

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COMPUWILL EXPRESS, INC. and	:	
THOMAS DELOR d/b/a/ COMPUWILL	:	
EXPRESS	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 96-2462
ATX TELECOMMUNICATIONS	:	
SERVICES, LTD.	:	
Defendant	:	

MEMORANDUM AND ORDER

YOHN, J. May , 2000

Plaintiffs Compuwill Express, Inc. [“Compuwill”] and Thomas Delor d/b/a/ Compuwill Express have sued defendant ATX Telecommunications Services, Ltd. [“ATX”] for conduct related to the telephone number 800-529-6278, the last seven digits of which correspond to the letters on a keypad spelling LAW-MART. Pending before the court is the defendant’s motion to dismiss the third amended complaint for failure to state a claim on which relief can be granted¹ (Doc. No. 174). The court will deny the defendant’s motion in part and grant it in part.

I have previously declined to accept the defendant’s arguments for the dismissal of the claims in Counts I and II, which describe the breach of a contract to assign 800-529-6278 [“LAW-MART”] to the plaintiffs and the fraudulent misrepresentation of the defendant’s willingness and/or ability to assign LAW-MART to the plaintiffs. Because the defendant makes no new arguments, I will deny the defendant’s motion to dismiss with respect to Counts I and II.

¹The defendant does not style its motion to dismiss as a motion to dismiss for failure to state a claim on which relief can be granted. That is, however, the substance of the arguments in the defendant’s memoranda of law in support of its motion to dismiss.

Counts III and IV contain claims that the defendant fraudulently and negligently reported the assignment and status of LAW-MART to a central database of all toll free long distance numbers. Because these claims are new and do not relate back to an earlier complaint, they are being asserted after the two-year statutes of limitations have run. The running of the statutes of limitations is not affected by either the discovery rule or the doctrine of fraudulent concealment. Therefore, I will grant the defendant's motion to dismiss with respect to Counts III and IV.

I will also grant the defendant's motion to dismiss with respect to Count V, which contains a claim for breach of fiduciary duty, because I dismissed this claim in the corrected second amended complaint and because the plaintiffs did not intend Count V of the third amended complaint to state a claim on which relief could be granted.

Count VI contains allegations that the defendant violated the Communications Act. For largely the same reasons the claims in Counts III and IV are time-barred, I conclude that the claims in Count VI are also time-barred. Therefore, I will grant the defendant's motion to dismiss with respect to Count VI.

I. Background

The third amended complaint contains the following allegations.

On May 1, 1993, the defendant reserved LAW-MART from the spare pool in the 800 number database. *See* Third Am. Compl. (Doc. No. 173) ¶ 19. After that date, the defendant never released LAW-MART back into the spare pool. *See id.* ¶ 21. As a result, from that date forward, the 800 number database indicated that LAW-MART was not available for assignment. *See id.* ¶ 22. From June 28, 1993, to March 31, 1994, the defendant caused the 800 number

database to indicate that LAW-MART had been assigned and was in “working” status. *See id.* ¶ 23. From May 1, 1993, to February 23, 1994, one or more sixty-day periods existed during which the defendant had not identified a toll free service subscriber for LAW-MART. *See id.* ¶ 26.

On February 24, 1994, the defendant assigned LAW-MART to T.A.P. Consultants [“TAP”]. *See id.* ¶ 28. Less than a month later, on March 21, 1994, the defendant terminated LAW-MART’s assignment to TAP and assigned LAW-MART to Julius Blumberg, Inc. [“Blumberg”]. *See id.* ¶ 29.

In late November 1993, Delor dialed LAW-MART, but it did not ring. *See id.* ¶ 31. Consequently, he asked his long distance telephone service provider whether LAW-MART was available for use. *See id.* He was told that LAW-MART was assigned and in “working” status. *See id.* From this time until late March 1994, Delor periodically dialed LAW-MART to determine if it was in use and asked various toll free number service providers about LAW-MART’s availability. *See id.* ¶¶ 32-33. LAW-MART never rang, and Delor was always told that LAW-MART was assigned and in “working” status. *See id.* On March 26, 1994, Delor was told that the defendant had control of LAW-MART. *See id.* ¶ 34.

On March 28, 1994, Delor telephoned the defendant to determine whether he could obtain the use of LAW-MART. *See id.* ¶ 35. Lisa Demetris, an ATX sales representative, told Delor that if LAW-MART was available, she would reserve it for him. *See id.* The following day, March 29, 1994, Demetris contacted Delor and informed him that LAW-MART was available. *See id.* ¶ 36. During that conversation, Delor and Demetris entered into a verbal agreement regarding the assignment of LAW-MART to Delor. *See id.* Later that day, Demetris

faxed Delor a partially completed service authorization form, which Delor completed and faxed back to Demetris. *See id.* On March 30, 1994, Delor received a telephone call from Carol, an ATX sales manager, who confirmed that the defendant had reserved LAW-MART for Delor and that service would begin on April 1, 1994. *See id.* ¶ 37.

The next morning, March 31, 1994, Demetris contacted Delor and asked him if he would consider taking another 800 number because there was a problem with assigning LAW-MART to Delor. *See id.* ¶ 38. Delor told her that an agreement existed and that he would not waive his rights to LAW-MART. *See id.* Later that afternoon, Thomas Gavina, a principal of ATX, telephoned Delor to discuss the situation. *See id.* ¶ 39. Delor told Gavina that a binding contract existed. *See id.* Gavina told Delor that he had not yet decided on a course of action and that he would inform Delor of his final decision by the next morning. *See id.* On April 1, 1994, eleven days after assigning LAW-MART to Blumberg, the defendant activated LAW-MART for Blumberg. *See id.* ¶ 29, 40.

This suit resulted.

The plaintiffs, proceeding pro se, originally brought this action against the defendant in the United States District Court for the Middle District of Florida on March 30, 1995. In the original complaint (Doc. No. 1), the plaintiffs asserted seven causes of action, which centered around the allegation that at the end of March 1994 the defendant failed to assign LAW-MART to the plaintiffs as it had agreed to do and the allegation that the defendant effectively sold LAW-MART to Blumberg at the end of March 1994. The defendant filed a motion to dismiss for improper venue and for failure to state a claim upon which relief can be granted (Doc. No. 1). On March 19, 1996, the motion to dismiss was granted with respect to six of the seven counts in

the complaint, but the plaintiffs were given leave to file an amended complaint. Additionally, the case was transferred to the Eastern District of Pennsylvania.

On April 24, 1996, the plaintiffs filed an amended complaint (Doc. No. 2). In the amended complaint, the plaintiffs sought relief for the defendant's late March 1994 failure to assign LAW-MART to them as promised and for the defendant's late March 1994 misrepresentation of its ability and/or willingness to assign LAW-MART to them. Again, the defendant filed a motion to dismiss (Doc. No. 3). The court dismissed the amended complaint on June 24, 1996, but allowed the plaintiffs to file a second amended complaint. The dismissal of the amended complaint was affirmed on appeal.

The plaintiffs filed a second amended complaint (Doc. No. 35) on December 22, 1997. In the second amended complaint, the plaintiffs again focused on the defendant's late March 1994 failure to assign LAW-MART to them as promised and on the defendant's late March 1994 misrepresentation of its ability and/or willingness to assign LAW-MART to them. On January 16, 1998, the theretofore pro se plaintiffs filed a motion to allow an attorney to enter an appearance on their behalf and to allow the filing of a corrected second amended complaint with the assistance of counsel (Doc. No. 39). The court granted this motion.

On February 17, 1998, the plaintiffs filed a corrected second amended complaint (Doc. No. 46). As before, the plaintiffs sought relief for the defendant's late March 1994 failure to assign LAW-MART to them as promised and for the defendant's late March 1994 misrepresentation of its ability and/or willingness to assign LAW-MART to them. Additionally, the plaintiffs claimed that the defendant violated the Communications Act ["Act"], 47 U.S.C. §§ 201-203, in March 1994 by effectively selling LAW-MART to Blumberg and by failing to

return LAW-MART to the spare pool on terminating its assignment to a customer. The defendant filed a motion to dismiss the corrected second amended complaint (Doc. No. 48). In spring 1998, the court granted the defendant's motion with respect to the plaintiffs' deceit and breach of fiduciary duty claims and dismissed those claims. The court denied the defendant's motion with respect to the plaintiffs' other claims. The defendant also filed a motion for summary judgment (Doc. No. 96), which the court denied after oral argument.

The plaintiffs sought leave to file a third amended complaint, which the court granted without prejudice to the defendant's right to raise issues concerning statutes of limitations. The plaintiffs filed the third amended complaint on September 13, 1999 (Doc. No. 173). In it, they continue to seek relief for the defendant's late March 1994 failure to assign LAW-MART to them as promised, for the defendant's late March 1994 misrepresentation of its ability and/or willingness to assign LAW-MART to them, and for the defendant's March 1994 failure to return LAW-MART to the spare pool on terminating its assignment to a customer. Additionally, the plaintiffs describe for the first time the defendant's conduct from May 1993 to February 23, 1994, and claim that this conduct is actionable.

II. Legal Standard

The defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *See Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most

favorable to the non-movant.” *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). At this stage of the litigation, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

III. Discussion

A. Count I: Breach of Contract

In Count I of the third amended complaint, the plaintiffs assert a claim for breach of the contract for the assignment and servicing of LAW-MART that was formed between them and the defendant at some point during their communications from March 28, 1994, to March 30, 1994. *See* Third Am. Compl. ¶¶ 41-51. The plaintiffs asserted the same claim in Count I of the corrected second amended complaint. *See* Corrected Second Am. Compl. (Doc. No. 46) [“Corr. Second Am. Compl.”] ¶¶ 24-32.

The defendant argues for the dismissal of Count I of the third amended complaint simply by incorporating the arguments it previously made for summary judgment in its favor on Count I of the corrected second amended complaint. *See* Def. ATX’s Mem. of Law in Supp. of Its Mot. to Dismiss Pls.’ Third Am. Compl. (Doc. No. 174) [“ATX Mem.”] at 4-5 (incorporating pages 3-10 of its memorandum in support of its motion for summary judgment). Because the court has already considered and rejected these arguments, the court will deny the defendant’s motion to dismiss with respect to Count I. *See* Order of Feb. 5, 1999 (Doc. No. 121) (denying the defendant’s motion for summary judgment).

B. Count II: Deceit

The plaintiffs style Count II of the third amended complaint as a claim for deceit. *See* Third Am. Compl. at 11. In Count II, they allege that in late March 1994 the defendant misrepresented its willingness and/or ability to assign LAW-MART to the plaintiffs and activate it. *See id.* ¶ 53. Moreover, the plaintiffs claim that they relied on the defendant's misrepresentations, as the defendant intended, and that they suffered injury as a result. *See id.* The allegations in Count II of the third amended complaint are substantially the same as the allegations in Counts II and III of the corrected second amended complaint. *Compare* Third Am. Compl. ¶¶ 52-54 *with* Corr. Second Am. Compl. ¶¶ 33-59.

The defendant argues that Count II of the third amended complaint must be dismissed because the court dismissed the plaintiffs' deceit claim in the corrected second amended complaint.² *See* ATX Mem. at 5. In April 1998, the court granted the defendant's motion to dismiss the corrected second amended complaint with respect to Count II because the plaintiffs conceded that Count II, which asserted a deceit claim, was subsumed within Count III, which asserted a fraud claim. *See* Order of April 1, 1998 ¶ 1. An examination of Counts II and III of the corrected second amended complaint reveals the reason for the plaintiffs' concession: the

²The defendant also contends that this claim is time-barred because it does not relate back to the original complaint. *See* ATX Mem. at 5. The defendant made the same argument unsuccessfully in seeking the dismissal of the fraud claim in the corrected second amended complaint. *See* Def.'s Mem. of Law in Supp. of Def.'s Mot to Dismiss Pls.' Corr. Second Am. Compl. (Doc. No. 48) at 13; Order of April 1, 1998 (Doc. No. 51) (denying the defendant's motion to dismiss the corrected second amended complaint with respect to the fraud claim). Because the court construes Count II of the third amended complaint to assert the fraud claim in Counts II and III of the corrected second amended complaint, and because the court can perceive no reason why the defendant's time-barred argument should be any more persuasive now than it was two years ago, the court will not dismiss Count II of the third amended complaint as time-barred.

wrong alleged in both counts is the same—the defendant misrepresented its willingness and/or ability to assign LAW-MART to the plaintiffs and to activate it. *Compare* Corr. Second Am. Compl. ¶¶ 33-45 *with id.* ¶¶ 46-59.

The plaintiffs contend that Count II of the third amended complaint should not be dismissed because it is simply a combination of Counts II and III of the corrected second amended complaint. *See* Pls.’ Br. in Opp’n to Def.’s Mot. to Dismiss Third Am. Compl. (Doc. No. 175) [“Pls.’ Resp.”] at 25. The plaintiffs point out that in dismissing Count II of the corrected second amended complaint, the court did not conclude that Count II failed to state a claim on which relief could be granted. *See id.* Instead, the plaintiffs argue that the court ordered, in effect, that Count II be consolidated with Count III into a single claim for relief. *See id.* Additionally, the plaintiffs admit that Count II of the third amended complaint is unadvisedly styled as a deceit claim simply in order to indicate its relationship to the misrepresentation claims of the corrected second amended complaint. *See id.*; *see also* Third Am. Compl. ¶¶ 55-65 (setting forth a fraud claim in Count III that is unrelated to the misrepresentations described in Counts II and III of the corrected second amended complaint).

The court agrees with the plaintiffs that Count II of the third amended complaint asserts the fraud claim that was asserted in Counts II and III of the corrected second amended complaint. For this reason, the court will deny the defendant’s motion to dismiss with respect to Count II.

C. Counts III and IV: Fraud and Negligence

In Count III, the plaintiffs assert a claim for fraud. The plaintiffs allege that the defendant intentionally or recklessly misrepresented to the 800 number database that LAW-MART was

assigned and in “working” status at least from November 1, 1993, through February 23, 1994, and perhaps for additional time from May 1, 1993, through October 31, 1993, and/or from February 24, 1994, to March 31, 1994. *See* Third Am. Compl. ¶¶ 56-57. Moreover, the defendant intended, or was reckless to the possibility, that the plaintiffs (or someone like the plaintiffs) would rely on the incorrect information in the 800 number database to their detriment, as the plaintiffs did. *See id.* ¶ 59, 61. In Count IV, the plaintiffs assert a negligence claim based on the same misrepresentations. *See id.* ¶¶ 69-71.

The defendant argues that Counts III and IV must be dismissed because the fraud and negligence claims therein were asserted after the statutes of limitations had run. *See* ATX Mem. at 3-4. Under Pennsylvania law, fraud and negligence actions are subject to two-year statutes of limitations. *See* 42 Pa. Cons. Stat. § 5524 (stating that a two-year statute of limitations applies to “[a]ny other action or proceeding to recover damages for injury to person or property which is founded on *negligent*, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or *fraud*, except an action or proceeding subject to another limitation specified in this subchapter” (emphasis added)). Because the fraud and negligence, as well as the injuries resulting therefrom, are alleged to have been completed by the end of March 1994, the fraud and negligence causes of action set forth in Counts III and IV could have been asserted by the end of March 1994. Thus, the statutes of limitations on these claims would have begun to run by then. *See Pocono Int’l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). Consequently, the statutes of limitations for these claims would have run by the end of March 1996. If the plaintiffs did not assert these claims until they filed their third amended complaint on September 13, 1999, then these claims would be time-barred.

The plaintiffs respond to the defendant's argument by contending that the fraud and negligence claims in the third amended complaint are not new. They claim that the corrected second amended complaint contained "[t]he same essential charge" as that in Counts III and IV of the third amended complaint. Pls.' Resp. at 5. Thus, they claim to have given the defendant adequate notice of the claims asserted in those counts. *See id.* at 5-6. The court disagrees.

The corrected second amended complaint contained allegations that at the end of March 1994 the defendant misrepresented to the plaintiffs its willingness and/or ability to assign LAW-MART to them. *See* Corr. Second Am. Compl. ¶¶ 33-59. It did not, however, contain any allegations that between May 1993 and March 1994 the defendant misrepresented to the 800 number database that LAW-MART was assigned and in "working" status. *See* Corr. Second Am. Compl. ¶¶ 12-23, 33-59. Consequently, the court concludes that the fraud and negligence claims in Counts III and IV of the third amended complaint are new.

Anticipating this conclusion, the plaintiffs argue that if the fraud and negligence claims in Counts III and IV are not new, then they relate back to the date of the original complaint pursuant to Federal Rule of Civil Procedure 15(c)(2). *See* Pls.' Resp. at 6-8. Rule 15(c)(2) permits an amendment to a pleading to relate back to the date of the pleading that is amended if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). Application of Rule 15(c)(2) is not mechanical. *See Brown v. New York Life Ins. Co.*, 32 F. Supp. 443, 445 (D.N.J. 1940) (rejecting a mechanical test for determining whether a claim arose out of the same "conduct, transaction, or occurrence"), *aff'd*, 148 F.2d 524 (3d Cir. 1945). Instead, courts apply Rule 15(c)(2) in such a way as to "ensure defendants of notice of the

conduct that is ultimately challenged in court.” *EEOC v. Westinghouse Elec. Corp.*, 632 F. Supp. 343, 364 (E.D. Pa. 1986), *aff’d in part, vacated in part on other grounds*, 869 F.2d 696, 704 (3d Cir. 1989), *vacated on other grounds*, 493 U.S. 801 (1989). For example, “[t]he addition of new theories of recovery . . . is permissible when the new claims are not based on events different from or in addition to those set out in the original complaint.” *Id.* (internal quotation marks omitted). An amendment will not, however, relate back under Rule 15(c)(2) in the following situation:

[I]f the alteration of the original statement is so substantial that it cannot be said that the defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense, then the amendment will not relate back and will be time barred if the limitations period has expired.

Charles A. Wright et al., *Fed. Prac. & Proc.: Civil 2d* § 1497 (1986).

The plaintiffs contend that Counts III and IV of the third amended complaint relate back to an earlier complaint under Rule 15(c)(2) for the same reasons that those counts are not new. *See Pls.’ Resp.* at 8 (arguing that the counts relate back “[f]or the reasons discussed in Section III.A.1 of this brief”). For largely the same reasons the court concluded that Counts III and IV of the third amended complaint state new claims, the court concludes that the claims in these counts do not relate back to any earlier complaint.

No earlier complaint contained any allegations that between May 1993 and March 1994 the defendant misrepresented to the 800 number database that LAW-MART was assigned and in “working” status; those allegations are unique to the third amended complaint. *Compare* Corr. Second Am. Compl. ¶¶ 12-23; Second Am. Compl. (Doc. No. 21) ¶¶ 8-24; Am. Compl. (Doc. No. 2) ¶¶ 8-24; Compl. (Doc. No. 1) ¶¶ 8-24 *with* Third Am. Compl. ¶¶ 19-27. Moreover, the

defendant's alleged misrepresentations to the 800 number database between May 1993 and March 1994 constitute completely separate conduct, transactions, and occurrences from its alleged misrepresentations to the plaintiffs at the end of March 1994. Considering the absence of any allegations in earlier complaints dealing with the defendant's representations to the 800 number database from May 1993 to March 1994, the defendant cannot have had notice that these representations would form the basis of claims for relief by the plaintiffs. Therefore, the court concludes that the fraud and negligence claims in Counts III and IV of the third amended complaint do not relate back under Rule 15(c)(2) to any earlier complaint.

Also anticipating this conclusion, the plaintiffs argue that pursuant to the discovery rule, the statutes of limitations for these claims had not begun to run by the end of March 1994. *See* Pls.' Resp. at 8-13. Instead, the plaintiffs contend that the statutes of limitations began to run on September 10, 1998, when they claim to have learned that they might have been injured by the defendant's pre-March 1994 conduct. *See id.* Under Pennsylvania law, the discovery rule dictates that the statute of limitations for a claim begins running only "when the plaintiff learn[s], or, by the exercise of reasonable diligence, could . . . learn[] of the [injury that is the basis for the claim]." *Baumgart v. Keene Bldg. Prods. Corp.*, 666 A.2d 238, 241 (Pa. 1995). Thus, a plaintiff bears the burden of exercising reasonable diligence in investigating the possibility of actionable injury. *See Pocono Int'l Raceway*, 468 A.2d at 471 (a plaintiff's "lack of knowledge, mistake, or understanding do[es] not toll the running of the statute of limitations"); *Colonna v. Rice*, 664 A.2d 979, 981 (Pa. Super. Ct. 1995) (a plaintiff's "failure to make inquiry when information is available is failure to exercise reasonable diligence as a matter of law").

The plaintiffs claim that when this action originated, they had no reason to suspect that they had been injured by the defendant's pre-March 1994 conduct. *See* Pls.' Resp. at 10-11. According to the plaintiffs, the only information that would suggest the defendant's involvement with LAW-MART prior to March 1994 was a document indicating that the defendant had assigned LAW-MART to TAP on February 24, 1994. *See id.* at 11. Because the defendant claimed that this document was not relevant to the plaintiffs' suit, the plaintiffs did not then pursue the issue of the defendant's pre-March 1994 conduct. *See id.* The plaintiffs began such pursuit only in September 1998 after discovery documents suggested possible wrongdoing on the part of the defendant before March 1994. *See id.* at 11-12.

The allegations in the third amended complaint suggest a different conclusion. According to the third amended complaint, Delor called LAW-MART for the first time in November 1993. *See* Third Am. Compl. ¶ 31. When LAW-MART did not ring, he thought it was unassigned and sought to reserve it, but he was told that it was assigned and in "working" status. *See id.* Over the next four months, Delor periodically called LAW-MART, but it never rang. *See id.* ¶ 32. During the same time period, he also sought to reserve LAW-MART, but he was always told that it was assigned and in "working" status. *See id.* ¶ 33. If failure to ring suggested that LAW-MART was unassigned, but Delor was repeatedly told that LAW-MART was assigned and in "working" status, then by March 1994 a plaintiff exercising reasonable diligence would have suspected either that LAW-MART was not assigned or that it was not in "working" status. In other words, by March 1994 a plaintiff exercising reasonable diligence would have begun to question the accuracy of the information it was receiving concerning LAW-MART's assignment and status and would have begun to suspect that the entity responsible for reporting the

assignment and status of LAW-MART was not reporting the assignment and status accurately. Thus, by March 1994 the plaintiffs either were aware or should have been aware that they had suffered the injury they claim to have suffered in Counts III and IV of the third amended complaint. The plaintiffs have not demonstrated that they were ignorant of this injury despite exercising reasonable diligence.

In late March 1994, the plaintiffs learned that the defendant had control of LAW-MART's assignment and status. *See id.* ¶ 34. If the plaintiffs were exercising reasonable diligence, then, upon learning in late March 1994 that the defendant controlled LAW-MART, the plaintiffs would have to suspect that the defendant was responsible for causing the plaintiffs the injury they claim to have suffered from May 1993 to March 1994. At the very least, by late March 1994, the plaintiffs should have been suspicious enough to inquire about the defendant's May 1993 to March 1994 representations to the 800 number database concerning LAW-MART's assignment and status. The plaintiffs have not demonstrated that they were ignorant of the defendant's possible pre-March 1994 connection to LAW-MART despite the exercise of reasonable diligence. Consequently, the court concludes that the plaintiffs' "failure to make inquiry when information [was] available is failure to exercise reasonable diligence as a matter of law." *Colonna*, 664 A.2d at 981. Thus, the statutes of limitations for the fraud and negligence claims in Counts III and IV of the third amended complaint had begun to run by the end of March 1994.

The plaintiffs also argue that even if the statutes of limitations had begun to run by the end of March 1994, the statutes of limitations were tolled because the defendant fraudulently concealed from the plaintiffs its pre-March 1994 connection to LAW-MART. *See Pls.' Resp.* at

13-17. The doctrine of fraudulent concealment “tolls the statute of limitations where ‘through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from the right of inquiry.’” *Bohus v. Beloff*, 950 F.2d 919, 925 (3d Cir. 1991) (quoting *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985)). As with the discovery rule, however, a plaintiff’s “‘mere mistake, misunderstanding, or lack of knowledge is insufficient’” to establish a defendant’s fraudulent concealment. *Id.* (quoting *Nesbitt v. Erie Coach Co.*, 204 A.2d 473 (Pa. 1964)). Instead, the doctrine of fraudulent concealment operates to toll a statute of limitations only if a defendant commits “an affirmative and independent act of concealment that would divert or mislead the plaintiff from discovering the injury.” *Id.*

The plaintiffs claim that during discovery the defendant concealed evidence of its pre-March 1994 connection to LAW-MART. *See* Pls.’ Resp. at 14-17. Specifically, the plaintiffs state that in response to their request for production of documents concerning the defendant’s dealings with TAP, which would have revealed the defendant’s pre-March 1994 connection to LAW-MART, the defendant objected that its relationship with TAP was not relevant to the plaintiffs’ claims. *See id.* at 15.

The defendant served the plaintiffs with this response on April 9, 1996. *See id.* Thus, the claims referred to by the defendant were the claims in the original complaint. Taking the timing of this objection into account, the defendant was correct in stating that its relationship with TAP was not relevant to the plaintiffs’ claims because the original complaint contained nothing that would put the defendant’s pre-March 1994 conduct at issue. *See* Compl. ¶¶ 8-24. The defendant’s legitimate attempt to confine the plaintiffs’ discovery to matters relevant to the plaintiffs’ claims does not constitute fraudulent concealment. Although the plaintiffs may have

“relax[ed their] vigilance or deviate[d] from the right of inquiry,” the defendant did not cause any relaxation or deviation. *Bohus*, 950 F.2d at 925 (internal quotation marks omitted).

Consequently, the court concludes that there was no fraudulent concealment on the part of the defendant that would operate to toll the statutes of limitations for the fraud and negligence claims in Counts III and IV of the third amended complaint.

For the foregoing reasons, the court concludes that the statutes of limitations for the fraud and negligence claims in Counts III and IV of the third amended complaint had begun to run by the end of March 1994 and had run by the end of March 1996. Because the plaintiffs did not assert these claims until September 13, 1999, when they filed the third amended complaint, the court concludes that these claims are time-barred. Thus, it is clear to the court “that no relief could be granted under any set of facts that could be proved consistent with the allegations” in Counts III and IV. *Hishon*, 467 U.S. at 73. Consequently, the court will grant the defendant’s motion to dismiss with respect to Counts III and IV.

D. Count V: Breach of Fiduciary Duty

The plaintiffs style Count V of the third amended complaint as a claim for breach of fiduciary duty. *See* Third Am. Compl. at 15. The defendants argue that this claim must be dismissed because the court already dismissed the plaintiffs’ breach of fiduciary duty claim in the corrected second amended complaint. *See* ATX Mem. at 5; *see also* Order of April 1, 1998; Order of May 5, 1998 (Doc. No. 58) (dismissing the corrected second amended complaint with respect to Count V, in which the plaintiffs assert a claim for breach of fiduciary duty).

In their response to the defendant's motion to dismiss the third amended complaint, the plaintiffs concede that in Count V they are not attempting to state a claim on which relief could be granted. *See* Pls.' Resp. at 25-26. Instead, the plaintiffs seek only to make the same factual allegations that they had in Count V of the corrected second amended complaint. *See id.* Although it is unclear to the court why the plaintiffs chose to style these factual allegations as Count V, in order to prevent any confusion, the court will grant the defendant's motion to dismiss with respect to Count V.

E. Count VI: Violations of the Communications Act

In Count VI, the plaintiffs allege that the defendant violated portions of the Act. Specifically, the plaintiffs claim that the defendant should be held liable for committing the following violations: (1) reserving LAW-MART from the spare pool without having a customer for it; (2) failing either to activate LAW-MART for a customer or to return it to the spare pool within sixty days of reserving it; (3) failing to return LAW-MART to the spare pool on terminating its assignment to a customer; and (4) failing to accurately report the assignment and status of LAW-MART to the 800 number database. *See* Third Am. Compl. ¶ 84.

Like fraud and negligence, violations of the Act are subject to two-year statutes of limitations. *See* 47 U.S.C. § 415(b) (creating a two-year statute of limitations for complaints filed with the FCC for violations of the Act); *Nordlicht v. New York Tel. Co.*, 617 F. Supp. 220, 228 (S.D.N.Y. 1985) (recognizing that courts have universally agreed on 47 U.S.C. § 415(b)'s application not only to complaints filed with the FCC but also to complaints filed in district court); Eunice A. Eichelberger, Annotation, *Construction and Application of Communications*

Act Statute of Limitations (47 U.S.C.A. § 415(b)) Relating to Recovery from Carrier of Damages not Based on Overcharges, 81 A.L.R. 700 (1987) (same). Because the violations of the Act claimed in Count VI and the injuries resulting therefrom are alleged to have been completed by the end of March 1994, the statutes of limitations would have begun to run by then and would have run by the end of March 1996. Thus, if the plaintiffs did not assert the claims in Count VI until they filed their third amended complaint on September 13, 1999, and if the discovery rule and the doctrine of fraudulent concealment do not operate to alter the running of the statutes of limitations, then these claims should be time-barred. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386-88 (3d Cir. 1994) (recognizing the applicability of the discovery rule and the doctrine of fraudulent concealment to federal causes of action).

Considering the similarity of the statute of limitations law applicable to the fraud and negligence claims in Counts III and IV and the statute of limitations law applicable to the claims in Count VI, it is unsurprising that the parties make basically the same arguments with respect to the dismissal of the claims in Count VI that they made with respect to the dismissal of the claims in Counts III and IV. *See supra* Part III.C. The defendant argues that the claims in Count VI are time-barred because the statutes of limitations had run before these claims were asserted. *See* ATX Mem. at 2-3. The plaintiffs argue that the claims in Count VI are not new, that they relate back, that the discovery rule prevented the statutes of limitations from beginning to run until September 1998, and that the doctrine of fraudulent concealment tolled the running of the statutes of limitations until September 1998. *See* Pls.' Resp. at 4-17.

For the reasons explained at length below, the court concludes that the claims asserted in Count VI of the third amended complaint are time-barred. Thus, it is clear to the court "that no

relief could be granted under any set of facts that could be proved consistent with the allegations” in Count VI. *Hishon*, 467 U.S. at 73. Consequently, the court will grant the defendant’s motion to dismiss with respect to Count VI.

1. Violations 1, 2, and 4

With respect to most of the violations of the Act alleged by the plaintiffs in Count VI, the court concludes that the statutes of limitations for asserting these claims have run for the same reasons the statutes of limitations for asserting the fraud and negligence claims in Counts III and IV have run. *See supra* Part III.C. The first, second, and fourth alleged violations are unique to the third amended complaint: (1) that the defendant reserved LAW-MART from the spare pool without having identified a customer for it; (2) that the defendant failed either to activate LAW-MART for a customer or to return it to the spare pool within sixty days of reserving it; and (4) that the defendant failed to accurately report the assignment and status of LAW-MART to the 800 number database. *Compare* Third Am. Compl. ¶¶ 19-29, 84 *with* Corr. Second Am. Compl. ¶¶ 12-23; Second Am. Compl. ¶¶ 8-24; Am. Compl. ¶¶ 8-24; Compl. ¶¶ 8-24. Moreover, the pre-March 1994 conduct alleged in these claims is completely separate from the March 1994 conduct alleged in earlier complaints. Considering the absence of any allegations in earlier complaints dealing with the conduct described in these claims, the defendant cannot have had notice that this conduct would form the basis of claims for relief by the plaintiffs. Therefore, the court concludes that first, second, and fourth alleged violations of the Act do not relate back under Rule 15(c)(2) to any earlier complaint.

The discovery rule does not operate to delay the accrual of these claims because the plaintiffs have not demonstrated that their ignorance of their injury or injuror existed in spite of their exercise of reasonable diligence. Just as the plaintiffs should have suspected by March 1994 that the defendant was inaccurately reporting to the 800 number database the assignment and status of LAW-MART, *see supra* Part III.C, they also should have suspected by that time that the defendant had committed other violations of the Act in connection with LAW-MART that would result in its unavailability (e.g., reserving LAW-MART without a customer and failing within sixty-days of reserving it either to assign LAW-MART to a customer or to return it to the pool). Thus, the discovery rule does not prevent the statutes of limitations for the first, second, and fourth alleged violations from beginning to run by the end of March 1994. Additionally, the plaintiffs have not demonstrated that the defendant caused them to relax their inquiry into the existence of these claims by fraudulent means. *See supra* Part III.C. Consequently, the court concludes that there was no fraudulent concealment on the part of the defendant that would operate to toll the statutes of limitations for these claims.

For the foregoing reasons, the court concludes that the statutes of limitations for these claims had begun to run by the end of March 1994 and had run by the end of March 1996. Because the plaintiffs did not assert the claims concerning the first, second, and fourth alleged violations of the Act until September 13, 1999, when they filed the third amended complaint, the court concludes that these claims are time-barred.

2. Violation 3

One of the claims in Count VI, however, is not new to the third amended complaint. The third alleged violation of the Act concerns the defendant's failure to return LAW-MART to the spare pool on terminating its assignment to a customer. *See* Third Am. Compl. ¶ 84(c). As the plaintiffs point out, they asserted a similar claim in the corrected second amended complaint. *See* Pls.' Resp. at 4-5 (citing Corr. Second Am. Compl. ¶ 75.4). The corrected second amended complaint, however, was filed on February 17, 1998, almost two years after the statute of limitations for this violation of the Act had run. *See* Corr. Second Am. Compl. at 1. Thus, this claim is nonetheless time-barred unless it was actually asserted in an earlier complaint filed before the end of March 1996 and preserved, unless it relates back to an earlier complaint filed before the end of March 1996, or unless the discovery rule or the doctrine of fraudulent concealment alter the running of the statute of limitations.

This claim was not actually asserted in a predecessor of the corrected second amended complaint. The plaintiffs argue, however, that this claim relates back to Count III of the original complaint. *See* Pls.' Resp. at 18-19. In Count III of the original complaint, the plaintiffs alleged that the defendant violated FCC rules when it improperly considered the anticipated long distance billing volume of the plaintiffs and of Blumberg in deciding to refuse to honor its March 29, 1994, promise to assign LAW-MART to the plaintiffs. *See* Compl. ¶¶ 17, 21, 30-32. The conduct claimed as actionable in Count III of the original complaint is, however, quite different from that described in Count VI of the corrected second amended complaint. In the original complaint, the plaintiffs complained about the defendant not honoring its March 29, 1994, agreement, but in the corrected second amended complaint, the plaintiffs complained the defendant should have released LAW-MART into the spare pool on March 21, 1994, eight days

before formation of the doomed agreement. *Compare* Compl. ¶¶ 17, 21, 30-32 *with* Corr. Second Am. Compl. ¶ 75.4.

No complaint filed before the corrected second amended complaint contained any allegations concerning the defendant's March 21, 1994, conduct in failing to return LAW-MART to the spare number pool after terminating its assignment to TAP. *See* Second Am. Compl. ¶¶ 8-24; Am. Compl. ¶¶ 8-24; Compl. ¶¶ 8-24. Thus, the defendant cannot have had notice before February 17, 1998, when the corrected second amended complaint was filed, that its March 21, 1994, conduct would form the basis of a claim for relief by the plaintiffs. Therefore, the court concludes that this part of Count VI of the corrected second amended complaint does not relate back under Rule 15(c)(2) to any earlier complaint.

The discovery rule does not operate to delay the accrual of this claim because the plaintiffs have not demonstrated that their ignorance of their injury existed in spite of their exercise of reasonable diligence. Just as the plaintiffs should have suspected by March 1994 that the defendant was inaccurately reporting to the 800 number database the assignment and status of LAW-MART, *see supra* Part III.C, by the end of March 1994 they also should have suspected that the defendant had committed other violations of the Act in connection with LAW-MART that would result in its unavailability (e.g., failing to return LAW-MART to the spare number pool after terminating its assignment to a customer). Thus, the discovery rule does not prevent the statute of limitations for the third alleged violation of the Act from having begun to run by the end of March 1994. Additionally, the plaintiffs have not demonstrated that the defendant caused them to relax their inquiry into this claim by fraudulent means. *See supra* Part III.C.

Consequently, the court concludes that there was no fraudulent concealment on the part of the defendant that would operate to toll the statute of limitations for this claim.

For the foregoing reasons, the court concludes that the statute of limitations for this claim had begun to run by the end of March 1994 and had run by the end of March 1996. Because the plaintiffs did not assert the claim concerning the third alleged violation of the Act until February 17, 1998, when they filed the corrected second amended complaint, the court concludes that this claim is time-barred.

IV. Conclusion

Because the defendant makes arguments for the dismissal of the claims in Counts I and II that the court has previously rejected, the court will deny the defendant's motion to dismiss with respect to Counts I and II. Because the claims in Counts III, IV, and VI are time-barred, the court will grant the defendant's motion to dismiss with respect to Counts III, IV, and VI. Because the court has previously dismissed Count V, and because the plaintiffs do not intend to state a claim therein on which they could recover, the court will grant the defendant's motion to dismiss with respect to Count V. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COMPUWILL EXPRESS, INC. and	:	
THOMAS DELOR d/b/a/ COMPUWILL	:	
EXPRESS	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 96-2462
ATX TELECOMMUNICATIONS	:	
SERVICES, LTD.	:	
Defendant	:	

ORDER

YOHN, J.

AND NOW, this day of May, 2000, upon consideration of the defendant's motion to dismiss (Doc. Nos. 174, 177, 180), as well as the plaintiffs' documents in opposition to the defendant's motion (Doc. Nos. 175, 176, 179, 181), IT IS HEREBY ORDERED that the motion to dismiss is GRANTED IN PART and DENIED IN PART. The motion to dismiss is GRANTED with respect to Counts III, IV, V, and VI. Counts III, IV, V, and VI are DISMISSED WITH PREJUDICE. With respect to Counts I and II, the motion to dismiss is DENIED.

IT IS FURTHER ORDERED that this matter is scheduled for trial at 10:00 A.M. on the 10th day of July, 2000, in courtroom 14-B.

William H. Yohn, Jr.