BR/HJH/EMM

ORIGINAL

Decision No. 72506

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ROBERT R. HORTON,

Complainant,

vs.

THE GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation,

Defendant.

Case No. 8226
(Filed July 19, 1965)

John M. Sink, for complainant.
A. M. Hart and Donald J. Duckett, by Donald J. Duckett, for defendant.

O P I N I O N

Complainant, a doctor of medicine, alleges that defendant negligently omitted from its Yellow Page Telephone Directory certain pertinent information pertaining to complainant's professional qualifications and by so doing defendant breached a written contract it had entered into with complainant. Defendant denied liability and claimed that, in any case, its Tariff Schedule No. D-1(B)(4)[1/] barred recovery. Complainant requests

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1/ "In case of error in or omission of an advertisement, the extent of the Company's liability shall be limited to a pro rata abatement of the amount to be paid to the Company to the extent that the error or omission affects the entire advertisement, except, however, that such liability shall not exceed the amount charged for the advertisement during the period of the active life of the directory issue from which the advertisement was omitted or in which the advertisement in error appeared."

this Commission to declare said tariff unreasonable or void; defendant moved to dismiss.

Public hearings were held before Examiner John R. Gillanders on February 8 and 9, 1966, and before Examiner Robert Barnett on May 26, 1966. On the latter date the matter was submitted subject to the filing of briefs, which have been filed.

Complainant alleges that he is a duly licensed physician and surgeon certified as a gynecologist by the American Board of Obstetrics and Gynecology. He limits his practice to gynecology and problems of infertility. On February 26, 1965 complainant applied to the defendant for telephone service in Santa Barbara. He also applied for a Yellow Page listing under "Physicians and Surgeons" that would note that his practice was limited to gynecology and infertility. Defendant listed him under "Physicians and Surgeons" but omitted the reference that his practice was limited to, or concerned with, either gynecology or infertility. This omission presented him to the public and to his fellow physicians as a general practitioner rather than as a specialist. He claims that this omission was a breach of contract and was negligent and as a direct consequence of this breach and negligence he was injured in his professional practice and reputation, lost potential patients, lost income, and suffered embarrassment, all to his damage in the sum of $50,000. Anticipating that defendant would raise its Tariff Schedule No. D-1(B)(4) as a defense, complainant alleges that said tariff schedule is unreasonable from its inception and asks this Commission to so declare. Further, complainant recognizes that this Commission may not have jurisdiction to award damages for negligence as demanded, so complainant

asks that this Commission affirmatively state that the issues "of the nature and amount of damages sustained by complainant, and complainant's redress therefor, are matters within the jurisdiction of the courts of the State of California, who may consider such matters in the light of such determination by the Public Utilities Commission of the State of California that said tariff is unreasonable."

Defendant answered and denied the material allegations of the complaint. As anticipated, defendant raised as a defense its Tariff Schedule No. D-1(B)(4) and, based on its provisions, moved to dismiss. The motion to dismiss was taken under submission pending the receipt of evidence on the merits of the case. That evidence having been taken, the motion is ripe for decision. The motion to dismiss is granted.

Complainant properly invokes our jurisdiction to determine the validity of defendant's tariff provision rather than proceeding originally in the Superior Court. (See, E. B. Ackerman Importing Co. v. City of Los Angeles (1964) 61 C 2d 595; Southwestern Sugar v. River Terminals Corp. (1959) 360 US 411, 3 L ed 2d 1334.)

The central question in this case, assuming defendant to be negligent as alleged and that defendant's tariff bars recovery of general damages by plaintiff for such negligence,[2/]

2/ No question of reparation for the omission has been raised and, therefore, we will not consider any possible reparation award.

is whether defendant's tariff should be declared to be void as an exculpatory agreement at this time, and void at the time plaintiff and defendant entered into their contract for telephone service. We hold that defendant's Tariff Schedule No. D-1(B)(4) is not void and is not unreasonable,[3/] now or at any time in the past.

Prior to 1965 the Pacific Telephone and Telegraph Company (Pacific) had a tariff limiting liability[4/] similar to General's. Pacific's tariff was held reasonable in Warren v. P.T.& T. (1956) 54 CPUC 704. Subsequently we decided Ross v. P.T.& T. (1963) 61 CPUC 760, a case similar to the case at bar, where we held that Pacific was not liable in excess of the amount provided in its tariff for directory errors or omissions which occurred while Pacific's tariff was in effect. In Ross the complainant sought to have Pacific's tariff limiting liability declared unreasonable at the time of commencement of the lawsuit, and at the time the errors were made.

3/ Complainant's complaint asks for a finding that the tariff is unreasonable; his brief asks for a finding that the tariff is void. This change in nomenclature may be inadvertent or it may be an attempt to avoid our holding in Ross v. P.T.& T. (1963) 61 CPUC 760. In either case our holding is the same.

4/ "In case of the omission of a part of or other error in an advertisement, the extent of the Company's liability shall be a pro rata abatement of the charge in such a degree as the error or omission shall affect the entire advertisement and in case of the omission of an entire advertisement, the extent of the Company's liability shall be an abatement of the entire charge."

Complainant does not attempt to distinguish Ross, but, rather, asserts that this case should be governed by Tunkl v. Regents of Univ. of Calif. (1963) 60 C 2d 92. Tunkl was an action for medical malpractice where defendant-hospital had judgment in the trial court based on a standard form of hospital agreement whereby the plaintiff-patient waived any claim for negligence. The Supreme Court reversed, holding that the exculpatory contract was invalid because it was an agreement affecting the public interest.

Tunkl sets forth six criteria for determining whether an exculpatory provision will be held invalid in a particular case. Those criteria are: "It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the

risk of carelessness by the seller or his agents." (Tunkl v. Regents; 60 C 2d at pp 98-101.) However, the Court does not state whether certain criteria are more important than others. In a later case the Court recognized that, when a regulated utility's tariff is being tested, in addition to the above criteria, consideration must be given to the relevant economic and other facts which the administrative agency charged with regulation of the public utility is equipped to evaluate. (See, E. B. Ackerman Importing Co. v. City of Los Angeles, supra.)

Complainant's reliance on Tunkl is misplaced. Tunkl did not consider the problem with regard to tariff regulations on file with a Commission such as ours. Those cases which have considered the problem in relation to supervision of communication utilities by a public utilities Commission have held that a provision limiting liability for negligence is valid. (Cole v. P.T.& T. (1952) 112 CA 2d 416; Riaboff v. P.T.& T. (1940) 39 CA 2d 775; accord, Western Union v. Esteve Bros. (1920) 256 US 566, 65 L ed 1094.)

Of the six criteria set forth in Tunkl it is apparent that the reference to one party's having the power to drive hard bargains is of primary importance. (See, Bisso v. Inland Waterways Corp. (1955) 349 US 85, 91, 99 L ed 911, 918; Southwestern Sugar v. River Terminals Corp., supra.) But in this case defendant does not have the power to drive hard bargains. In fact, there is no bargaining at all. Defendant's rates are fixed by this Commission. If complainant wants defendant's service he must take it on the terms provided in defendant's tariff, which is subject to this Commission's regulatory powers, and defendant cannot vary from its

tariff. Neither party has any choice in the matter. Admittedly, if complainant wants telephone service, he has no alternative but to take defendant's service, but defendant has no alternative but to render the service pursuant to its filed tariff.[5/] As the Supreme Court of the United States said, "the rule of Bisso, however applicable where the towboat owner has 'the power to drive hard bargains', may well call for modification when that power is effectively controlled by a pervasive regulatory scheme." (Southwestern Sugar v. River Terminals Corp. 3 L ed 2d at 1341.)

To determine whether defendant's exculpatory provision is subject to a pervasive regulatory scheme we should look to the totality of factors that influenced the retention of such provision over a considerable span of years. At the time this dispute arose defendant's, or its predecessor's, tariff had been in effect for over thirty years. Just since 1948, and while the tariff has been in effect, there have been six general rate hearings where defendant's income and expenses, including those arising from directory advertising, were subject to close scrutiny. Because defendant was insulated from negligence claims for directory errors and omissions by the operation of its tariff

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5/ There are some exceptions to this duty on the part of defendant, such as, when defendant knows that complainant will utilize the service for an unlawful purpose. But these exceptions are not pertinent here.

no expenses were incurred for this type of negligence. So, to some unknown extent, directory advertising rates are lower than they would be if provision had to be made for negligence claims, or for insurance against negligence claims.[6/] Further, defendant had every right to rely on our decision in Ross, where we held that an exculpatory provision similar to defendant's was reasonable.

Other factors which we have considered persuade us not to weaken our adherence to Ross at this time or to hold defendant's exculpatory provision void. Primarily, no warning has been given to defendant that it might be exposed to liability for directory errors, and no determination has been made as to whether rates should be adjusted to cover such liability. In this case complainant prays for $50,000. Such potential liability, coupled with the exposure to additional claims that would assuredly follow, if realized, could impair defendant's ability to serve the general public. If we were to hold defendant's exculpatory provisions to be void on public policy grounds similar provisions in the tariffs of all other telephone utilities in the State would automatically become ineffective. Such a holding could result in judgments that might seriously impair the ability of small telephone companies to operate. Also, the problem, generally, is aggravated by the fact that telephone companies publish their directories only once a year. An error or omission in a directory

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6/ For an idea of the magnitude of the problem as applied to another telephone company see Re Pacific Tel. & Tel. (1965) 65 CPUC 103.

advertisement cannot be rectified for an entire year. In many instances this makes it impracticable for the telephone company to take steps to mitigate its potential liability.[7/] Newspapers can republish an erroneous advertisement the next day, with appropriate apologies, and magazines can do so in a week, or a month; the harm from their error can be minimized. But the telephone company does not have this remedy at its disposal; often it can do no more than stand by and watch the damages mount. On the other hand, the affected subscriber usually can mitigate damages by purchasing advertising through other media. However, we recognize that some groups, such as lawyers and doctors, cannot advertise their services and must rely on telephone directories providing necessary information to the public at large. Whether or not subscribers are in a better position than the telephone company to mitigate damages arising from directory errors has a bearing on the reasonableness of the exculpatory provision and can be determined only in a hearing that has a larger scope than this one.

Complainant argues that defendant is in a better position than individual subscribers to insure against directory errors. But, to provide such insurance, without special rates for certain classes of subscribers, would create an unreasonable discrimination.

7/ In some instances satisfactory mitigation results through the use of informational listings, intercept service, and referral arrangements.

In Re Pacific Tel. & Tel. (1965) 65 CPUC 103, we found that "over 96 percent of all directory errors occur in new or changed listings, not in listings which continue unchanged from directory to directory, and only approximately 35 percent of all directory listings are new or changed listings." (65 CPUC at 121.) We have no doubt that the experiences of defendant are similar. It is obviously unfair to charge all subscribers to insure the errors that occur within a limited class of subscribers. Further, even amongst this limited class some subscribers can mitigate damages and some cannot. Whether these differences should be factors in determining insurance rates, what the rates should be, and whether some form of insurance is the proper solution for the issues raised by complainant, cannot be determined without a hearing to develop the relevant facts.[8/] In any event, a resolution of problems of insurance would not affect complainant's case even if we were to hold that defendant's exculpatory tariff is void.

To sum up, to accede to complainant's demand and declare defendant's Tariff Schedule D-1(B)(4) void would negate our holding in Ross v. P.T.& T. supra, would willy-nilly void every similar item in some forty telephone utility tariffs, thereby subjecting many small telephone companies to liability they are not prepared to handle and cannot afford, and would interfere with the pervasive scheme of regulatory control by this Commission.

8/ In Re Pacific Tel. & Tel. supra, when the wording of Pacific's tariff concerning directory errors and omissions was changed, we considered such factors. Pacific is the largest utility in the State. Factors pertinent to its operation might not necessarily be relevant to much smaller utilities.

Issues similar to those raised by complainant are now being considered by this Commission in Case No. 8593, a general investigation of defendant's tariffs which limit liability for errors and omissions. Complainant's problem requires close attention and some of his arguments merit further consideration in a hearing more appropriate to their resolution. We invite him to become an interested party in Case No. 8593.

Because of our holding in this case we do not reach the question of defendant's alleged negligence, or which forum may consider it.

Complainant avers that unless he is afforded the relief sought he will be deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. He has not elaborated on this argument or cited any authority in support of it; we find it without merit.

Findings of Fact

1. The matters sought to be raised by the complaint are similar to those passed upon and disposed of adversely to complainant's contention in Ross v. P.T.& T. (1963) 61 CPUC 760.

2. Defendant's Tariff Schedule D-1 (B) (4) was reasonable at the time the facts alleged in this complaint arose and it is reasonable at this time.

3. Defendant's rates and tariffs are subject to a pervasive regulatory scheme by this Commission.

4. The relief sought by complainant is barred by the application of defendant's Tariff Schedule No. D-1 (B) (4).

5. The Commission is presently considering, in Case No. 8593, the reasonableness, for the future, of tariff provisions that limit defendant's liability for errors and omissions and, therefore, no useful purpose would be served by considering those questions at this time.

Conclusions of Law

Defendant's Tariff Schedule No. D-1 (B) (4) is not void; the complaint should be dismissed.

O R D E R

IT IS ORDERED that Case No. 8226 is hereby dismissed.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 31st day of MAY, 1967.

President

Commissioners