Thus, since the "Friday's Free" agreements between Sprint and its customers differed from Sprint's new, amended tariff, the terms in the original "Fridays Free" tariff no longer had a binding legal effect.

Most significantly perhaps, the district court held that it lacked the power to enforce the terms contained in the original tariff. Such enforcement, it explained, would infringe upon the FCC's jurisdiction. In response to this, however, Cahnmann argued that this jurisdictional problem could easily be avoided by the court if it only enforced the original "Fridays Free" filed tariff. This way, the court would escape intrusion of the FCC's powers, and the cause of the Plaintiffs' increased long-distance calling charges would still be a filed tariff. The court quickly dismissed this argument, however, on the grounds that Cahnmann's suggested "original" tariff would nonetheless be a different tariff being enforced, and not "the" (amended) tariff at issue. It reasoned that "the Federal Communications Act would

[not] permit a court to choose among several tariffs filed by a single company over the years and enforce whichever one it selects." This holding results in a significant impact on long-distance customers. In essence, even if a tariff contains a provision that a special rate will be in effect for a specific amount of time, it cannot be enforced by a court.

Cahnmann's last argument was built on the specific language contained in the "Fridays Free" agreement, which promised that "customers can receive free usage (outbound international only) on one day a week (such day to be determined by Sprint) for twelve months." Due to lack of precedent, however, the court rejected the argument that, contained in a tariff, the phrase "customer can" means that the carrier is obligated to provide such service, or that the carrier promises to provide the special service for twelve months if the customer elects.

Writing for the Seventh Circuit Court of Appeals, Chief Judge Posner affirmed the district court's holding in all respects. Prior to beginning its examination of the issues presented, the court noted Sprint's reasons for amending its tariff, which included claims of congested phone lines and consumer fraud (residential customers pretending to be small businesses). However, for purposes of reaching its holding, the court assumed "that Sprint had no good reason for the amendment – or, worse, that it was planning from the start to renege on the offer of a full year of free Friday calls to anywhere in the world." The court then agreed with the district court's holding that Cahnmann's state law-based breach of contract claim was actually a federal claim. Although the question of the Communication Act's complete pre-emption under these facts is not discussed by the court, it was exactly this preemption that led the court to conclude that federal jurisdiction over the claims existed.

Leading up to its ultimate holding, the court set forth a detailed background of public utility regulation and common carrier regulations. Although many of these regulations have been rolled back in recent years, long-distance telephone service regulation has remained in its original form. One example of such a long-standing regulation is the requirement of long-distance carriers to file tariffs with the FCC.

Judge Posner found that the history of the tariff system reaches back many years; it was established in order to "discourage[ ] price competition by preventing secret discounts." Since filed tariffs are published documents, they supposedly prevent a long-distance carrier from discriminating among the prices or services offered to customers. The tariff-filing rule continues to survive, though the intention behind the requirement has changed slightly. Today, tariffs must be filed in order to discourage long-distance carriers from striking "special, off-tariff deal[s]" with their customers; even if the customer "reasonably relied on the carrier's promise to file the negotiated rate as a tariff," only the actual, filed tariff would be enforceable.

The only valid contract between the customer and the provider, therefore, is the tariff; any other agreement has absolutely no legal effect. This well-established rule is the "filed tariff doctrine." Permitting Cahnmann to obtain relief under Illinois' common law of contracts, therefore, "would effectively nullify the tariff provisions of the Communications Act."

Turning then to Cahnmann's breach of contract claim, the court held that the Communications Act in fact "extinguishes the right to bring a suit for breach of contract under state law when the effect of the suit would be to challenge a tariff." Because Sprint's tariff is the contract, a suit to enforce its terms arises under federal law. The Seventh Circuit's view regarding the Communication Act's preemption over state law claims, however, is not a view embraced by all circuits.

Split Among the Circuits

A split exists among the various circuit courts regarding the question of federal jurisdiction over state law-based breach of contract claims brought against long distance telecommunications carriers for changes made to their filed tariffs. Although the Seventh Circuit clearly explained the reasoning behind the Communication Act's federal pre-emption, which extinguishes a consumer's state law-based claims, a number of courts have held that the filed tariff doctrine is simply a defense brought by the telecommunications carrier; not an overarching preemptive doctrine. This "defense" theory rests on the fact that, when attempting to recover customer bill payments for long distance calls, Sprint has regularly brought actions in state courts. Thus, as long as Sprint's claims for breach of contract on the consumers' parts can stand in state courts, it would logically follow that the filed tariff doctrine should only be invoked by carriers as a defense.

A review of the circuit courts' holdings regarding federal pre-emption over state law claims based on the filed tariff doctrine shows the degree of the split. For example, the First, Fifth and Ninth Circuits have held that no federal jurisdiction exists over state-based claims brought against common carriers. Neither the Third nor the Tenth Circuit Courts of Appeals have ruled on the issue yet, though the district courts therein are split.[3] Courts that have found federal jurisdiction exists over state-based actions are the Second, the Fourth, the Sixth, the Eighth and the Eleventh Circuits.[4]

The circuits are also split with regard to federal pre-emption over claims alleging fraud and deceptive marketing by federally regulated carriers.[5] The Seventh Circuit has held that the Federal Communications Act pre-empts state law-based fraud claims, prohibiting states from enjoining the carriers from continuing their fraudulent and deceptive marketing practices. The disturbing result in circuits which refuse to grant consumers the power to enjoin telecommunications carriers from further fraudulent acts is that long distance customers are left helpless, as Suzanne Cahnmann was. The Act's federal pre-emption over fraud claims effectively prohibits relief from further deceptive advertising, based on federal courts' refusal to interfere with the FCC's jurisdiction under the Communications Act.

One court, however, declined to follow the Seventh Circuit's reasoning with regard to this issue. In *Marcus v. AT&T Corp.*, the Second Circuit recently held that states do have the power to enjoin telecommunications carriers from engaging in deceptive marketing.[6]

The Resulting Impact on Consumers

The meaning, or result, of the filed tariff doctrine is concisely explained by the district court. Since the "core" of the Federal Communications Act dictates that long-distance carriers file their tariffs with the FCC, only the FCC is vested with the authority to decide the reasonableness of those rates, and has the sole power to amend, modify, supersede or disapprove of the tariff. Once they have filed a tariff, long-distance carriers are bound to the rates set forth therein (notwithstanding modifications by the FCC), and are prohibited from charging either more or less than the filed rates. Thus, until the FCC changes the filed tariff, "the carrier may not deviate from its terms. It doesn't matter how eager both the carrier and its customers are to strike a special, off-tariff deal, or even whether the customer reasonably relied on the carrier's promise to file the negotiated rate as a tariff."[7] Most significantly, the district court explained that, since the filed tariffs are also made publicly available,

> "[t]he law presumes a provider cannot effectively misrepresent its rates. Whatever the salesman says and whatever is advertised, the consumer can learn the truth from the FCC. And it matters not if the claim arises from an amendment to a tariff which changes the rates. The customer is presumed to be aware that amendments to tariffs are always possible. If the customer does not like the amendment, the customer has standing to complain to the FCC which can invalidate the amendment. There is, therefore, no contract to enforce [...]."[8]

Based on the Communication Act's policy of conferring primary jurisdiction over telecommunication carriers' fled rates on the FCC, the Seventh Circuit built on the district court's reasoning, explaining that, "a tariff filed with a federal agency is the equivalent of a federal regulation, [and] a suit to enforce it arise[s] under federal law."[9]

The Seventh Circuit's strongest suggestion of complete preemption, however, lies in the following portion of its opinion:

> "[S]ince the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce.

Federal law does not merely create a right; it occupies the whole field, displacing state law."[10]

Thus, the consumer is left with a legally unenforceable contract, originally entered into with the carrier as a result of reliance on the deceptive advertising, and without a remedy from the court. To make matters worse, the court here denied Cahnmann the relief of simply enforcing Sprint's original "Fridays Free" tariff for fear of treading on the FCC's toes.

Conclusion

Until federal courts begin allowing state causes of actions against telecommunications carriers to be brought in, and remain in, state court, consumers will remain powerless in their attempts to enforce the terms of agreements entered into, or in their attempts to enjoin the carriers from further deceptive practices. The Seventh Circuit's finding of federal jurisdiction over state law-based breach of contract claims against Sprint denies consumers the capacity to enforce contractual terms which have been unilaterally amended by the carriers. Through their federal jurisdiction over breach of contract, common law and consumer fraud claims, courts are left to decide that the Communications Act effectively pre-empts state causes of action. Thus, the filed tariff doctrine is invoked, and consumers lose the opportunity to enforce terms of the original tariff, as well as the power to enjoin the carrier from continuing the deceptive acts.

Endnotes

1 Cahnmann v. Sprint Corp., 961 F.Supp. 1229 (N.D. Ill. 1997), *aff'd*, 133 F.3d 484 (7th Cir. 1998).

2 All material referred to in the "Background" and "The District Court's Ruling and the Seventh Circuit's Affirmation" is taken from Cahnmann v. Sprint Corp., 133 F.3d 484 (7th Cir. 1998), unless specifically cited otherwise.

3 *See* Weinberg v. Sprint, 165 F.R.D. 431 (D. N.J. 1996) with In re Comcast Cellular Telecomm. Litig., 949 F.Supp. 1193 (E.D. Penn. 1996).

4 *See* Marcus v. AT&T Corp., 1998 WL 91098 (2nd Cir. (N.Y.) Feb. 24, 1998)(holding that claims against common carriers arise under federal law, though disagreeing with the Seventh Circuit's holding that the customers' fraud claims were preempted by or arose under federal law); MCI v. Telecomm. Corp. v. Graham, 7 F.3d 477 (6th Cir. 1993) (holding that claims regarding common carriers arise under federal law); MCI Telecomm. Corp. v. Garden State Investment Corp., 981 F.2d 385 (8th Cir. 1992) (holding federal jurisdiction exists over a claim brought by a common carrier for violations of the Communications Act, though implying that federal jurisdiction would not exist over a consumer's breach of contract claim); Western Union Int'l Inc. v. Data Development, Inc., 41 F.3d 1494 (11th Cir. 1995)(holding federal jurisdiction exists over a claim brought by a common carrier); *see* e.g., Harrison Higgins, Inc. v. AT&T Communications, Inc., 697 F.Supp 220 (4th Cir. 1988)(where federal jurisdiction upon removal has not yet been contested).

5 *See Marcus*, 1998 WL 91098 at *5.

[6] *See id.*

[7] *See* Cahnmann v. Sprint, 133 F.3d 484, 487 (7th Cir. 1998).

[8] *See* Cahnmann v. Sprint Corp., 961 F.Supp. 1229, 1232 (N.D. Ill. 1997).

[9] *See Cahnmann*, 133 F.3d at 488.

[10] *See id.* at 489.

CLR

"Do you really get what you pay for?" - Compensation of Mortgage Brokers Restricted by the Eleventh Circuit

by Robert Kurinsky

Few individuals who take out mortgage loans receive the lowest interest rate available. While that may be expected, the disbursement of the excess interest is restricted by federal law. Specifically, the Real Estate Settlement Procedures Act ("RESPA") prohibits lenders from providing mortgage brokers with kickbacks or referral fees. However, payments in exchange for either goods or services are not prohibited by RESPA. In *Culpepper v. Inland Mortgage Corp.*, 1998 WL 5591 (1998), the United States Court of Appeals of the Eleventh Circuit ruled that a contractual payment by a lender to a mortgage broker for the origination of a loan above the lender's minimum interest rate was a prohibited referral fee. In rendering this decision, the court reversed the district court decision granting Inland's motion for summary judgment.

Class Action Suit Creates Case of First Impression by Alleging a Yield Spread Premium to be a Violation of RESPA

The appellants, John and Patricia Culpepper, were the named plaintiffs in a class action suit against the appellee, Inland Mortgage Corporation ("Inland"), for an alleged violation of RESPA §2607(a). That section of RESPA specifically prohibits the payment of referral fees in the provision of brokerage services. The Culpeppers went to a mortgage broker, Premiere Mortgage Company ("Premiere"), and obtained a federally insured loan. However, Premiere did not fund the Culpeppers' mortgage loan. Instead, Premiere only provided the service of matching the