

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

AUDIOTEXT INTERNATIONAL	:	
LTD.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
AT&T CORPORATION	:	NO. 00-5010
Defendant.	:	NO. 02-6937

MEMORANDUM AND ORDER

Fullam, Sr. J.

January 10, 2005

Plaintiff, in the business of supplying phone service between the United States and the United Kingdom, sued Defendant, an international provider of communications services.

Plaintiff purchases phone service from a common carrier, such as AT&T, and then resells that service to other providers for a profit. It appears that Plaintiff was, at various times, using an autodialer to call PNS numbers in the U.K. An autodialer is a device that artificially stimulates call traffic by having a computer generate phone numbers. Calls to these PNS numbers cost more due to the additional routing that is required.

Audiotext and AT&T entered into a contract in December 1999, the terms of which took effect on September 7, 2000. Under the contract, Audiotext was to pay \$0.058 per minute based on a commitment to purchase approximately 345,000 minutes per month.

On September 15, 2000 AT&T suspended service under the contract on the grounds that Audiotext was committing a form of fraud through the use of the autodialer.

On October 3, 2000, after the suspension of service, AT&T amended its General Tariff Number 1, which had been incorporated by reference into the contract tariff between the parties, to specifically prohibit autodialed traffic.

Audiotext then initiated this action alleging substantial damages based on the lost contract term. This Court transferred the case to the FCC for a determination of AT&T's liability. On February 13, 2004, the FCC concluded that AT&T breached the contract and had improperly terminated Audiotext's service. I find that the FCC's determination of liability is persuasive.

In the instant motions, AT&T requests that the Court disregard all damage claims accruing after October 3, 2000, the date on which AT&T amended the tariff. Audiotext has filed a cross motion seeking to limit the introduction of any evidence concerning AT&T's actions after the breach of the contract. I will deny AT&T's motion for summary judgment, but will allow post-breach evidence to be admitted on a limited basis.

(1) Case or Controversy

Every common carrier of telecommunications must, under the Federal Communications Act, file a tariff with the FCC governing the terms of service. 47 U.S.C. § 203(a). It is well settled

that, under the filed tariff doctrine, the rate contained in this tariff is the only rate that can be charged for service.

American Telephone and Telegraph Co. v. Central Office Telephone Inc., 524 U.S. 214, 222 (1998). Here, AT&T filed contract tariff number 14363 which contained the terms of the agreement and stated that it incorporated general tariffs number 1,2 and 14, the terms of which were subject to amendment from time to time. See Master Agreement Sec. 6(a).

The dispositive issue in this case is the status of the relationship between the parties at the time of the amendments. On September 15, 2000, AT&T terminated service to Audiotext under the contract and in so doing committed a material breach of the contract. As a result, on the date AT&T amended the tariff there was no contractual relationship between the parties. This circumstance places AT&T in a rather untenable position, as it is left to speculate about what may or could have resulted from a tariff amendment that never took effect.

AT&T's argument proceeds on the assumption that the FCC would have accepted the tariff amendments. However, Audiotext would have had time, had the contract been in effect, to file a petition challenging the reasonableness of the tariff amendment. Moreover, when there is a tariff change filed with the FCC, the Commission can conduct a hearing on the lawfulness of the change, and pending the resolution of that hearing the proposed changes

cannot take effect. 47 U.S.C. § 204(a)(1). Thus, since it is not clear in this case that the tariff amendment would have taken effect, it cannot be used as the basis for a motion for summary judgment.

For the same reasons, AT&T's claim that the decision of Oftel to ban revenue sharing agreements must limit damages will fail. On October 31, 2001 Oftel banned the type of activity Audiotext engaged in. However, this occurred long after the breach in this case had already taken place, and this Court will not speculate at this time as to what effect this change in law may have had on this contract.

(2) Preemption

AT&T argues that Plaintiff's state law claims are preempted by the Communications Act. In Cahnmann v. Sprint Group, 133 F.3d 484 (7th Cir. 1998), the Seventh Circuit concluded that the Act preempted state law claims seeking to enforce a filed tariff.

However, the language of Justice Rhenquist's concurrence in Central Office, supra, indicates that the purpose of the filed rate doctrine is to ensure that the filed rates are the only source of terms, not as "a shield against all actions based in state law." Central Office, 524 U.S. at 230-31. This reasoning has been followed by other courts after Cahnman, and is applicable to this case. In re Universal Service Fund Telephone Billing Practices Litigation, 247 F.Supp.2d 1215, 1232 (D. Kan.

2002) (holding that claims that are not challenges to rates, terms, and conditions of interstate phone service are not preempted).

Here, Audiotext is not seeking to challenge the terms of the tariff, nor is it seeking to enforce a filed tariff; it is challenging the breach of the tariff. Since Plaintiff is challenging conduct that occurred after the federal regulation was breached and not addressing the terms of the tariff, federal law should not control the remedy.

(3) Damages

Plaintiff seeks a ruling precluding AT&T from introducing post-breach evidence at trial for the purpose of limiting damages. Plaintiff's basis for this assertion is its interpretation of New York state law, which is the law chosen by the parties in the Master Agreement.

Plaintiff contends that New York law states that damages are to be measured at the time of the breach without regard to later events. Orange and Rockland Utilities, Inc. v. New England Petroleum Co. 60 A.D.2d 233, 236 (N.Y.A.D. 1977). Under this interpretation, the changes in the tariff by AT&T and the decision of Oftel to ban certain behavior would have no bearing on damages, since they occurred after the breach. Thus, plaintiff would be entitled to a measure of damages representing the full term of the contract.

I disagree with this interpretation of New York law. Numerous cases state that the proper measure of damages for breach of contract is whatever is necessary to place the non-breaching party in the position it would have attained had the contract been performed. Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associations, P.C., 692 N.E.2d 551 (N.Y. 1998); Siegel v. Laric Entertainment Corp., 763 N.Y.S.2d 607 (N.Y.A.D. 1 Dept., 2003). Stated another way, where there has been a breach, the injured party is entitled to fair compensation based on the loss. Bibeau v. Ward, 645 N.Y.S.2d 107 (N.Y.A.D. 3 Dept., 1996). It seems to me that excluding evidence that may show a limitation of damages does not advance the goal of just compensation.

Plaintiff has retained an expert whose report values the loss at over 28 million dollars. This figure is arrived at under the assumption that the entirety of the contract would have been carried out. However, as AT&T has posited, amendments to the tariff and European regulations could have had some effect on the contract, either forcing a modification of its terms or its outright cancellation. In addition, Audiotext could have shifted its business away from autodialing and continued to operate under the contract. For those reasons, in order to determine where the non-breaching party would have been had the contract been performed, some examination of future events is needed.

Accordingly, I will not limit the damages in this case to the period before October 3, 2000 as AT&T requests. The parties will be permitted to introduce evidence of post-breach actions at trial for the limited purpose of establishing what a fair measure of damages should be.

An Order follows.

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Defendant.	:	NO. 02-6937

ORDER

AND NOW, this 10th day of January, 2005, upon consideration of Defendant's Motion for Partial Summary Judgment, Plaintiff's Motion in Limine, and all responses thereto, IT is ORDERED:

1. Defendant's Motion for Partial Summary Judgment is Denied.
2. Plaintiff's Motion in Limine is Denied. The parties will be allowed to introduce evidence of post-breach actions for the limited purpose of determining damages.

/s/ John P. Fullam
John P. Fullam, Sr. J.