

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

KEVIN KNIPMEYER and
JOANNE KNIPMEYER

: AUGUST TERM, 2000

: No. 0308

v.

:

BELL ATLANTIC CORPORATION, etal.

: **Control No. 110840**

O R D E R

AND NOW, this 22nd day of May 2001, upon consideration of the defendants' Preliminary Objections to the Complaint, the plaintiffs' response and the transcript of the oral argument, and in accord with the court's contemporaneously-filed Opinion, it is hereby **ORDERED** that:

- (1) The Preliminary Objection based on the filed tariff doctrine is **Sustained**, and
- (2) the Complaint is **Dismissed**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. May 22, 2001

This is a class action against Bell Atlantic Corporation and its local operating companies. The plaintiffs, Kevin and Joanne Knipmeyer, claim that the phone companies misrepresented the meaning of the term “non-published telephone number.” At issue are the defendants’ Preliminary Objections. Because the “filed rate doctrine” bars the Knipmeyers’ claims, the court sustains the Objections and dismisses the Complaint.

FACTS

The defendants -- collectively, "Bell Atlantic" -- are Bell Atlantic Corporation and its nine local operating companies: Bell Atlantic-Delaware, Bell Atlantic-Maryland, Bell Atlantic-New Jersey, Bell Atlantic-Pennsylvania, Bell Atlantic-Virginia, Bell Atlantic-Washington, D.C., Bell Atlantic-West Virginia, New York Telephone Co. and New England Telephone & Telegraph Co.¹ The local operating companies serve ten states and the District of Columbia. The Knipmeyers are Pennsylvania residents and customers of Bell Atlantic-Pennsylvania. They paid Bell Atlantic-Pennsylvania a premium for a non-published telephone number. A non-published telephone number is a number that is not listed in the telephone directory or in Bell Atlantic's Directory Assistance service.

Bell Atlantic has a website through which a customer from any of the ten states or the District of Columbia can order phone service from the local operating company serving the pertinent area. Among the pages on the website is a page for each state with the title "Directory Assistance." On this page the customer selects one of three options for his directory listing: (1) "Listed in Phone Book"; (2) "Not Listed in Phone Book, but listed in Directory Assistance"; or (3) "Non-Published: not listed anywhere." Complaint, Ex. B.

¹The defendants have recently changed their names to Verizon Communications, Verizon Delaware, Verizon Maryland, etc. This Opinion, however, refers to the defendants by their prior names.

Another page for each state has the title “Non-published Telephone Number.” This page further describes non-listed and non-published telephone number services:²

Non-Listed Telephone Number -- Want a little privacy? With this service, you won't be listed in the telephone directory, but you will be listed in directory assistance.

Non-Published Telephone Number -- Want even more privacy? With this service, Bell Atlantic will omit your telephone number from both the published telephone directory and from directory assistance.

* * *

Additional Information:

A non-listed or non-published telephone number does not include blocking. You must use Per Call Blocking or order Line Blocking if you want to block your name and number from people you call.

Complaint, Ex. B.

Non-published telephone number service does not completely bar a number from disclosure. When billing an owner of a toll-free number for calls made to that number, Bell Atlantic lists in the bill all numbers -- including non-published telephone numbers -- that called the toll-free number. This seems to be an accepted and required practice that the Knipmeyers do not challenge. See Perfetti v. Bell-Atlantic-Pennsylvania, No. C-00003475 (Pa. Pub. Util. Comm'n Oct. 18, 2000). Instead, the Knipmeyers challenge the sufficiency of Bell Atlantic's website descriptions of non-published telephone number service. The Knipmeyers argue that “Non-Published: not listed anywhere” falsely implies that Bell Atlantic does not disclose non-published telephone numbers to anybody, including owners of toll-free numbers. The Knipmeyers' two-count complaint requests damages for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) and for civil conspiracy to violate the UTPCPL.

²The format, copyright dates and service prices of the Directory Assistance webpage are different from those of the Non-published Telephone Number webpage. Thus the court cannot now determine whether the Non-published Telephone Number webpage -- which provides a clearer description of non-published telephone number service -- was available during the same time as the Directory Assistance webpage.

In its Preliminary Objections to the Complaint, Bell Atlantic argues that the Knipmeyers' claims must fail because (1) the filed rate doctrine bars the claims, (2) the Pennsylvania Public Utility Commission (PUC) has primary subject matter jurisdiction over the claims, (3) the Knipmeyers fail to allege any false or deceptive statement, (4) the court does not have personal jurisdiction over the ten out-of-state local operating companies, (5) the UTPCPL does not apply to out-of-state transactions by the out-of-state local operating companies and (6) the court does not have personal jurisdiction over the out-of-state class members.

DISCUSSION

This court sustains the Objection on the basis of the filed rate doctrine and dismisses the Complaint.

As a public utility,³ Bell Atlantic-Pennsylvania must file tariffs with the PUC showing all schedules of rates, rules, regulations, practices, or contracts within the jurisdiction of the PUC. See 66 Pa.C.S.A. §§ 102 and 1302. “Tariffs have the force of law and are binding on both the utility and the customer.” Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm’n, 663 A.2d 281, 284 (Pa.Comm.w.Ct. 1995). Unless the PUC grants an exception, a public utility cannot charge any other rate than that set forth in the tariff. Bell Telephone Co. of Pennsylvania v. Pub. Util. Comm’n, 53 Pa.Comm.w. 241, 417 A.2d 827, 828-29 (1980); 66 Pa.C.S.A. § 1303 (“No public utility shall, directly or indirectly, by any device whatsoever, or in anywise [sic], demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of

³The term “public utility” includes “[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for . . . [c]onveying or transmitting messages or communications [with certain exceptions not applicable here] by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.” 66 Pa.C.S.A. § 102.

such public utility applicable thereto.”); 66 Pa.C.S.A. § 1304 (“No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage.”). Any attempt to vary the terms of the tariff, even by agreement with the customer, is not effective. Bell Telephone Co., 417 A.2d at 829.

Federal courts and other states’ courts have named this invariability of filed tariffs the “filed rate doctrine.” See, e.g., American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 222 (1998); Porr v. NYNEX Corp., 660 N.Y.S.2d 440, 442 (App.Div. 1997). Under the filed rate doctrine, customers are charged with notice of filed tariffs, and utilities and customers must abide by the tariffs. Central Office Telephone, 524 U.S. at 222. Ignorance or misquotation of the tariff is no excuse for deviating from its terms. Id. “[E]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff.” Id. (quotation omitted).

Courts have applied the doctrine to bar claims of breach of contract, breach of warranty, fraud, unjust enrichment and false advertising where the plaintiffs essentially sought different rates or services from those set forth in the tariff. Id. at 224-28 (holding that filed rate doctrine barred plaintiff’s claim for breach of contract and tortious interference where plaintiff claimed that AT&T failed to provide certain additional services promised in its sales brochures because the services pertained to subjects specifically addressed by AT&T’s FCC tariff, and the tariff did not provide for those additional services); Marcus v. AT&T Corp., 938 F.Supp. 1158, 1171 (S.D.N.Y. 1996) (holding that filed rate doctrine barred plaintiff’s claims for false advertising, fraud and breach of warranty where plaintiff argued that AT&T failed to disclose its billing practice of rounding the number of minutes of calls up to the next whole number because the relevant FCC tariff specifically disclosed and permitted the rounding up practice), aff’d, 138 F.3d 46, 56 (2d

Cir. 1998); Porr, 660 N.Y.S.2d at 446 (following Marcus and dismissing claims based on same facts where tariff filed with New York agency addressed the practice).

Though the filed rate doctrine originated to bar claims based on rates approved by federal agencies, courts have applied it to bar claims based on rates approved by state agencies. See, e.g., Porr, 660 N.Y.S.2d at 443 (applying filed rate doctrine to bar state law claims based on tariff approved by New York agency); Wegoland, Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994) (applying filed rate doctrine to bar RICO and fraud claims based on tariffs approved by New York and New England agencies); Sun City Taxpayers' Ass'n v. Citizens Utils. Co., 847 F.Supp. 281, 289 (D.Conn. 1994), aff'd, 45 F.3d 58 (2nd Cir. 1995)(applying filed rate doctrine to bar RICO claims based on rates approved by Arizona agency); Taffet v. Southern Co., 967 F.2d 1483, 1494 (11th Cir. 1992)(applying filed rate doctrine to bar claims based on tariff approved by Alabama and Georgia agencies); H.J. Inc. v. Northw. Bell Telephone Co., 954 F.2d 485, 492 (8th Cir.1992) (applying filed rate doctrine to bar RICO claims based on tariffs approved by Minnesota agency).

This court knows of no published court decision applying the filed rate doctrine to bar claims based on rates approved by the Pennsylvania PUC. But, see Pennsylvania Power Co. v. Pa. Pub. Util. Comm'n., 127 Pa.Comm.w. 97, 561 A.2d 43, 49-50 (1989) (discussing federal filed rate doctrine). However, Sections 1303 and 1304 of the Public Utility Code -- which effectively establish a statutory filed tariff doctrine⁴ -- and persuasive authority from other jurisdictions convince this court that the filed tariff doctrine bars claims where a plaintiff essentially seeks different rates or services from those set forth in a PUC tariff. 66 Pa.C.S.A. § 1303; Central Office Telephone, 524 U.S. at 222.

⁴See Watergate East, Inc. v. District of Columbia Pub. Serv. Comm'n., 662 A.2d 881, 888-89 (D.C. 1995) (describing similar D.C. statute, D.C.Code § 43-529, as “a codification of the filed rate doctrine”).

Bell Atlantic-Pennsylvania's PUC tariff specifically defines non-published telephone number

service:

At the request of the customer, the numbers of initial dial tone lines may be omitted from the directory and from the Directory Assistance Records of the Telephone Company, subject to [a \$1.75 monthly rate and a \$15.00 service charge]. These numbers are designated as "Non-Published Telephone Numbers." Unless the specific call number is given by the person calling, connection will not be established with a telephone having a "Non-Published Telephone Number."

Bell Atlantic-Pennsylvania PUC Tariff No. 1, § 5(A)(4)(c)(eff. May 11, 1997).⁵

The Knipmeyers allege that Bell Atlantic implicitly misrepresented on their website that non-published telephone number service includes omission of the Knipmeyers' number from bills sent to the owners of toll-free numbers. The tariff specifically defines the rights conferred on a customer who pays for non-published telephone number service: (1) omission of the customer's telephone number from the telephone book and from directory assistance, and (2) inability of an outside caller to connect with the customer without knowing the customer's phone number. Omission of the customer's telephone number from bills sent to toll-free number owners is not one of those rights. The Knipmeyers essentially ask the court to expand their rights under non-published telephone number service beyond the rights specifically set forth in the tariff. The filed rate doctrine prohibits this court from expanding those rights and bars the Knipmeyers' claims. Central Office Telephone, 524 U.S. at 225; Keogh v. Chicago Northw. Ry. Co., 260 U.S. 156, 163 (1922) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.").

The Knipmeyers' description of their injury in the complaint reinforces this conclusion. In paragraph 44 of Complaint, the Knipmeyers allege that they were injured "by, inter alia, paying for a service that they did not receive." To award damages for this injury, the court would have to calculate the difference

⁵The defendants attached a copy of the tariff to their preliminary objections. Because publicly-filed tariffs have the force of law, the court has considered them on a demurrer even though the tariffs themselves are not part of the Complaint.

in value between the non-published telephone number service that Bell Atlantic advertised and the non-published telephone number service that the Knipmeyers actually received. The end result of such an award would be an impermissible refund of a portion of Bell Atlantic-Pennsylvania's filed rate for non-published telephone number service. See Marcus, 938 F.Supp. at 1170 (holding that filed tariff doctrine bars any remedy that requires a refund of a portion of the filed rate); Porr, 660 N.Y.S.2d at 446 (same).

CONCLUSION

The filed tariff doctrine bars the Knipmeyers' claims. The court will enter a contemporaneous Order sustaining the Preliminary Objection based on the filed tariff doctrine and dismissing the Complaint. ⁶

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

⁶In view of this determination, the court did not consider the remaining Preliminary Objections.