COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2017-P-0569

PHONE RECOVERY SERVICES, LLC

PLAINTIFFS-APPELLANTS,

v.

VERIZON OF NEW ENGLAND, INC., et al.

DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT

BRIEF OF THE PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21: Corporate Disclosure Statement on Possible Judicial Conflicts of Interest, plaintiff-appellant Phone Recovery Services, LLC states that it does not have a parent company and that no public company holds 10% or more of its membership interest.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....2

STATEMENT OF ISSUES PRESENTED.....8

STATEMENT OF CASE.....8

STATEMENT OF FACTS.....12

SUMMARY OF ARGUMENT.....17

ARGUMENT.....17

I. THE SUPERIOR COURT ERRONEOUSLY FOUND THAT THE 911 SURCHARGE AT ISSUE IN THIS CASE IS A "TAX" RATHER THAN A "FEE." 18

A. Under the *Emerson College* Test, the 911 Surcharge is a Fee Not A Tax 19

1. Factor 1 – The 911 Surcharge is paid in exchange for a particular governmental service which benefits the party paying the fee 20

2. Factor 2: The 911 Surcharge is voluntary. 24

3. Factor 3 - The money collected by the Commonwealth is used to fund the 911 service, not to raise revenue generally. 25

B. The Legislature And The Defendants Do Not Treat the 911 Surcharge as a Tax 27

C. Other jurisdictions have characterized 911 surcharges as fees not taxes 29

D. Alternatively, whether the 911 Surcharge is a tax or a fee is a question of fact which can be cured through an amended complaint 34

II. THE SUPERIOR COURT'S DISMISSAL SHOULD NOT BE AFFIRMED BASED ON GROUNDS RAISED BY THE DEFENDANTS BUT NEVER ADDRESSED BY THE SUPERIOR COURT 36

A. PRS Is A Proper Relator 36

B. The Complaint Should Not Be Dismissed Based On The Public Disclosure Bar 39

C. PRS Can Cure Alleged Defects in the Complaint by Filing a Second Amended Complaint 42

CONCLUSION.....44

Table of Authorities

Cases

Associated Indus. Of Mass., Inc. v. Comm'r of Revenue, 378 Mass. 657 (1979) 28

Bay Area Cellular Telephone Co. v. City of Union City, 162 Cal. App. 4th 686 (2008) 32

Bellsouth Telecomm. LLC v. Cobb County, GA, A17A0265 (Ct. App. Ga. June 15, 2017) 35

Charbonnier v. Amico, 367 Mass. 146 (1975) 44

Commonwealth v Caldwell, 25 Mass.App.Ct. 91 (1987) 33

Commonwealth v. Martin, 476 Mass. 72 (2016) 28

Denver St. LLC v. Twn. of Saugus, 462 Mass. 651 (2012) 21

Emerson College v. City of Boston, 391 Mass. 415 (1984) 19

Fulton Cty. v. T-Mobile, S., LLC, 305 Ga. App. 466 (2010) 33

Griffith v. Cty. of Santa Cruz, 2009 WL 3327397 (Cal. Ct. App. Oct. 16, 2009) 29

Kessler v. Hevesi, 824 N.Y.S.2d 763 (Sup. Ct. 2006), aff'd as modified, 45 A.D.3d 474(2007) 31

Madison Cty. Commc'ns. Dist. v. BellSouth Telecomm., Inc., 2009 WL 9087783 (N.D.Ala., March 31, 2009) 26

Morton v. Twn. of Hanover, 43 Mass.App.Ct. 197 (1997) 22

Murphy v. Mass. Turnpike Auth., 462 Mass. 701 (2012) 22

Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 421 Mass 196 (1995) 23

Otis Co. v. Inhabitants of Ware, 74 Mass. 509 (1857) 37

Phone Recovery Servs., LLC v. Verizon Pa., Inc., 2016 WL 2638829 (Pa. Ct. Com. Pl. Apr. 21, 2016)
20, 30

Scannell v. Attorney Gen., 70 Mass.App.Ct. 46 (2007)
38

Shea v. Boston Edison Co., 431 Mass. 251 (2000)
24

Silva v. City of Attleboro, 454 Mass. 165 (2009)
19

T-Mobile S., LLC v. Bonet, 85 So.3d 963 (Ala. 2011)
26

TracFone Wireless, Inc. v. Commission on State Emergency Communications, 397 S.W.3d 173 (Tex. 2013)
31

United States v. Kiewit Pacific Co., 41 F.Supp.3d 796 (N.D.Cal. May 14, 2014)
38

United States ex rel. Baltazar v. Warden, 635 F.3d 866 (7th Cir. 2011)
41

United States ex rel. Banigan v. Organon USA Inc., 883 F. Supp. 2d 277 (D. Mass. 2012)
41

United States ex rel. Ciaschini v. Ahold USA Inc., 282 F.R.D. 27 (D. Mass. 2012)
38

United States ex rel. Lissack v. Sakura Glob. Capital Mkts., 337 F.3d 145 (2d Cir. 2004)
29

Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765 (2000)
38

Vogelaar v. H.L. Robbins & Co., 348 Mass. 787 (1965)
44

Wayne Cty. Taxpayers Ass'n v. Cty. of Wayne, 1998 WL 1992550 (Mich. Ct. App. May 5, 1998)
21

Statutes

G.L. c. 12, §§ 5A-5O_
8

G.L. c. 12, § 5B
9, 18

G.L. c. 12, § 5C
9

G.L. c. 6A, §18E
29

G.L. c. 6A, § 18H
13, 25, 27

31 U.S.C. §§ 3729-30
37

Regulations

220 C.M.R. 16.02
20

220 C.M.R. § 16.03
13, 27

560 C.M.R. § 3.04
28

Other Authorities

All Taxes A-Z Listing, http://www.mass.gov/dor/all-taxes/all-taxes-a-z-listing (Aug. 14, 2015)
37

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Statement of Issues Presented

1. Did the Superior Court err in finding that the 911 Surcharge is a tax rather than a fee?

2. Did the Superior Court err in dismissing the complaint with prejudice?

Statement of the Case

Plaintiff, Phone Recovery Services, LLC (PRS), brought this *qui tam* action on behalf of the Commonwealth under the Massachusetts False Claims Act (MFCA), G.L. c. 12, §§ 5A–5O, inserted by St.2000, c. 159, 18, against Defendants, various mobile telecommunications or telephone exchange companies: Verizon of New England, Inc., XO Massachusetts, Inc., United Business Telephone, Inc., Comcast Business Communications, LLC, YMAX Communications Corp., Paetec Communications, Inc., and John Does 1 through 75, based on the Defendants' failure to bill, collect, report and remit to the Commonwealth the required surcharge (the "911 Surcharge") from subscribers and users of communication services for each line capable of reaching a 911 operator. RA000012-23 (Complaint). PRS's complaint alleges that Defendants misrepresented to the Commonwealth the information regarding the amount of

phone line charges that are subject to the 911 Surcharge, causing substantial monetary losses to the Commonwealth. RA000012-13.

PRS served the Massachusetts Attorney General with a copy of the complaint pursuant to the MFCA. RA000013 (Complaint ¶ 3). On December 3, 2014, the Commonwealth filed a notice of its statutory election not to intervene pursuant to G.L. c. 12, § 5C(4).

Defendants served a motion to dismiss upon Plaintiff on May 1, 2015 in which they advanced four main arguments for dismissal: (1) the complaint was not pled with sufficient particularity under Mass. R. Civ. P. 9(b); (2) PRS is not a proper relator under the MFCA because it is a corporate entity rather than a natural person; (3) the 911 Surcharge is a tax, not a fee, and is therefore subject to the MFCA's tax bar; and (4) the allegations in the complaint are based entirely on publicly-available information and therefore the complaint is subject to the MFCA's public disclosure bar. RA000025-91.

Plaintiff responded to the motion to dismiss in conjunction with filing a motion for leave to file a Second Amended Complaint, which cured the alleged defects in the First Amended Complaint. RA000092-211.

The Proposed Second Amended Complaint pled with more particularity, substituted a natural person as the relator, and further explained why the relator was the original source of the publicly available information. RA0000171-211.

The motion for leave to file the Second Amended Complaint was denied without prejudice on June 18, 2015 because of the pending motion to dismiss. RA000092. The Superior Court determined that the Defendants were entitled to a ruling on the pending motion before the new complaint was filed and that PRS was also entitled, for purposes of appeal, to have a clear record with respect to which version of the complaint was being challenged and ruled upon. Id.; RA000409-10 (Tr. of Sep. 17, 2015 Oral Arg. 45:13-46:24). The Superior Court indicated that if the case survived the motion to dismiss, PRS would be able to cure any curable defects through a second amended complaint and the Defendants could file a renewed motion to dismiss if they still found the complaint inadequate. RA000409-10 (Tr. 45:13-46:24).

After Todd & Weld LLP entered appearance for PRS in August 2015, it requested leave to submit a supplemental memorandum in opposition to the motion to

dismiss, which included a new proposed second amended complaint. RA000223-95. The Superior Court allowed the motion for leave without deciding and without prejudice to a putative motion to amend the complaint. RA000010 (Docket No. 36). The Defendants then submitted a Reply Memorandum of Law in Further Support of Defendants' Joint Motion to Dismiss Phone Recovery Services LLC's First Amended Massachusetts False Claims Act Complaint. RA000296-364.

The Superior Court heard argument on the motion to dismiss on September 17, 2015. RA000365-426. Thereafter, the Superior Court granted the motion to dismiss on October 27, 2015 based solely on its determination that the 911 Surcharge is a tax, not a fee, and thus the MFCA's tax bar prohibits PRS from pursuing recovery of the payments at issue. RA000427-439. Having made its decision on that basis, the Superior Court did not address any of the Defendants' other arguments for dismissal in its Memorandum and Order. RA000438 (Mem. and Order 12 n.9). Judgment entered on November 6, 2015, and PRS timely filed a notice of appeal. RA000440-41.

Statement of Facts

The 911 Surcharge

In 2007, the Commonwealth established a 911 emergency telephone system (the "911 system") within the Division of Telecommunications and Cable. RA000015 (Compl. ¶ 11). The 911 system is jointly administered by the Massachusetts Department of Public Safety. Id. The 911 system was established to provide a stable source of revenue to fund the Commonwealth's 911 Emergency Telephone System Account, which pays for the installation, operation, and maintenance costs of the statewide enhanced 911 network, including wireless enhanced 911 services. RA000015 (Compl. ¶ 12). The 911 system is also used to fund the Commonwealth's costs arising from emergency response and emergency response training. RA000015 (Compl. ¶ 13).

The Commonwealth funds the 911 system through general appropriations and, in addition, through a $0.75 monthly surcharge imposed on each telecommunications customer for each mobile number primarily used in Massachusetts and for each voice grade access telephone number provided to the customer with a service address in Massachusetts. RA000015-16 (Compl. ¶¶ 14-15). By statute, the surcharge is

assessed to each subscriber or end user of communications systems. See G.L. c. 6A, § 18H ("There shall be imposed on each subscriber or end user whose communication services are capable of accessing and utilizing an enhanced 911 system, a surcharge in the amount of 75 cents per month for expenses associated with services provided ..."). The mobile telecommunications company assesses the surcharge pursuant to 220 C.M.R. § 16.03 and 560 C.M.R. § 3.04.

Mobile telecommunications companies and telephone exchange companies are required to collect the $0.75 surcharge on a monthly basis for each and every voice grade line and mobile phone. RA000016 (Compl. ¶ 17). They are also required to pay the amounts collected on a quarterly basis to the 911 Division within the Department of the Treasury. Id. Moreover, each mobile telecommunications company and telephone exchange company is liable for the surcharge imposed and must itemize and separately identify the surcharge on a customer's monthly bill. RA000016 (Compl. ¶ 19). The Massachusetts Department of Revenue has established instructions and forms for mobile telecommunications companies and telephone exchange companies to report

and remit the surcharges it has collected on a quarterly basis. RA000016-17 (Compl. ¶ 20).

Defendants' Misrepresentations to the Commonwealth

PRS' First Amended Complaint alleges that "the defendants have and are presently engaged in a practice that has resulted in the under-collection of the 911 assessment that they are required to collect and remit to the Commonwealth of Massachusetts for payment pursuant to Massachusetts law." RA000017 (Compl. ¶ 21). Therefore, the Defendants have benefitted by failing to comply with Massachusetts law. RA000017 (Compl. ¶ 22). Relying on data from the Federal Communications Commission (FCC), PRS maintains that Massachusetts has an operating base of approximately 9.9 million non-mobile telephone voice grade access lines (e.g., landlines). RA000017-19 (Compl. ¶¶ 22-25). Based on this data, PRS alleges that the amount of 911 surcharges that should be collected from landline phones in Massachusetts each year is approximately $89.8 million. RA000018 (Compl. ¶ 23).

Based on data reported to the FCC by the Commonwealth on 911 collection of surcharges in 2012, Massachusetts anticipated collecting $80 million per year in 911 surcharges: $49.6 million in mobile

surcharges and only $30.4 million in 911 surcharges from landlines. In 2012, "Massachusetts experienced an annual shortfall in collections of 911 fees ... in the range of $36 million per annum from landlines ... alone." RA000018 (Compl. ¶ 24). In addition, surcharges are not being paid on phones associated with the Lifeline Program for low-income consumers. Id. Thus, PRS estimates that since the Commonwealth established the MFCA in 2000, it has experienced lost revenues of $214,079,323 based on Defendants' failure to collect 911 surcharges. RA000018-19 (Compl. ¶ 25).

Defendants purposefully and knowingly failed to file accurate and truthful reports to the Commonwealth and that the Commonwealth was not aware of the amounts not collected by Defendants because that information is in the control of Defendants. RA000019 (Compl. ¶ 26). This resulted in a substantial loss of revenue for the Commonwealth. Id.

PRS' MFCA claim is based on the following allegations: Massachusetts law requires Defendants to collect, report, and remit surcharges to the Commonwealth. RA000019 (Compl. ¶ 28). Defendants knowingly failed to charge their customers the statutory surcharge required or only charged a portion

of the statutory surcharge. RA000019 (Compl. ¶¶ 30-31). Defendants knowingly provided false information to the Commonwealth in order to conceal, avoid, or decrease their financial obligations under the law. RA000019 (Compl. ¶ 32). The Commonwealth lacks information to sufficiently identify the total number of false records or statements contained in the reports submitted to the Commonwealth because this information is solely in Defendants' custody. RA000020 (Compl. ¶ 33). As a result of these actions, the Commonwealth has not received the statutory surcharges it is entitled to receive under the law, and the Commonwealth and the general public have been harmed. RA000020 (Compl. ¶¶ 34-36).

Summary of Argument

The Superior Court should not have dismissed the complaint. It erroneously found that the 911 surcharge at issue in this case is a "tax" rather than a "fee" subjecting the MFCA claim to dismissal under its tax bar. Infra pp. 18-35. Under the Emerson College test employed by Massachusetts courts, the 911 Surcharge is a fee not a tax. Infra pp. 19-27. The 911 Surcharge is paid in exchange for a particular governmental service which benefits the party paying the fee, it is

voluntary, and the money collected by the Commonwealth is used to fund the 911 service, not to raise revenue generally. Id. Moreover, the Legislature and the Defendants do not treat the 911 Surcharge as a tax, and other jurisdictions have characterized 911 surcharges as fees not taxes. Infra pp. 27-34. Alternatively, whether the 911 Surcharge is a tax or a fee is a question of fact which can be cured through an amended complaint. Infra pp. 34-35.

In addition, the Superior Court's dismissal should not be affirmed based on grounds raised by the Defendants but never addressed by the Superior Court. Infra pp. 36-44. Despite the Defendants contentions, PRS is a proper relator. Infra pp. 36-39. Further the complaint should not be dismissed based on the public disclosure bar. Infra pp. 39-42. PRS can cure alleged defects in the Complaint by filing a second amended complaint. Infra pp. 42-44.

Argument

I. THE SUPERIOR COURT ERRONEOUSLY FOUND THAT THE 911 SURCHARGE AT ISSUE IN THIS CASE IS A "TAX" RATHER THAN A "FEE."

PRS asserts claims in this case through the MFCA,[1] a statute which permits a relator to pursue claims on behalf of the Commonwealth and to recover amounts owed to the Commonwealth as a result of a Defendant's false or fraudulent claims. The MFCA, however, expressly does not extend to claims that the Commonwealth is owed payment of a tax, a so-called "tax bar." G.L. c. 12, § 5B(d) ("Sections 5B to 5O, inclusive, shall not apply to claims, records or statements made or presented to establish, limit, reduce or evade liability for the payment of tax to the commonwealth or other governmental authority.").

[1] The First Amended Complaint contains three counts: false claims action and declaratory judgment (Count I), breach of fiduciary duty (Count II), and injunctive relief (Count III). See RA000019-22. Only Count I is at issue in this appeal. The Superior Court found that in light of its decision to dismiss Count I, dismissal of Counts II and III was required as well. RA000438 (Mem. and Order 12). In any event, PRS' Proposed Second Amended Complaint eliminates Counts II and III altogether and PRS does not intend to pursue those counts on remand if successful in this appeal. RA000243-79 (Proposed Second Am. Compl., attached as Ex. A to Pl.'s Suppl. Mem. in Opp'n to Mot. to Dismiss).

As a result of its determination that the 911 Surcharge at issue in this case is a "tax" and not a "fee," the Superior Court found that PRS's claims asserted through the MFCA were prohibited by the MCRA's tax bar. RA000438 (Mem. and Order 12). The Superior Court erred in reaching this conclusion. As discussed below, as a matter of law, the 911 Surcharge is a "fee" not a "tax."

A. Under the *Emerson College* Test, the 911 Surcharge is a Fee Not A Tax

To determine whether a charge is a "tax" or a "fee," the Supreme Judicial Court employs the three-factor test first espoused in Emerson College v. City of Boston, 391 Mass. 415, 424-25 (1984). A charge is a "fee" if it is (1) "charged in exchange for a particular governmental service which benefits the party paying the fee in a 'manner not shared by other members of society" (2) voluntary, such that the party paying the fee has the option of not utilizing the government service and thus avoiding the fee; and (3) collected not to raise revenue but to compensate the governmental entity providing the services for its expenses." Id.; see also Silva v. City of Attleboro, 454 Mass. 165, 169-71 (2009).

The 911 Surcharge assessed by the Commonwealth qualifies as a fee under each of these factors.

1. Factor 1 – The 911 Surcharge is paid in exchange for a particular governmental service which benefits the party paying the fee

First, the 911 Surcharge is charged in exchange for governmental services provided to the party paying the fee in a manner not shared by the other members of society. Emergency 911 services are not provided to the public at large, but are rather only provided to users of telecommunications services within the Commonwealth. As stated in the regulations implementing the 911 Surcharge, "Wireline Enhanced 911 Service"--the service funded by the surcharge--is the "service consisting of telephone network features provided for users of the public telephone system..." 220 C.M.R. 16.02 (emphasis supplied).

"[N]onsubscribers who do not own or have access to a telephone do not have the same protections" as users of the public telephone system who pay the surcharge. Phone Recovery Servs., LLC v. Verizon Pa., Inc., 2016 WL 2638829, at *6-7 (Pa. Ct. Com. Pl. Apr. 21, 2016) (Wettick, J.) (explicitly rejecting the Massachusetts Superior Court's conclusion in this case that subscribers or other end users of 911 have access to

the same emergency services communications regardless of whether they paid the surcharge). While the public at large certainly benefits from the existence of the 911 system, what matters is "whether the group [paying the surcharge] is receiving a benefit that is sufficiently specific and special to its members." Denver St. LLC v. Twn. of Saugus, 462 Mass. 651, 660 (2012).

Here, those who pay the fee receive the "specific and special" benefit of immediate, direct, guaranteed access to emergency 911 services within their homes or offices through landlines, or at any location they choose through their cell phones. Indeed, some families choose to maintain a wired "landline" telephone simply in order to ensure that emergency 911 services are available in their home and that dispatch will be able to immediately pinpoint the caller's location. See, e.g., Tara Siegel Bernard, Weighing the Need for a Landline in a Cellphone World, N.Y. Times, January 18, 2014 at B1. The added level of certainty and peace of mind in knowing that 911 can be easily accessed in the event of an emergency is a benefit that the rest of the public at large cannot enjoy without paying the surcharge. See Wayne Cty. Taxpayers Ass'n v. Cty. of

Wayne, 1998 WL 1992550, at *2 (Mich. Ct. App. May 5, 1998) ("[T]he benefit of the 911 service inures primarily to those who subscribe to telephone service and pay the fee accordingly. That there may be an incidental public benefit does not make the charge a tax.").

This benefit is similar to others that Massachusetts courts have found sufficiently "specific and special" to groups paying a surcharge. See Murphy v. Mass. Turnpike Auth., 462 Mass. 701, 710-11 (2012) (even though tolls also support a major public work that is available to all people with cars, the toll payers got to use particular roads unavailable to non-toll paying drivers); Denver St. LLC, 462 Mass. at 657-60 (immediate access to sewer system without having to wait for lifting of moratorium was a special benefit even though public also benefitted from reduced I/I throughout the whole town); Silva, 454 Mass. 165, 170-71 (2009) (although proper disposal of dead bodies benefits public at large, funeral directors received the particularized benefit of working in a well-regulated industry for the disposal of human remains); Morton v. Twn. of Hanover, 43 Mass.App.Ct. 197, 200 (1997) (water surcharge paid by abutters to construct

new water main benefitted everyone by providing water to fire hydrants but the abutters got the special benefit of better water flow and pressure); Commonwealth v Caldwell, 25 Mass.App.Ct. 91, 95-96 (1987) (slip fee for mooring boats helped the public but also particularized benefit of safety and order provided by the harbor master); Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 421 Mass 196, 204 (1995) ("While safe disposal of low-level radioactive waste is a public benefit, it is the plaintiff (not the general public) which requires access to disposal facilities" so access was a special benefit).

Like those paying fees in these cases, people who use phones and maintain phone lines in their business or homes or through cell phones receive the benefit of immediate access to 911 services above and beyond those people who do not maintain their own phone line services.

Moreover, the fact that the overwhelming majority of people are "users of the public telephone system" does not change the fact that those people receive a benefit that the few members of society without phone lines do not. Cf. Murphy, 462 Mass. at 710 (holding

that tolls were fees not taxes; although nearly all Massachusetts residents pay tolls on the Massachusetts Turnpike at some point, toll payers may access "the Boston extension, and the Sumner and Williams tunnels, and enter the nontolled central artery of the MHS through these roadways" while the few non-toll paying drivers do not receive those benefits).

2. Factor 2: The 911 Surcharge is voluntary.

Second, the 911 Surcharge is voluntary; one may opt out of the surcharge by not purchasing telephone services in the Commonwealth. Cf. Murphy, 462 Mass. at 710 (drivers "had the option of not driving on tolled MHS roads and tunnels and thereby could avoid paying the tolls").

The Defendants relied below on Shea v. Boston Edison Co., 431 Mass. 251 (2000) to argue that this surcharge is not voluntary. See RA000375-76 (Tr. 11:24-12:10). Defendants asserted at the hearing on the motion to dismiss that the court in Shea "expressly rejected" the argument that electricity was not essential and that "the SJC said no, electricity is essential to our modern way of living, so we're not going to say that you can just not pay the fee but [sic] not having electricity." RA000376 (Tr. 12:1-7).

Defendants' representation to the Superior Court (and presumably the Superior Court's reliance on this interpretation) was inaccurate. The SJC in Shea did not entertain that particular argument and did not hold that electricity was essential; the Legislature specifically set out in the statute that electricity was "essential to the health and well-being of all residents of the commonwealth, to public safety, and to orderly and sustainable economic development." Id. (quoting St. 1997, c. 164, § 1(a)). Based on that legislative statement, the SJC assumed that electricity was essential and that the charge was therefore involuntary. There is no similar legislative pronouncement here regarding telephones. Unlike electricity, telephones are optional.

Because any of the Defendants' customers may opt out of paying the 9-1-1 surcharge by ceasing to purchase telephone services in the Commonwealth, the 911 Surcharge operates as a fee rather than a tax.

3. Factor 3 - The Money Collected by the Commonwealth is Used to Fund the 911 Service, Not to Raise Revenue Generally.

Finally, the 911 Surcharge is a fee because it is designed to cover the cost of providing emergency 911 services and does not contribute to the general

revenues of the Commonwealth. Cf. Madison Cty. Commc'ns. Dist. v. BellSouth Telecomm., Inc., 2009 WL 9087783, at *10 (N.D.Ala., March 31, 2009) ("Because the E911 charge is based on provision of telephone service and is used to fund a specific service (911 service), the charge is not a revenue-raising measure and, therefore, not a tax."); Wayne Cty. Taxpayers Ass'n, 1998 WL 1992550, at *2 (holding 911 charge was a fee, not a tax because "funds collected...are used solely to defray the costs of operating the 911 system"); T-Mobile S., LLC v. Bonet, 85 So.3d 963, 984-85 (Ala. 2011) (holding 911 charge was a fee not a tax where "money collected from the service charge does not provide general revenue that can be used for any purpose" and statute "set[] out the disbursements of the…charge, which are used to defray the costs of implementing and operating the emergency 911 system").

The statute at issue here states that the 911 Surcharge is "for expenses associated with services provided under sections 18A to 18J, inclusive, and sections 14A and 15E of chapter 166." G.L. c. 6A, § 18H(a). The money is remitted "to the state treasurer for deposit in the Enhanced 911 Fund" where it "shall be expended for the administration and programs of the

department including, but not limited to, salaries, enhanced 911 training programs, enhanced 911 public education programs, the creation of PSAP customer premises equipment for, and maintenance of, primary and regional PSAPs, the programs mandated by section 18B and sections 14A and 15E of chapter 166, and for the implementation and administration of enhanced 911 service in the commonwealth." Id. § 18H(d).

The regulations provide that the "surcharge is intended to recover prudently incurred costs associated with the provision of wireline enhanced 911 service, dual party TDD/TTY message relay service, and adaptive equipment services." 220 C.M.R. § 16.03(1). There can be no legitimate dispute that the funds from the 911 Surcharge go directly to 911 services and not the Commonwealth's general reserve.

B. The Legislature And The Defendants Do Not Treat the 911 Surcharge as a Tax

While the Emerson analysis leads to the inevitable conclusion that the 911 Surcharge is a fee, it bears noting that neither the Massachusetts Legislature nor the Defendants have classified the surcharge as a tax.

The Legislature did not call the 911 Surcharge a tax in the statute itself; it refers to the payment as a "surcharge." See G.L. c. 6A, § 18H(a) ("There shall

be imposed on each subscriber or end user ...a surcharge in the amount of 75 cents per month" which " shall be shown on the subscriber's or end user's bill as 'Disability Access/Enhanced 911 Service Surcharge', or an appropriate abbreviation" (emphasis added)); 560 C.M.R. § 3.04 (same).

Emerson makes clear that this Court should give deference to the legislature's characterization of the 911 Surcharge. 391 Mass. at 424; see also Commonwealth v. Martin, 476 Mass. 72, 77 (2016) (holding probation fees were "fees" where "[t]he plain language of the statute specifically refers to the monthly payments as 'fees'"); Associated Indus. Of Mass., Inc. v. Comm'r of Revenue, 378 Mass. 657, 667-68 (1979) ("In any doubtful case, the intention of the Legislature, as it may be expressed in part through its characterization … deserves judicial respect, and especially so where the constitutionality of the exaction depends on its proper characterization.").

Further, the Department of Revenue's "All Taxes A-Z Listing" does not include the 911 Surcharge as a tax. See All Taxes A-Z Listing, http://www.mass.gov/dor/all-taxes/all-taxes-a-z-listing (Aug. 14, 2015). And, unlike in other cases analyzing whether a charge is a

fee or a tax, the Department of Revenue has no authority to collect the 911 fees at issue; the Attorney General, instead, is explicitly charged with enforcing the 911 Surcharge. See G.L. c. 6A, §18E. Contrast United States ex rel. Lissack v. Sakura Glob. Capital Mkts., 337 F.3d 145 (2d Cir. 2004) (relator's claims ran afoul of the federal False Claims Act's tax bar because the alleged fraud "depend[ed] entirely on a purported violation of the Tax Code" and "the IRS has authority to recover the precise amounts [relator] is seeking in this action."). Similarly, the Defendants, in their bills to their customers, use the term "911" or "9-1-1" service fee and not tax. See, e.g., RA000285 (Verizon bill, Exhibit B to Proposed Second Am. Compl.)

Although not dispositive alone, these undisputed facts further support the conclusion that the 911 Surcharge was not intended to be and is not a tax.

C. Other jurisdictions have characterized 911 surcharges as fees not taxes

A number of other jurisdictions have addressed this same question and concluded that 911 Surcharges are fees, not taxes. See T-Mobile S., LLC, 85 So. at 984-85; Madison Cty. Comm'ns. Dist., 2009 WL 9087783, at *10; Griffith v. Cty. of Santa Cruz, 2009 WL 3327397, at *1 (Cal. Ct. App. Oct. 16, 2009)

(discussing Mancini v. Cty. of Santa Cruz (Dec. 14, 2005, H028434 [nonpub. opn.]), which held that the "County's 911 fee was not a special tax."); Wayne Cty. Taxpayers Ass'n, 1998 WL 1992550, at *2 (noting the "purpose of a tax is to raise revenue. In contrast, a fee should have as its purpose something other than the raising of revenue, such as protecting the public health, safety, and welfare," and holding the 911 service charge was a fee, not a tax) (quotation omitted). Most recently, a Pennsylvania court explicitly addressed the logic of the Massachusetts Superior Court's holding in this case and rejected its conclusion that the charge is a tax rather than a fee. Phone Recovery Servs., LLC, 2016 WL 2638829, at *6-7 (discussing Phone Recovery Servs., LLC v. Verizon of New England, Inc., et al., 33 Mass.L.Rptr. 102 (Mass. Super. Ct. Oct. 27, 2015) and rejecting the Massachusetts Superior Court's conclusion that 911 charge was a tax). That court found that the Superior Court's decision was inconsistent with Murphy and that payers of the 911 surcharge received a particularized benefit akin to that of the toll-payers on the Massachusetts Turnpike.

This Court should follow the logic of these other jurisdictions and hold that the 911 Surcharge is a fee.

The Defendants cited cases in their papers below from New York, Texas, California, and Georgia which found 911 charges to be "taxes" rather than "fees." See RA000057 (Defs.' Mem. in Supp. of Mot. to Dismiss 23 n.19). For various reasons, however, each of these cases are inapposite.

As an initial matter, TracFone Wireless, Inc. v. Commission on State Emergency Communications, 397 S.W.3d 173 (Tex. 2013) did not formally address the issue before this Court. The parties both referred to the surcharge as a tax in their papers, so the court treated it as such. Id. at 176 n.3. Whether the surcharge was a tax or a fee was not briefed or litigated, and the court only addressed the question in a cursory fashion in a footnote.

In the New York case of Kessler v. Hevesi, a key consideration in the court's finding that the 911 surcharge was a "tax" was that the money collected went to the Department of Taxation and Finance to be spent on general expenses. 824 N.Y.S.2d 763, *8 (Sup. Ct. 2006), aff'd as modified, 45 A.D.3d 474(2007). "Nearly half of the surcharge money" in that case was

"allocated directly to the general revenue. The remainder of the money is directed to various activities such as anti-terrorism funding. Only a relatively small portion of the surcharge is directed to wireless telephone service in the form of the allocation of money to the New York State 911 Board to assist counties in providing for their own E911 systems." Id. at *9. In contrast, Massachusetts' 911 Surcharge, as discussed in Part I(A)(3), supra, goes directly into a 911 Fund and pays for 911 emergency services.

In Bay Area Cellular Telephone Co. v. City of Union City, the California court, evaluated how to classify a city 911 surcharge and relied on the fact that the state 911 surcharge was treated as a tax by the Legislature. Because the state surcharge was part of the Tax Code and was defined in the statute as "a tax levied by this state" and because the city surcharge "effectively does what the [state] surcharge does," the court found that it was a tax. 162 Cal. App. 4th 686, 699 (2008). Here, the Massachusetts legislature, as discussed above in Part I(B), supra, does not designate the surcharge as a tax and the statute is not part of the tax code.

Importantly, these jurisdictions also employ a different standard than that which Massachusetts uses in its first Emerson College factor. The cases cited by Defendants each asked whether the public at large benefitted *at all* from the 911 system, and upon concluding that it did, the inquiry stopped. See Bay Area Cellular Tel. Co., 162 Cal. App. 4th at 696 (tax because "[t]he 911 system benefits every inhabitant of the City"); Fulton Cty. v. T-Mobile, S., LLC, 305 Ga. App. 466, 472 (2010)(tax because "provides revenues to fund a governmental service available to all"); Kessler, 45 A.D.3d at 475 (tax because "the surcharge... pays for services received by, and for the benefit of, the general public").

Massachusetts' standard is more nuanced. The inquiry does not hinge simply upon whether or not the public at large receives a benefit. Rather, the SJC directs that courts here are to evaluate whether, even where the public at large does benefit, "the limited group is receiving a benefit that is, in fact, sufficiently specific and special to its members." Denver St. LLC, 462 Mass. at 660. Even in instances where Massachusetts courts acknowledge a public benefit, so long as a sufficiently particularized

benefit also exists, the factor is satisfied. Indeed, there is no requirement that the particularized benefit be the main purpose of the service nor that that benefit be greater than the benefit to society at large. Id. ("A precise balancing or weighing of public benefits against a particularized benefit is not part of the first Emerson College factor … This inquiry does not involve an exact measuring or quantifying of the comparative economic benefits of the limited group and the general public."). As noted above in Part I(A)(1), supra, Massachusetts courts have found many charges to be fees rather than taxes where the public at large benefits greatly from the service provided.

In sum, the cases in which other jurisdictions have held 911 charges to be taxes are clearly distinguishable and should not be relied upon here.

D. Alternatively, whether the 911 Surcharge is a tax or a fee is a question of fact which can be cured through an amended complaint

Even if the Court below could not have conclusively decided on the facts alleged that the 911 Surcharge is a fee, it should not have dismissed the complaint on this basis. Rather than dismiss with prejudice, the Court should have recognized that the issue of whether the 911 Surcharge is a fee or a tax

may depend on the further development of the factual record. See Bellsouth Telecomm. LLC v. Cobb County, Ga., A17A0265, *19-20 (Ct. App. Ga. June 15, 2017) ("Because the analysis of whether the 9-1-1 Act charges are a tax or a fee…could be impacted by and/or turn on whether those upon whom the 9-1-1 charge is imposed receive a special benefit not received by others," there remain questions of fact that must be resolved by further evidentiary proceedings by the trial court."). Indeed, additional evidence exists supporting the conclusion that the Surcharge is a fee. Such evidence includes the fact that Massachusetts, in compliance with the Government Accounting Standards Board, classifies the Surcharge as an "exchange transaction," which is not considered a tax, in preparing its Comprehensive Annual Financial Report. There is also further evidence of particularized benefits that those who pay the fee receive that the general public does not. While these facts were not alleged in the complaint, the case should not have been dismissed with prejudice because, as discussed in Part II(C) below, PRS should be given the opportunity to supplement its factual allegations through an amended complaint.

II. THE SUPERIOR COURT'S DISMISSAL SHOULD NOT BE AFFIRMED BASED ON GROUNDS RAISED BY THE DEFENDANTS BUT NEVER ADDRESSED BY THE SUPERIOR COURT

As is evident from the Superior Court's Memorandum of Decision, the court did not reach any of the Defendants' other arguments advanced in support of their dismissal request. See RA000438 (Mem. and Order 12 n.9). Should this Court decide to entertain any of those arguments, none provide valid grounds upon which to affirm dismissal.

A. PRS Is A Proper Relator

Beyond the issue of whether the 911 Surcharge is a tax or a fee, the only other issue raised by the Defendants which could conceivably be addressed by the Superior Court at the motion to dismiss stage is the question of whether PRS qualifies as an "individual" under the MFCA. The Defendants argued below that only natural persons can bring *qui tam* complaints under the MFCA. RA000047-49 (Defs.' Mem. in Supp. of Mot. to Dismiss 13-15); RA000305-08 (Defs.' Reply Mem. 5-8). That statute states that an "individual" can bring a claim as a relator, and the term "individual" is not defined. The Defendants claim that because the term "person" is defined to include corporations and natural

persons, the term "individual" means something different.

No Massachusetts case, however, has come close to making such a narrow interpretation and no case standard for the proposition that a Massachusetts False Claims Act relator must be a "natural person." To the contrary, the Massachusetts Supreme Judicial Court has held that use of the term "individual" in a statute includes a corporation where it is clear from the policy goal of the statute that corporations, like natural persons, are subject to the provisions of that statute. See Otis Co. v. Inhabitants of Ware, 74 Mass. 509, 510-11 (1857) (provision of statute requiring that "individual" file list of estate liable to taxation included corporations because corporations are, like individuals, subject to taxation on their property); see also Black's Law Dictionary (5th ed. 1979) (restriction of term "individual" to natural persons "is not necessarily inherent in the word, and … it may, in proper cases, include artificial persons").

Here, it is clear that corporations were intended to be within the MFCA's ambit. Under the Federal False Claims Act (FCA), organizations and corporate entities may bring *qui tam* actions. See 31 U.S.C. §§ 3729-30;

Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 782 (2000) (noting that FCA does extend to corporations); see also United States v. Kiewit Pacific Co., 41 F.Supp.3d 796 (N.D.Cal. May 14, 2014) (dismissing retaliation-based FCA claim by LLC because not a proper relator, but allowing other FCA claims by LLC). The MFCA "is modeled on the federal FCA, and courts use the federal FCA for guidance in interpreting the MFCA." United States ex rel. Ciaschini v. Ahold USA Inc., 282 F.R.D. 27, 37 (D. Mass. 2012); see also Scannell v. Attorney Gen., 70 Mass.App.Ct. 46, 49 n.4 (2007) ("There is little decisional law interpreting the MFCA, and its legislative history is scant. However, the MFCA was modeled on the similarly worded Federal False Claims Act…Therefore, we look for guidance to cases and treatises interpreting the Federal False Claims Act."). The MFCA and the FCA are intended to combat the same behaviors and forward the same policy goals. There is no indication that Massachusetts intended to depart from the FCA by limiting the range of potential relators that can bring suit and enforce the statute's important objectives.

Defendants speculate – without support – that PRS and other corporate False Claims Act plaintiffs sue to

abuse the statutes and not to disclose wrongdoing. See RA000048 (Defs.' Mem. in Supp. of Mot. to Dismiss 14). On the contrary, there is no reason why a corporation which acquires knowledge of wrongdoing through agents like its managing member, Roger Schneider, cannot uncover and prosecute fraud against the government.[2]

B. The Complaint Should Not Be Dismissed Based On The Public Disclosure Bar

The Defendants erroneously contended below that the so-called "public disclosure bar" of the MFCA requires dismissal of the complaint. RA000049-55 (Defs.' Mem. in Supp. of Mot. to Dismiss 15-21); RA000308-16 (Defs.' Reply Mem. 8-16). Under the public disclosure bar, the court must dismiss an MFCA complaint "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed…from the news media, unless…the relator is an original source of the information." G.L c. 12, § 5G(c). This provision does not apply in this case because none of PRS's allegations have been publicly disclosed.

PRS's complaint alerted the Commonwealth to information that had not previously been discussed in

[2] As discussed in Section C below, this entire issue is mooted by the fact that PRS has proposed, through its Second Amended Complaint, to include Mr. Schneider as a Plaintiff.

any public forum: the specific conduct in which Defendants engage that leads to shortfalls in the amount of money that the Commonwealth collects from 911 Assessments. The Defendants were unable in the court below to point to a single occasion when their conduct in the Commonwealth was publicly disclosed. See RA000050-53 (Defs.' Mem. in Supp. of Mot. to Dismiss 16-19). Instead, they suggested that because some article somewhere mentioned that someone was under-remitting 911 assessments in some other jurisdictions, they are immune from suit under the MFCA. Id. This is incorrect.

Before PRS, no one disclosed that phone companies were violating the Massachusetts laws requiring collection of 911 fees in the Commonwealth, which companies were under-collecting or under-remitting in the Commonwealth, and the exact conduct in the Commonwealth that led to the under-collections. The Defendants cannot rely on statements in other jurisdictions or on statements that do not identify particular actors, and reference industry-wide alleged conduct or conduct arising nowhere near Massachusetts to invoke the public disclosure bar. Federal Courts interpreting the FCA have consistently rejected that

approach: "no court of appeals supports the view that a report documenting widespread false claims, but not attributing them to anyone in particular, blocks *qui tam* litigation against every member of the industry." United States ex rel. Baltazar v. Warden, 635 F.3d 866, 868 (7th Cir. 2011); see also United States ex rel. Banigan v. Organon USA Inc., 883 F. Supp. 2d 277, 292 (D. Mass. 2012) (disclosure of fraudulent practices in pharmaceutical industry did not bar claims for fraud with respect to particular drug alleged in complaint).

PRS has brought forth original, defendant-specific facts concerning conduct in Massachusetts. It has identified specific telecommunications companies under-remitting 911 Assessments to the Commonwealth and has quantified the amount of the 911 System funding shortfall for which each company is responsible. None of the news articles cited by the Defendants below disclosed their specific participation in a fraud in the Commonwealth or anywhere else. For this reason alone, the Complaint should not be dismissed on public disclosure grounds.

Additionally, even if the general articles on which Defendants based their public disclosure argument below were sufficient to invoke that rule – and they

are not – they still would not warrant dismissal of this action in its entirety. Not a single public disclosure discusses the unique issue of misclassification of services as PRI instead of VoIP, or failure to properly collect 911 fees on each channel of a PRI phone line, a prominent feature of Plaintiff's proposed amended complaint. Where such conduct is not disclosed in any news article, it cannot serve as a basis for dismissal on public disclosure grounds.

C. PRS Can Cure Alleged Defects in the Complaint by Filing a Second Amended Complaint

Each of the remaining purported defects raised by the Defendants below can (and was) cured through a proposed amended complaint, a copy of which was provided to the Court and the Defendants. RA000244-000295 (Proposed Second Am. Compl.). Thus, dismissal with prejudice should not be affirmed on any of these grounds.

Even if PRS is not an individual, PRS's has proposed to substitute or add as co-plaintiff Roger Schneider, a natural person. RA000246 (Proposed Second Am. Compl. ¶ 2) Thus, this perceived defect, even if legitimate, could be cured if PRS were granted leave to amend. In addition, to the extent the allegations in the complaint were publicly disclosed, the public

disclosure bar does not apply when the relator was the "original source" of the information. If the First Amended Complaint contains insufficient facts to demonstrate that PRS is the original source of the information at issue, the Proposed Second Amended Complaint cures that defect as well. The Proposed Second Amended Complaint alleges in detail how Mr. Schneider, and PRS through Mr. Schneider, came to learn of the Defendants' false claims and brought them to light. RA000259-267 (Proposed Second Am. Compl. ¶¶ 54-87).

Similarly, PRS's proposed Second Amended Complaint addresses the Defendants' arguments that the allegations do not meet the 9(b) pleading standard. Compare RA000041-47 (Defs.' Mem. in Supp. of Mot. to Dismiss 7-13), and RA000303-305 (Defs.' Reply Mem. 3-5), with RA000244-000295 (Proposed Second Am. Compl.). Both the Court below and the Defendants agreed that this issue is curable through an amended complaint. See Tr. 7:7-11.[3]

[3] "THE COURT: Would you agree that the – that the 9B issue and probably the public disclosure issue really should await till there's as [sic] amended complaint on file with the additional allegations?
MR. SKIDMORE[on behalf of Defendants]: So I agree, your Honor, that in theory the 9B issue could be cured by an amendment."

Therefore, even if any of the Defendants' grounds for dismissal not addressed by the Superior Court below are deemed by this Court to support a basis for dismissal of PRS's operative complaint, this matter should still be remanded to the Superior Court so the Superior Court can address whether PRS should be granted leave to file its Second Amended Complaint. See Charbonnier v. Amico, 367 Mass. 146, 153-54 (1975) (reversing dismissal and giving plaintiffs leave to amend because "we cannot say that when the plaintiff's counsel reexamine the facts and law they will be unable to state a claim"); Vogelaar v. H.L. Robbins & Co., 348 Mass. 787, 787 (1965) (same); see also RA000409 (Tr. 45:12-21) ("THE COURT: So assuming the complaint gets by the tax bar and the individual versus corporate bar…then don't I really need to move to the amended – the second amended complaint?…I'm not going to dismiss the action when there's an amended complaint out there that the plaintiffs say states the claim.").

CONCLUSION

For the foregoing reasons, Phone Recovery Services, LLC respectfully requests that this Court vacate the Trial Court's Memorandum and Order

Respectfully submitted,

PHONE RECOVERY SERVICES, LLC

By its attorneys,

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Date: July 12, 2017

RULE 16(k) Certification

I, Alycia M. Kennedy, herewith certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. A. P. 16(a)(6); 16(e); 16(f); 16(h); 18; and P. 20, as applicable.

/s/ Alycia M. Kennedy_____
Alycia M. Kennedy

CERTIFICATE OF SERVICE

I, Alycia M. Kennedy, certify that a true copy of the foregoing Brief of Plaintiff-Appellant Phone Recovery Services, LLC was filed on July 12, 2017 through eFileMA and will be sent electronically to counsel of record for Defendants-Appellees.

/s/ Alycia M. Kennedy_____
Alycia M. Kennedy

TABLE OF CONTENTS TO ADDENDUM

Trial Court's (Leibensperger, J) Judgment of Fact and Conclusions of Law dated September 3, 20131..... 1

Bellsouth Telecomm. v. Cobb County, Georgia, A17A0265 (Ct. App. Ga. June 15, 2017).....2 –

Griffith v. Cty. of Santa Cruz, 2009 WL 3327397 (Cal. Ct. App. Oct. 16, 2009) .....

Madison Cty. Commc'ns. Dist. v. BellSouth Telecomm., Inc., 2009 WL 9087783 (N.D.Ala., March 31, 2009) .....

Phone Recovery Servs., LLC v. Verizon Pa., Inc., 2016 WL 2638829 (Pa. Ct. Com. Pl. Apr. 21, 2016) .....

Statutes

G.L. c. 12, §§ 5A-5O.....

G.L. c. 12, § 5B.....

G.L. c. 12, § 5C.....

G.L. c. 6A, §18E.....

G.L. c. 6A, § 18H.....

31 U.S.C. §§ 3729-30.....

Regulations

220 C.M.R. 16.02.....

220 C.M.R. § 16.03.....

560 C.M.R. § 3.04.....

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

40

CIVIL DOCKET15-783BLS1P

Phone Recovery Services, LLC.

vs.

Verizon of New England, Inc. & others

JUDGMENT

This action came on before the Court, Edward P. Leibensperger, Justice, presiding, and upon consideration thereof,

It is **ORDERED and ADJUDGED:**

That the Defendants' Joint Motion to Dismiss First Amended Massachusetts False Claims Act Complaint is ALLOWED. Phone Recovery Services, LLC's First Amended Massachusetts False Claims Act Complaint shall be DISMISSED WITH PREJUDICE as to Phone Recovery Services, LLC and shall be DISMISSED WITHOUT PREJUDICE as to the Commonwealth of Massachusetts.

Dated at Boston, this 6th day of November, 2015.

Notice sent 11/9/15 (cm)
D.H.R - T&W - C.W
E.J.C.
L.S. - S&W - D.J.N.
J.W.C. - NP - K.C.B.
C.H. - Shire
D.B.C. - W&W
W.A.W - PLT
J.B.L. - RM - D.G.

Michael Joseph Donovan,
Clerk of the Court

Helen Foley-Bousquet
Assistant Clerk

JUDGMENT ENTERED ON DOCKET Nov 9, 2015
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

Generic Judgment.wpd 4544010 motallow muscator

FOURTH DIVISION
DILLARD, P. J.,
RAY and SELF, JJ.

June 15, 2017

In the Court of Appeals of Georgia

A17A0265. BELLSOUTH TELECOMMUNICATIONS LLC d/b/a AT&T GEORGIA et al. v. COBB COUNTY, GEORGIA et al.

RAY, JUDGE.

Defendants Bellsouth Telecommunications, LLC, and Earthlink, Inc., Earthlink, LLC, Deltacom, LLC, and Business Telecomm, LLC (collectively, "Defendants") filed this interlocutory appeal from the trial court's denials of their motions to dismiss the complaints by Cobb County, Georgia and Gwinnett County, Georgia (collectively, the "Counties") regarding the Defendants' alleged violations of the Georgia Emergency Telephone Number 9-1-1 Service Act of 1977, OCGA § 46-5-120 et seq (the "9-1-1 Act").[1] The 9-1-1 Act requires telephone customers to pay a monthly charge to the telephone companies, which act as middlemen to collect and

[1] The United States Telecom Association and Incompas, as well as the Georgia Chamber of Commerce, have filed amicus curiae briefs in this case.

remit the collected charges to local governments that run 9-1-1 call centers and dispatch emergency services. See OCGA § 46-5-134 (a)-(b). The Counties allege that the Defendants purposefully did not bill – and therefore, their customers did not pay – enough 9-1-1 charges under the statute. The Counties seek to hold the Defendants liable for damages equal to the amount of 9-1-1 charges owed by their customers, as well as for punitive damages.

We agree with the Defendants that the 9-1-1 Act does not explicitly or implicitly sanction a direct right of action by the Counties against the Defendants due to their alleged failure to bill or collect the required fees, but also find that the Counties may pursue their claims against the Defendants for the alleged failure or refusal to collect the 9-1-1 charges pursuant to OCGA §§ 51-1-6 and 51-1-8. However, the viability of any common law claims may turn on whether the 9-1-1 charges are taxes or fees. As any decision thereon is premature at this stage of the proceedings, we remand this issue for further consideration.

BACKGROUND

In 1977, the General Assembly passed the 9-1-1 Act to "establish and implement a cohesive state-wide emergency telephone number 9-1-1 system which will provide citizens with rapid, direct access to public safety agencies by dialing

telephone number 9-1-1 [.]" OCGA § 46-5-121 (a). The 9-1-1 Act authorizes a local government to pay for the 9-1-1 services it provides by "impos[ing] a monthly 9-1-1 charge upon each telephone service" that is or would be served by the 9-1-1 service. OCGA § 46-5-133 (a). The 9-1-1 Act broadly describes "telephone service" as "any method by which a 9-1-1 emergency call is delivered to a public safety answering point[,]" and includes

> local exchange telephone service or other telephone communication service, wireless service, prepaid wireless service, mobile telecommunications service, computer service, Voice over Internet Protocol service, or any technology that delivers or is required by law to deliver a call to a public safety answering point.

OCGA § 46-5-122 (16.1).

The 9-1-1 Act makes telephone companies intermediaries between local governments and citizens for the purpose of collecting the funds necessary to implement the 9-1-1 service and dispatch centers. It provides that telephone customers "may be billed for the monthly 9-1-1 charge" of up to $1.50 for each

subscription per telephone service provided. OCGA § 46-5-134 (a) (1) (A).[2] The specific language of the Act provides:

> Each service supplier shall, on behalf of the local government, collect the 9-1-1 charge from those telephone subscribers to whom it provides telephone service in the area served by the emergency 9-1-1 system. As part of its normal billing process, the service supplier shall collect the 9-1-1 charge for each month a telephone service is in service, and it shall list the 9-1-1 charge as a separate entry on each bill.

OCGA § 46-5-134 (a) (1) (B). The same requirement applies to wireless service, except for services billed to federal, state or local governments. See OCGA § 46-5-134 (a) (2) (C). Further, "[e]ach service supplier that collects 9-1-1 charges" may "retain . . . an administrative fee" and "[t]he remaining amount shall be due quarterly to the local government[.]" OCGA § 46-5-134 (d) (1). The 9-1-1 Act further grants local governments the right to "audit or cause to be audited the books and records of

[2] When a customer "has several telephone access lines, each exchange access facility shall constitute a separate subscription." OCGA § 46-5-122 (17). "Exchange access facility" is defined as "the access from a particular telephone subscriber's premises to the telephone system" of a telephone company and includes, inter alia, service supplier-provided access lines, PBX trunks, Centrex network access registers, and Voice over Internet Protocol service suppliers and any other communication, message, signal, or information delivery system capable of initiating a 9-1-1 emergency call. OCGA § 46-5-122 (7).

service suppliers with respect to the collection and remittance of 9-1-1 charges." OCGA § 46-5-134 (d) (4).

The Counties sued the Defendants alleging that they should have billed two classes of customers a larger amount of 9-1-1 charges. The Counties argued that Defendants were required to, but did not, bill a 9-1-1 charge for all of the "exchange access lines, channels, or pathways" available to customers that purchased "multiplex" services, which can carry multiple simultaneous calls over a single physical line, and that Defendants were required to, but did not, bill a 9-1-1 charge for every 10-digit telephone number provided to users of VoIP technology.[3] The complaints, inter alia, assert damages claims arising out of these alleged violations of the 9-1-1 Act and arising out of common law theories of recovery, and seek to enforce the 9-1-1 Act's audit provision.

[3] Voice over Internet Protocol service ("VoIP") is "any technology that permits a voice conversation using a voice connection to a computer . . . which sends a digital signal over the Internet through a broadband connection to be converted back to the human voice at a distant terminal[.]" OCGA § 46-5-122 (17.1).

The Defendants moved to dismiss the Counties' complaints. After a consolidated oral argument, the trial court denied the motions to dismiss.[4] In its order, the trial court held that the 9-1-1 charges constitute fees, rather than taxes; that the lawsuit was permissible because there is "no express language" preventing the Counties from bringing the action and that "it is implausible that the General Assembly would confer auditing powers without a corresponding remedy;" and that the Counties could enforce the 9-1-1 Act through common law claims based on alleged violations of the 9-1-1 Act. This Court granted the Defendants' application for interlocutory review.

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[4] The trial court should not grant a motion to dismiss a complaint for failure to state a claim upon which relief may be granted unless:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

(Citations omitted.) *Best Jewelry Mfg. Co., Inc. v. Reed Elsevier, Inc.*, 334 Ga. App. 826, 826-827 (780 SE2d 689) (2015) (cert denied).

ANALYSIS

1. The parties agree that the 9-1-1 Act does not contain an express right of action authorizing local governments to enforce the statute against telephone companies and service suppliers. However, the Plaintiff Counties allege and the trial court found that the statutory scheme of the 9-1-1 Act indicates an intent by the General Assembly to give local governments an implied right of action for damages against telephone companies and suppliers based upon a violation of the statute. The trial court reasoned that it was implausible that the General Assembly would confer auditing powers to local governments without a corresponding remedy if they were to discover that a telephone company or service supplier had not collected and/or remitted the proper amount owed to them under the statute. The Defendants argue that this ruling was in error; we agree that the trial court so erred.

Georgia has "longstanding precedential authority rejecting the creation of implied private rights of action[.]" (Footnote omitted.) *Somerville v. White*, 337 Ga. App. 414, 417 (787 SE2d 350) (2016). See also *Govea v. City of Norcross*, 271 Ga. App. 36, 41 (1) (608 SE2d 677) (2004) ("[I]t is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof") (footnote omitted). In 2010,

the General Assembly codified this presumption in OCGA § 9-2-8 (a), which provides that "[n]o private right of action shall arise from any Act enacted after July 1, 2010, unless such right is expressly provided therein." Our Supreme Court has noted that the creation of OCGA § 9-2-8 revealed the General Assembly's concern over "judicial creation of implied civil causes of action[.]" *Anthony v. American Gen. Fin. Servs., Inc.*, 287 Ga. 448, 459 (2) (c) (697 SE2d 166) (2010). Although OCGA § 9-2-8 (a) "would not apply to the pre-existing [9-1-1 Act] at issue in this case, . . . it certainly counsels against deviating from our established precedent to find new implied civil causes of action." Id.

As noted above, all parties concede that the 9-1-1 Act does not contain an express right of action that would allow the Counties to bring the claims in this lawsuit against the Defendants. See generally OCGA § 46-5-120, et seq. Accordingly, the Counties bear the burden of overcoming Georgia's presumption against implied rights of action. See *Brooks-Powers v. Metropolitan Atlanta Rapid Transit Auth.*, 260 Ga. App. 390, 392 (1) (579 SE2d 802) (2003). This they cannot do.

Although the 9-1-1 Act does not provide that local governments have a right of action against telephone *companies*, it does provide a similar right of action against telephone *customers*. Specifically, the 9-1-1 Act provides that telephone customers

are "liable for the 9-1-1 charge[] . . . until it has been paid to the service supplier." OCGA § 46-5-134 (b). Under the 9-1-1 Act, if a customer refuses to pay the 9-1-1 charge, then the telephone company is to inform the local government, which may "initiate[]" a "collection action" against that customer. Id. While the legislature also could have specifically created a cause of action for a breach of the 9-1-1 Act against telephone service providers by its terms, it did not choose to do so.

Not to be deterred, the Counties claim and the trial court held that the audit provisions of the 9-1-1 Act gave rise to an inference that the General Assembly intended that local governments could sue telephone service providers. See OCGA § 46-5-134 (d) (4) (The 9-1-1 Act provides that a "local government may on an annual basis, and at its expense, audit or cause to be audited the books and records of service suppliers with respect to the collection and remittance of the 9-1-1 charges"). However, again, had the General Assembly intended within the statute itself to make the Defendants or other telephone service providers liable for amounts not collected from customers, then it knew how to do so.[5] See e. g., OCGA § 48-8-7

[5] In their supplemental brief, the Counties argue that Section 14 (b) of the Senate Bill 222 from the 2017 legislative session indicates that the General Assembly intended to preserve an implied cause of action under the 9-1-1 Act. However, we fail to see how legislation passed 40 years after the 9-1-1 Act was enacted clarifies what the intent was of the original General Assembly which passed the Act, and in any

(a) - (b) (making it "unlawful for any dealer to knowingly and willingly fail, neglect, or refuse to collect" from its customers a sales and use tax, and imposing a "penalty of being liable for and paying the tax himself" if a dealer violates the statute).[6]

Contrary to the Counties' assertion, , it is plausible that the General Assembly would make service providers subject to an audit (but not confer a right of action against them) since the service providers are the parties that hold the records regarding the 9-1-1 taxes charged to and paid by others, namely, their customers.[7] Further, the audits could lead to retroactive collection by the local governments against end-users who did not pay the appropriate amounts of 9-1-1 charges or lead to prospective changes to the service supplier's manner of billing.

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event, Senate Bill 222 was vetoed by Georgia's governor and did not become law.

[6] See also OCGA § 48-13-59 (a) - (b) (making it unlawful "for any innkeeper to fail, neglect, or refuse to collect the [hotel] tax," and imposing a "penalty of being liable for and paying the tax himself" as well as a misdemeanor charge punishable by a fine or imprisonment if the statute is violated); OCGA § 48-13-124 (a) - (b) (making it unlawful for any dealer to "knowingly and willfully fail, neglect, or refuse to collect the [energy tax]" and imposing a penalty of "being liable for and paying the tax himself" as well as a "misdemeanor of high and aggravated nature" punishable by a fine or imprisonment if the statute is violated).

[7] See OCGA § 46-5-134 (m) (2) (providing that the local government may be held liable to subscribers for pro rata reimbursement of funds not spent according to the 9-1-1 Act).

The Counties next allege that an implied right of action exists because the 9-1-1 Act gave them the power to "bring and defend actions." OCGA § 46-5-138 (c) (1). However, the fact that the Counties may sue or be sued does not confer a right of action; it merely confers the capacity to sue. The Eleventh Circuit rejected a similar argument in *Smith v. Russellville Production Credit Assn.*, 777 F.2d 1544, 1548 (I) (11th Cir. 1985). *Smith* held that the appellants' argument

> in support of an implied right of action, that the inclusion of a 'sue and be sued' provision in the Farm Credit Act is evidence that Congress intended to create a private right of action under that act, is completely without merit. The 'sue and be sued provision' simply indicates that Congress intended that [Production Credit Associations ("PCAs")], like other private entities, be held accountable for breaking the law and be able to seek relief under appropriate circumstances. The provision does not indicate that Congress intended, in enacting the Farm Credit Act, to create an independent substantive legal basis under which PCAs could be sued.

Id.

In summary, we disagree with the trial court's finding that the 9-1-1 Act provides an implied right of action to the Counties for the Defendants' alleged failure to collect the proper amount of fees under the statute.

2. The Defendants next argue that the trial court erred in concluding that the 9-1-1 Act, when read in conjunction with OCGA §§ 51-1-6 and 51-1-8, provides the Counties with common law remedies against the Defendants or any other telephone service provider. As to this point, we hold that the Counties may pursue claims against the Defendants due to their alleged failure or refusal to collect these charges; the 9-1-1 Act imposed a duty upon the Defendants to do so, and OCGA §§ 51-1-6 and 51-1-8 allow the Counties to enforce that statutorily imposed duty.[8]

"The language of OCGA §§ 51-1-6[9] and 51-1-8[10] does not confer a separate cause of action in tort upon one who has suffered a breach of a legal or a private duty." *Parris*, supa at 524. Rather, they operate in conjunction with a statute, such as

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[8] At this time, we do not address whether and/or to what extent common law might also impose a duty upon the Counties that could be enforced under these statutes. The viability of these common law claims will more appropriately be tested pursuant to a motion for summary judgment after discovery. We refrain from ruling thereon until the "tax" versus "fee" issue is resolved, as discussed in Division 3 herein.

[9] OCGA § 51-1-6 states that "[w]hen the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby."

[10] OCGA § 51-1-8 provides that "[p]rivate duties may arise from statute or from relations created by contract, express or implied. The violation of a private duty, accompanied by damage, shall give a right of action."

the 9-1-1 Act, that imposes a legal duty but does not expressly provide a cause of action. See also *Dupree v. Keller Indus., Inc.*, 199 Ga. App. 138, 141 (1) (404 SE2d 291) (1991). The Counties argue that the 9-1-1 Act imposes upon the providers a duty to bill and collect the 9-1-1 charges for all voice lines or pathways capable of reaching 9-1-1 call centers, and to remit those fees to the Counties according to the terms of the statute (See OCGA § 46-5-134 (a) (1) (B) (telephone service providers "shall collect" 9-1-1 charges)), thus giving rise to their claims due to the providers' alleged failure or refusal to do so. The duty to bill and collect the charges imposed by the 9-1-1 Act falls within the ambit of OCGA §§ 51-1-6 and 51-1-8, even though they arise from a statute that does not directly provide for a private cause of action. See, e.g., *Pulte Home Corp. v. Simerly*, 322 Ga. App. 699, 705-706 (3) (746 SE2d 173) (2013) (violations of Georgia Water Quality Control Act, Georgia Waste Control Act and Georgia Erosion and Sedimentation Control Act "fall within the ambit of OCGA § 51-1-6"); *Dupree*, supra at 141-142 (1) (violation of federal OSHA regulations are admissible as evidence of and give cause of action when in concert with OCGA § 51-1-6).

We do not agree with the Defendants' argument that *Best Jewelry Mfg. Co., Inc.,* supra, and *U. S. Bank, N. A. v. Phillips*, 318 Ga. App. 819 (734 SE2d 799)

(2012), require a different result. In *Best Jewelry*, supra, the plaintiff filed a class action, inter alia, on the grounds that the superior court's e-filing system, as implemented, violated various statutes and regulations. Id. at 830 (1) (a) (i). This Court affirmed the trial court's grant of a motion to dismiss these claims, finding that the claims had no basis other than statutory violations and that the plaintiff failed to plead "facts sufficient to show violations" of the statutes. Id. at 830 (1) -834 (1) (b). In *U. S. Bank, N. A.*, supra, this Court affirmed the trial court's grant of a motion to dismiss the plaintiffs' claim under OCGA § 51-1-6 for negligent implementation of the Federal Home Affordable Modification Program because the homeowner/plaintiff was not the intended third-party beneficiary to whom the defendant owed a legal duty. Id. at 820. The cases relied upon by the amici curiae briefs, *Reilly v. Alcan Aluminum Corp*, 272 Ga. 279, 280 (1) (528 SE2d 238) (2000) and *Mattox v. Yellow Freight Sys., Inc.*, 243 Ga. App. 894, 895 (534 SE2d 561) (2000) are also distinguishable. Both of those cases involve specific *prohibitions* against liability, unlike this case.

Further, both OCGA §§ 51-1-6 and 51-1-8 were passed in 1863, prior to the passage of the 9-1-1 Act in 1977. Thus,

> we must presume that the General Assembly had full knowledge of the existing state of the law and enacted the statute with reference to it. We

> construe statutes in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts.

(Punctuation and footnotes omitted.) *Chase v. State*, 285 Ga. 693, 695-696 (2) (681 SE2d 116) (2009). See also *Barbush v. Oiler*, 158 Ga. App. 625, 625 (281 SE2d 359) (1981) ("Statutes are to be construed in connection and in harmony with existing law") (citation and punctuation omitted). Thus, in enacting the 9-1-1 Act, the General Assembly would have been aware of the right of local governments to pursue claims under OCGA §§51-1-6 and 51-1-8 if the telephone companies did not properly collect these charges.

3. The Defendants argue that the trial court erred in concluding that the 9-1-1 charge imposed by the 9-1-1 Act is a "fee" rather than a "tax," and contend that if the trial court had properly classified the charge as a tax, that it would have had no choice but to dismiss the Counties' claim pursuant to our holding in *Fulton County v. T-Mobile, South, LLC*, 305 Ga. App. 466 (699 SE2d 802) (2010). In essence, the Defendants argue that if the charges at issue are taxes, that a common law action for the recovery of the taxes will not lie. *Kirk v. Bray*, 181 Ga. 814, 818 (184 SE 733)

(1935). However, as we found in Division 2 herein, the Counties have statutory claims against the Defendants pursuant to OCGA §§ 51-1-6 and 51-1-8 to enforce the duty imposed upon the Defendants by the 9-1-1 Act. And, even if we were to assume that such claims are really claims at common law, the Counties have complained that *T-Mobile* was wrongfully decided or inapplicable to the facts of this case. As explained below, we vacate the trial court's decision on the issue of whether the 9-1-1 Act charges are a tax or a fee, and remand for further consideration.

"Although it is often important to decide whether a particular charge is a fee or a tax, it is frequently difficult to discern whether a given enactment provides for a regulatory fee or authorizes simply a tax." *Hadley v. City of Atlanta*, 232 Ga. App. 871, 872 (1) (502 SE2d 784) (1998). The distinction between a tax and a fee "is not one of names but of substance." *Richmond County Business Assoc. v. Richmond County*, 224 Ga. 854, 856 (1) (165 SE2d 293) (1968). Our Supreme Court has defined a tax as "an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered." (Citation and punctuation omitted; emphasis supplied.) *McLeod v. Columbia County*, 278 Ga. 242, 244 (2) (599 SE2d 152) (2004). A charge is generally not a tax if its purpose and objective is to

compensate for services rendered. Id. Additional factors which distinguish a fee from a tax:

> First, taxes are a means for the government to raise general revenue and usually are based on ability to pay (such as property or income) without regard to direct benefits which may inure to the payor or to the property taxed. Fees, on the other hand, are intended to be and should be clearly described as a charge for a particular service provided. Second, fees should apply based on the contribution to the problem. Third, fee payers, unlike tax payers, should receive some benefit from the service for which they are paying, although the benefits may be indirect or immeasurable.

(Citation and punctuation omitted.) Id. See also *Homewood Village, LLC v. Unified Govt. of Athens-Clarke County*, 292 Ga. 514, 515 (1) (739 SE2d 316) (2013). The last factor set forth in *McLeod,* supra – that fee payers, unlike tax payers, should receive some benefit from the service for which they are paying, although the benefits may be indirect or immeasurable – cannot be determined without further evidentiary proceedings.[11]

The Defendants and the amicus briefs argue that the trial court ignored binding precedent in *T-Mobile*, supra. In *T-Mobile*, supra, this Court held that the 9-1-1

[11] We note that the order appealed was pursuant to a Motion to Dismiss where no evidence was considered.

charges collected in advance at the point of sale for prepaid wireless services were a tax because, inter alia, those upon whom the charge was imposed did not receive a special benefit not received by others and the charge was for the purpose of raising general revenue. Id. at 470-471 (2).

However, we find that *T-Mobile*[12] is potentially distinguishable from the instant case because it involved a "taxpayer" seeking a refund for "taxes" that it mistakenly paid or was illegally required to pay, while in this case the Counties aren't seeking to collect monies which were owed by the Defendants as "taxpayers," but to collect monies which the Defendants had a duty to collect *for* the Counties. Also, *T-Mobile* arguably is distinguishable from the instant case because the residents of the plaintiff Counties allegedly receive a special benefit not received by residents of other counties in Georgia or by persons simply passing through the Counties who call 9-1-1. The 9-1-1 Act grants autonomy to each local government to establish its own 9-1-1 services if it so chooses and the amount of fees to be imposed up to the $1.50 maximum set forth under the 9-1-1 Act. OCGA § 46-5-133 (a). The Counties argue that, although all members of the public with telephone service may access Georgia's

[12] While we do not endeavor herein to determine, the Counties contend that *T-Mobile* was wrongly decided. We defer consideration of such issue until after the trial court further considers the fee versus tax issue on remand.

9-1-1 systems, the citizens in Cobb and Gwinnett counties who incur the 9-1-1 charges receive enhanced 9-1-1 benefits and services. The Counties contend that the evidence in this case will

> show that while some local governments provide no 9-1-1 services at all, Cobb and Gwinnett Counties provide enhanced landline 9-1-1 services that use special computer software to display the caller's home address and location on a map. Residents may even have "Smart 9-1-1" services that allow them to pre-register their anticipated 9-1-1 needs for special circumstances, such as "senior with Alzheimer's" or "child with disability." Indeed, because different local governments offer different 9-1-1 services, and none are authorized to accumulate more charges than their actual service costs, different local governments charge different amounts for 9-1-1 services up to the statutory maximum of $1.50.

If the evidence shows that these assertions are true, then, contrary to the conclusion in *T-Mobile*, supra, not all landline and wireless 9-1-1 services are created equal.

Because the analysis of whether the 9-1-1 Act charges are a tax or a fee, or whether *T-Mobile* was correctly decided in the first instance,[13] could be impacted by and/or turn on whether those upon whom the 9-1-1 charge is imposed receive a special benefit not received by others," there remain questions of fact that must be

[13] We note that because *T-Mobile* was an appeal on an order resolving a Motion to Dismiss, it likewise appears to have been decided without the benefit of evidence.

resolved by further evidentiary proceedings by the trial court. See e.g., *Covenant Media of Ga., LLC v. City of Lawrenceville*, 580 F. Supp. 2d 1313, 1315 (1) (N.D. Ga. 2008) ("In a case involving disputed facts, however, it may be necessary to provide an opportunity for discovery and a hearing that is appropriate to the nature of the motion to dismiss") (citation and punctuation omitted). Accordingly, we vacate the trial court's ruling on the motion to dismiss as to whether these charges are a "tax" or a "fee," and we remand the issue for discovery and further evidentiary proceedings.

Judgment reversed in part, affirmed in part, and vacated in part. Self, J., concurs fully and also concurs in Division 1 and Division 2 of the special concurrence. Dillard, P. J., concurs fully with Division 1 and Division 2, concurs in the judgment only as to Division 3, and also specially concurs.

A17A0265. BELLSOUTH TELECOMMUNICATIONS LLC d/b/a/

AT&T GEORGIA et al. v. COBB COUNTY GEORGIA, et al.

DILLARD, Presiding Judge, concurring fully and specially.

I concur fully with the majority's holdings in Divisions 1 and 2 that the 9-1-1 Act does not provide the Counties with a private right of action, explicitly or otherwise, to enforce its provisions against telephone-service providers such as the Defendants, but that the 9-1-1 Act, read in conjunction with OCGA § 51-1-6,[1] provides the Counties with a potentially viable avenue for relief such that their complaints should not be dismissed at this early stage of the proceedings. Nevertheless, because litigants often seek to persuade this Court to recognize implied causes of action and to invoke OCGA § 51-1-6 as a way of circumventing a statute that does not authorize a litigant to seek enforcement of its provisions, I write

[1] The trial court below and Defendants (on appeal) reference OCGA § 51-1-8 in passing, but their primary focus is on OCGA § 51-1-6 and its accompanying caselaw. Indeed, the Defendants cite only one case that even references OCGA § 51-1-8, and that opinion merely groups it with OCGA § 51-1-6 for the basic proposition that both statutes only authorize recovery of damages for the breach of a legal duty otherwise created. *See Parris v. State Farm Mut. Auto. Ins. Co.*, 229 Ga. App. 522, 524 (494 SE2d 244) (1997). For these reasons, and because a claim brought under OCGA § 51-1-8 is separate and distinct from one brought under OCGA § 51-1-6, my analysis is limited to OCGA § 51-1-6.

separately to provide further guidance as to the current state of Georgia law regarding these issues. Finally, as to Division 3, I disagree with the majority that it is premature to determine whether or not the type of charge imposed by the 9-1-1 Act is a tax or a fee because we have already expressly held, as a matter of law, that the 9-1-1 charge is indeed a tax, and the Defendants have not provided us with a compelling argument for revisiting that holding. That said, because I agree with the majority's ultimate conclusion that the Counties' complaints are sufficient to survive the motion to dismiss and that the case should be remanded for further proceedings, I concur in judgment only as to Division 3.

1. As to the trial court's erroneous finding that the 9-1-1 Act provides an implied cause of action for the Counties to sue the Defendants to enforce its provisions, I write separately to emphasize that, even with regard to statutes enacted prior to the effective date of OCGA § 9-2-8,[2] Georgia law does not recognize implied

[2] As noted by the majority, OCGA § 9-2-8 (a) provides that "[n]o private right of action shall arise from any Act enacted after July 1, 2010, unless such right is *expressly* provided therein." (emphasis supplied). Subsection (b) of OCGA § 9-2-8 provides that "[n]othing in subsection (a) of this Code section shall be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law, including, but not limited to, theories of recovery under the laws of tort or contact or for breach of legal or private duties as set forth in Code Sections 51-1-6 and 51-18 or Title 13."

causes of actions. In our state, a private right of action cannot be based solely on speculation regarding the "intent" of the General Assembly[3] when there is no

[3] In my view, our appellate courts should stop referencing altogether the ethereal fiction of "legislative intent" in the context of statutory interpretation. A judge should not care about what any legislator intended but did not expressly provide for in the statutory text. *See King v. Burwell*, ___ U.S. ___ (135 SCt 2480, 2505 (V), 192 LEd2d 483) (2015) (Scalia, J., dissenting) ("More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers."). If the General Assembly "enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Id*. (citation and punctuation omitted); *accord Lamie v. U.S. Trustee*, 540 U. S. 526, 542 (III) (124 SCt 1023, 157 LEd2d 1024) (2004); *see Malphurs v. State*, 336 Ga. App. 867, 870-71 (2016) (Peterson, J.) ("The General Assembly does not enact general intention; it enacts statutes. Statutes have words, and words have meanings. It is those meanings that we interpret and apply, not some amorphous general intention."). And as for the notion that judges are somehow able to discern the collective intent of a legislative body, that is "[p]ure applesauce." *King*, 135 SCt at 2505 (II) (Scalia, J., dissenting); s*ee In re Whittle*, 339 Ga. App. 83, 85-86 (1) (793 SE2d 123) (2016) ("[I]n the context of legislation, discerning 'collective intent is pure fiction because dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae.'") (citation omitted)). Judges are not in the business of divining unexpressed legislative intent, nor are we capable of doing so with any reasonable degree of accuracy. As Judge Bethel (a former legislator) has aptly noted, "[a]ny attempt to discern legislative intent beyond the express language passed by a legislative body is as practical and productive as attempting to nail Jello to the wall." *Bishop v. State*, No. A17A0569, 2017 WL 2450771, at *3 (Ga. App. June 6, 2017) (Bethel, J., concurring). I agree. Judges are trained to interpret the meaning of the words expressly ratified by the people or enacted by their representatives in a manner consistent with longstanding canons of construction. Thus, when judges speak as if they are engaging in some mystical search for the legislature's unexpressed intent (in the context of statutory interpretation), they create an impression that is both

indication in the text of the statute itself that such a cause of action exists. Indeed, in determining whether a private right of action is authorized by a statute, "[t]he judicial task is . . . to interpret the statute the General Assembly has passed to determine whether it displays an intent to create not just a private right of action but also a private remedy."[4] And statutory "intent," as reflected by the plain meaning of the relevant text, on this latter point is "determinative."[5] Thus, it is entirely irrelevant that the trial court found it to be "implausible" that the General Assembly would enact the

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misleading and squarely at odds with the judicial duty. It is time to state plainly what is already manifestly true: What legislators intend but do not expressly provide for in the text of a statute is meaningless. I realize, of course, that OCGA § 1-3-1 (a) provides that "[i]n the interpretation of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy," but this statutory directive must be read in conjunction with OCGA § 1-3-1 (b), which provides that "[i]n all interpretations of statutes, the ordinary signification shall be applied to all words . . . ." In any event, the General Assembly can no more tell the judiciary how to *generally* interpret the law than we can direct them how to legislate. The separation of powers is essential to the maintenance of our constitutional republic, and it is high time that our discussion of statutory interpretation reflects the reality of our jurisprudence and acknowledges the strict demarcation line between judicial interpretation and legislating. We are judges, not black-robed philosophers.

[4] *Somerville v. White*, 337 Ga. App. 414, 416 (1) (787 SE2d 350) (2016) (punctuation omitted); *accord Alexander v. Sandoval*, 532 U.S. 275, 286 (II) (121 SCt 1511, 149 LEd2d 517) (2001); *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (122 SCt 2268, 153 LEd2d 309) (2002).

[5] *Somerville*, 337 Ga. App. at 416-17 (1); *see Sandoval*, 532 U.S. at 286 (II).

9-1-1 statute without providing a cause of action against telephone-service providers to enforce its provisions because that is exactly what it did. Bottom line: In the absence of an explicit textual basis, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[6] As we have previously explained, "[i]t is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this Court to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit."[7]

Thus, I take this opportunity to reiterate that, so long as the meaning of the relevant statutory text is plain and does not lead to an absurd result, that is the end of our inquiry.[8] Indeed, it is deeply troubling when

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[6] *Somerville*, 337 Ga. App. at 417 (1); *see Sandoval*, 532 U.S. at 286-87 (II).

[7] *Somerville*, 337 Ga. App. at 417 (1) (punctuation omitted) (quoting *Schroeder v. Hamilton School Dist.*, 282 F3d 946, 951 (II) (7th Cir. 2002) (Manion, J.)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (II) (118 SCt 1003, 140 LEd2d 210) (1998) (holding that "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts" (punctuation and citation omitted)).

[8] *See Shorter Coll. v. Baptist Convention of Ga.*, 279 Ga. 466, 470 (1) (614 SE2d 37) (2005); *Ray v. Barber*, 273 Ga. 856, 856 (1) (548 SE2d 283) (2001); *see also City of Atlanta v. Miller*, 256 Ga. App. 819, 820 (1) (569 SE2d 907) (2002) ("In construing a legislative act, a court must first look to the literal meaning of the act.

> judges start discussing not the meaning of the statutes the legislature actually enacted, as determined from the text of those laws, but rather the unexpressed "spirit" or "reason" of the legislation, and the need to make sure the law does not cause "unreasonable consequences," [thus venturing] into dangerously undemocratic, unfair, and impractical territory. The "spirit or reason" approach to statutory interpretation invites judges to read their own policy preferences into the law, as we all believe that our own policy preferences are wise and reasonable, which tempts us to assume, consciously or unconsciously, that the legislature could not have intended differently.[9]

If the language is plain and does not lead to any absurd or impracticable consequences, the court simply construes it according to its terms and conducts *no further inquiry*." (punctuation omitted and emphasis supplied)); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 397 (1st ed. 2012) ("Intentionalist theorists and courts promote the idea that enacted texts merely evoke or suggest—as opposed to state—what the true law is . . . . If this were true, then it would hardly be possible ever to reach a consensus about the law. The traditional view is that an enacted text is itself the law."); *id*. at 376 ("[T]hat the legislature even *had* a view on the matter at issue . . . is pure fantasy. In the ordinary case, most legislators could not possibly have focused on the narrow point before the court [and] the few who did undoubtedly had varying views.").

[9] *Merritt v. State*, 286 Ga. 650, 656 (690 SE2d 835) (2010) (Nahmias, J., concurring specially); *accord Callaway Blue Springs, LLLP v. W. Basin Capital, LLC*, No. A17A0130, 2017 WL 2417779, at *5 (1) (Ga. App. June 5, 2017).

As Georgians (and Americans), we are "governed by laws, not by the intentions of legislators."[10] And as judges, we should only be concerned with what laws actually say, "not by what the people who drafted the laws intended."[11] Suffice it to say, the trial court erred in disregarding these well-established principles and finding that the 9-1-1 Act provides an implied cause of action under the circumstances of this case.

2. I also fully concur with the majority's holding that OCGA § 51-1-6 provides the Counties with a potentially viable cause of action to enforce the Defendants' duties imposed by the 9-1-1 Act. Nevertheless, because litigants routinely invoke OCGA § 51-1-6 in an attempt to enforce statutory provisions that do not give them the right to do so, I write separately to emphasize that the cause of action authorized by OCGA § 51-1-6 arises only in limited circumstances, and several requirements must be satisfied before a viable claim may be brought under the statute. As noted by the majority, OCGA § 51-1-6 provides that "[w]hen the law requires a person to

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[10] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (113 SCt 1562, 123 LE2d 229) (1993) (Scalia, J., concurring); *accord Callaway Blue Springs, LLLP*, 2017 WL 2417779, at *5 (1); *Day v. Floyd Cty. Bd. of Educ.*, 333 Ga. App. 144, 151 (775 SE2d 622) (2015) (Dillard, J., concurring).

[11] SCALIA & GARNER, *supra* note 8, at 16; *accord Callaway Blue Springs, LLLP*, 2017 WL 2417779, at *5 (1); *Day*, 333 Ga. App. at 151 (Dillard, J., concurring).

perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby." But as we have repeatedly explained, the alleged duty cannot rest solely upon OCGA § 51-1-6 because that statute merely sets forth general principles of tort law.[12] Thus, the legal duty necessary to support a claim under OCGA § 51-1-6 "must be found in another legislative enactment[,]"[13] which in this case is the 9-1-1 Act.[14]

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[12] *See Wells Fargo Bank, N.A. v. Jenkins*, 293 Ga. 162, 164 (744 SE2d 686) (2013) (noting that a plaintiff cannot sue for the breach of an alleged duty based solely on OCGA § 51-1-6); *Gobran Auto Sales, Inc. v. Bell*, 335 Ga. App. 873, 877 (2) (783 SE2d 389) (2016) (explaining that OCGA § 51-1-6 "do[es] not create causes of action, but simply set[s] forth general principles of tort law, authorizing the recovery of damages for the breach of a legal duty otherwise arising, though not expressly stated, under a statute or common law"); *Parris*, 229 Ga. App. at 524 ("OCGA § 51-1-6, standing alone, creates no cause of action. Rather, it simply authorizes the recovery of damages for the breach of a legal duty otherwise created."); *see also Pulte Home Corp. v. Simerly*, 322 Ga. App. 699, 705 (746 SE2d 173) (2013) ("OCGA § 51-1-6 does not create a legal duty but defines a tort and authorizes damages when a legal duty is breached." (punctuation omitted)).

[13] *Jenkins*, 293 Ga. at 164; *accord McConnell v. Dep't of Labor*, 337 Ga. App. 457, 459 (1) n.3 (787 SE2d 794) (2016).

[14] While OCGA § 51-1-6 "set[s] forth general principles of tort law," *Bell*, 335 Ga. App. at 877 (2), OCGA § 51-1-6 claims are typically evaluated under the same legal framework as negligence *per se* claims, which makes sense because such claims, like those under OCGA § 51-1-6, seek damages for the violation of a statute. *See Goldstein Garber & Salama, LLC v. J.B.*, No. S16G0744, (797 SE2d 87 (2)) (Ga. Feb. 27, 2017) ("[N]egligence per se arises when a statute is violated, the person

The Defendants have cited our Supreme Court's decision in *Wells Fargo Bank, N.A. v. Jenkins*,[15] and this Court's decisions in *Parris v. State Farm Mutual Automobile Insurance Co.*[16] and *Best Jewelry Manufacturing, Co. v. Reed Elsevier, Inc.*[17] to support their argument that, if the statute imposing the legal duty does not provide a plaintiff with a private right of action, neither does OCGA § 51-1-6. They contend that the Counties cannot bring a claim under OCGA § 51-1-6 for a violation of the 9-1-1 statute solely because the 9-1-1 statute does not authorize such a claim. But this argument misconstrues the holdings in the cases cited *supra* and conflicts with the plain language of OCGA § 51-1-6, which only applies when "no cause of action is given in [the underlying statute's] express terms." Furthermore, in *Jenkins*,

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injured by the violation is within the class of persons the statute was intended to protect, and the harm complained of was the harm the statute was intended to guard against." (punctuation omitted)); *Brown v. Belinfante*, 252 Ga. App. 856, 861 (1) (557 SE2d 399) (2001) ("In determining whether the violation of a statute or ordinance is negligence per se as to a particular person, it is necessary to examine the purposes of the legislation and decide (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm it was intended to guard against." (punctuation omitted)). Thus, OCGA § 51-1-6 does not necessarily authorize *any* type of tort claim merely because an alleged statutory violation satisfies its requirements.

[15] 293 Ga. 162 (744 SE2d 686) (2013).

[16] 229 Ga. App. 522 (494 SE2d 244) (1997).

[17] 334 Ga. App. 826 (780 SE2d 689) (2015).

the Supreme Court of Georgia held that an alleged violation of a federal statute did not give rise to a negligence claim under OCGA § 51-1-6 because the plaintiff did not show that there was a violation of *any* duty imposed by the federal statute, not because the federal statute did not provide the plaintiff with a cause of action to enforce its terms.[18] And in reaching this conclusion, the *Jenkins* Court emphasized that, "[i]n order for a plaintiff to invoke OCGA § 51-1-6, there *must be the alleged breach* of a legal duty with some ascertainable standard of conduct."[19] As for *Parris* and *Best Jewelry*, the Defendants are simply mistaken that, despite the express language of OCGA § 51-1-6 providing otherwise, we nevertheless held in those cases that OCGA § 51-1-6 only authorizes claims when those claims are *also* authorized by the underlying statute imposing the relevant duty. While it is certainly true that some of the language employed in those cases is rather cursory and less than precise, it is likewise manifestly evident that OCGA § 51-1-6 may only be used to provide a cause of action to enforce a legal duty imposed by a different statute that does not otherwise authorize such an action itself. And, of course, plaintiffs have been allowed by

[18] *See Jenkins*, 293 Ga. at 164.

[19] *Id.* (emphasis supplied).

Georgia courts to pursue claims under OCGA § 51-1-6 under those exact circumstances in numerous cases.[20]

But even though OCGA § 51-1-6 can provide a private right of action to enforce a duty imposed by a different statute, in order to successfully assert a claim under OCGA § 51-1-6, the alleged duty arising from the other statute must be *mandatory* and imposed *expressly* by the statute at issue with specificity.[21] Not only that, the legal duty at issue must specifically impose "some ascertainable standard of conduct."[22] And even if such a statutorily-mandated duty exists, a plaintiff cannot

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[20] *See, e.g.*, *Simerly*, 322 Ga. App. at 705-06 (3) (holding that the plaintiffs' claims regarding the defendant's noncompliance with various federal and state statutes relating to environmental protection "[fell] within the ambit of OCGA § 51-1-6"); *Combs v. Atlanta Auto Auction, Inc.*, 287 Ga. App. 9, 12 (2) (650 SE2d 709) (2007) (holding that a plaintiff could pursue a negligence claim under OCGA § 51-1-6 based on the defendant's alleged violation of certain zoning ordinances); *Ford v. Saint Francis Hosp., Inc*., 227 Ga. App. 823, 827 (490 SE2d 415) (1997) (affirming the trial court's denial of a directed verdict in favor of the defendant on a negligence *per se* claim brought under OCGA § 51-1-6 based on a hospital's noncompliance with federal regulations governing infection control).

[21] *See Schaff v. Snapping Shoals Elec. Membership Corp.*, 330 Ga. App. 161, 164 (2) (767 SE2d 807) (2014) (holding that the plaintiff failed describe the alleged statutory duties with enough specificity to support a negligence *per se* claim brought under OCGA § 51-1-6); *Hubbard v. Dep't of Transp.*, 256 Ga. App. 342, 351 (3) (568 SE2d 559) (2002) (affirming partial summary judgment in favor of the defendant as to the plaintiff's negligence claim asserted under OCGA § 51-1-6 because the statutory duties identified by the plaintiff were not mandatory).

[22] *See Jenkins*, 293 Ga. at 164.

recover under OCGA § 51-1-6 unless the duty set forth in the other statute is expressly owed to the plaintiff, who must "fall[ ] within the class of persons it was intended to protect."[23] Thus, the fact that a plaintiff might have some unintended or

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[23] *Norman v. Jones Lang Lasalle Americas, Inc*., 277 Ga. App. 621, 628 (2) (b) (627 SE2d 382) (2006) (punctuation omitted); *see Newman v. Johnson*, 319 Ga. App. 307, 309 (733 SE2d 520) (2012) (rejecting a claim based on OCGA § 51-1-6 when the plaintiff was not in the class of persons for whose benefit the statute from which the alleged duty arose was enacted); *Jenkins v. Wachovia Bank, Nat. Ass'n*, 309 Ga. App. 562, 566 (2) (711 SE2d 80) (2011) (holding that a plaintiff could not sue to enforce a check, which was allegedly paid by a bank "over a forged endorsement" when the bank's alleged wrongful actions were not violations of any legal right of or duty owed to the plaintiff); *R & R Insulation Servs., Inc. v. Royal Indem. Co.*, 307 Ga. App. 419, 424-25 (1) (705 SE2d 223) (2010) (noting that to recover under a theory of negligence *per se* under OCGA § 51-1-6, a plaintiff must show that he or she fell within the persons that the underlying statute was intended to protect); *DaimlerChrysler Motors Co., LLC v. Clemente*, 294 Ga. App. 38, 47 (2) (a) (668 SE2d 737) (2008) (holding that the plaintiff could not assert a claim under OCGA § 51-1-6 (or OCGA § 51-1-8) against a car dealership's franchisor for a violation of the Georgia Motor Vehicle Franchise Practices Act when that Act regulated the relationship between automobile franchisors and their franchisee dealers and did not impose any legal duty upon automobile franchisors owed to the franchisee's *consumers*); *Benefit Support, Inc. v. Hall Cty.*, 281 Ga. App. 825, 832 (637 SE2d 763) (2006) (holding, in the context of rejecting a OCGA § 51-1-6 claim, that the generic statement in OCGA § 33-23-5 (a) that it is "for the protection of the people of this state" does not expand the intent of the statute requiring licensure for counselors to benefit businesses that provide insurance); *Brantley v. Custom Sprinkler Sys., Inc.*, 218 Ga. App. 431, 432 (1) (461 SE2d 592) (1995) (holding that the defendant was entitled to summary judgment as to the plaintiff's OCGA § 51-1-6 claim because plaintiff was not an employee of defendant, and "therefore was not [a] person intended to be benefitted by the . . . regulations upon which he relie[d]" in conjunction with OCGA § 51-1-6).

incidental benefit from the defendant's compliance with a statutorily imposed duty is insufficient to support a claim under OCGA § 51-1-6.[24] Furthermore, even when the plaintiff is the intended beneficiary of such a duty, a successful claim under OCGA § 51-1-6 requires that there has actually been a violation of that duty on the part of the defendant.[25]

In addition to satisfying the foregoing requirements, a plaintiff asserting a claim under OCGA § 51-1-6 must have suffered damages or harm resulting from the defendant's violation of a legal duty owed to the plaintiff.[26] And plaintiffs must also

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[24] *See U.S. Bank, N.A. v. Phillips*, 318 Ga. App. 819, 826 (3) (734 SE2d 799) (2012) (holding that OCGA § 51-1-6 did not apply to the plaintiff homeowner because, "[w]hile homeowners incidentally benefit from [the Home Affordable Modification Program (HAMP)]'s incentives, homeowners are not intended third-party beneficiaries to whom servicers owe a legal duty under HAMP")

[25] *See Rowell v. Phoebe Putney Meml. Hosp., Inc.*, 338 Ga. App. 603, 606-07 (791 SE2d 183) (2016) (affirming grant of summary judgment because, although "[a] hospital has a legal duty to follow its existing bylaws and any alleged breach of that duty can be asserted as a cause of action under OCGA § 51-1-6[,]" there was no evidence that hospital breached that duty); *Simon Prop. Grp., Inc. v. Benson*, 278 Ga. App. 277, 279 n.7, 281-82 (628 SE2d 697) (2006) (reversing the trial court's order, which found that the plaintiff could sue to enforce a statute's provisions under OCGA § 51-1-6, because there was no violation of the underlying statute).

[26] *See Legacy Acad., Inc. v. Doles-Smith Enterprises, Inc.*, 337 Ga. App. 575, 583-84 (2) (789 SE2d 194) (2016) (holding that the "[p]laintiffs failed as a matter of law to establish any economic damages to support their claim for negligence under OCGA § 51-1-6, and thus, the trial court should have granted the [defendants'] motions for directed verdict and j.n.o.v. as to that claim); *Sofet v. Roberts*, 185 Ga.

show that "the harm complained of was the harm the statute was intended to guard against."[27] Finally, as with any negligence claim, OCGA § 51-1-6 requires a causal connection between the defendant's violation of a statutory duty and the injuries sustained by the plaintiff.[28]

In sum, to establish a negligence *per se* claim under OCGA § 51-1-6, a plaintiff must show that (1) the defendant violated a specific statutory duty, (2) the duty is mandatory and expressly imposed, (3) the plaintiff is in the class of persons that the statutory duty was intended to protect, (4) the plaintiff suffered the type of harm that the duty was intended to guard against, and (5) the defendant's breach of that duty caused the plaintiff's injuries. And here, it remains to be seen whether the Counties can present sufficient evidence to satisfy each of these requirements with respect to

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App. 451, 452 (2) (364 SE2d 595) (1987) (affirming the dismissal of a negligence claim brought under OCGA § 51-1-6 when the plaintiff did not allege that the defendant's negligence caused him damage to his person or property); *Hodges v. Tomberlin*, 170 Ga. App. 842, 845 (3) (319 SE2d 11) (1984) (holding that the plaintiffs failed to state a right to recovery under OCGA § 51-1-6 when they suffered no damage as a result of the defendants' conduct).

[27] *Norman*, 277 Ga. App. at 628 (2) (b) (punctuation omitted); *accord Combs*, 287 Ga. App. at 12 (2); *Hubbard*, 256 Ga. App. at 350 (3).

[28] *See Norman*, 277 Ga. App. at 628 (2) (b) (holding, in evaluating a claim brought under OCGA § 51-1-6, that "if the court finds negligence per se, the plaintiffs must then demonstrate a causal connection between the negligence per se and the injury); *Hubbard*, 256 Ga. App. at 350 (3) (same).

the Defendants' alleged violations of the 9-1-1 Act. That said, at this stage in the proceedings, the allegations in the Counties' complaints are at least sufficient to withstand a motion to dismiss. Nevertheless, litigants should be cautioned that the mere fact that a plaintiff is negatively impacted or harmed by a defendant's violation of a statutorily imposed duty is insufficient, in and of itself, to successfully plead and maintain a claim under OCGA § 51-1-6, and this is true regardless of how egregious the defendant's conduct may be or how seemingly unfair it is to the plaintiff.

3. As previously mentioned, I concur with the majority's ultimate conclusion that the Counties' complaints are sufficient to withstand a motion to dismiss, and I agree that the case should be remanded for further proceedings consistent with this Court's opinion. Nevertheless, I concur in judgment only as to Division 3 of the majority's opinion because I do not agree with all that is said in reaching that conclusion. According to the majority, the trial court's finding that the charge the Defendants are required to exact from their customers under the 9-1-1 Act is a fee, rather than a tax, is premature, and the parties, upon remand, should be allowed to present evidence to aid the court in deciding that issue. I respectfully disagree. This Court has already considered the charge exacted under the 9-1-1 Act and expressly held, as a matter of law, that the type of charge authorized by and imposed under the

Act is a tax. And the trial court, which is bound by the decisions of this Court, erred in holding otherwise. But for the reasons set forth *infra*, the trial court's error in this regard is irrelevant to our resolution of this appeal.

In *Fulton County v. T-Mobile, S., LLC*,[29] this Court considered, as a matter of first impression, "whether the 9-1-1 charge *authorized by the Act* is properly classified as a 'tax' *under Georgia law.*"[30] In doing so, we relied on several Supreme Court of Georgia cases addressing whether payments made in other contexts were taxes or fees, decisions of other jurisdictions considering this issue with respect to their similar 9-1-1 statutes, and the provisions and stated purpose of the 9-1-1 Act itself.[31] And ultimately, without ever mentioning the manner in which the 9-1-1 charge had been imposed by Forsyth County in that particular case, we concluded that "the 9-1-1 charge *is a tax*."[32] In reaching this conclusion, we did not reference any facts or evidence unique to the *T-Mobile* case, and we did not include any caveats or

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[29] 305 Ga. App. 466 (699 SE2d 802) (2010).

[30] *Id.* at 469 (2) (emphasis supplied).

[31] *See generally id.* at 469-74 (2).

[32] *Id.* at 473 (2) (emphasis supplied).

limiting language suggesting that, under different factual circumstances in another County, the type of charge that the Act imposed might not be a tax.[33]

Nevertheless the trial court attempted to distinguish *T-Mobile* by suggesting that the sole basis for our holding was that the residents in Fulton County who paid the charge "receive no benefit not received by the general public, because all members of the general public *may access* the 9-1-1 system."[34] But the "public benefit" factor was only one of several factors that we considered in *T-Mobile*. For example, we evaluated whether the charge was voluntary and whether it was imposed to raise revenue for a public or governmental purpose.[35] And in considering whether the charge was for the benefit of the public, we relied on an extra-jurisdictional opinion addressing a similar 9-1-1 statute, which explained that the charge is not for the *use* of the 9-1-1 service like a payment for services rendered, but for *access* to the 9-1-1 system, regardless of whether or not a resident ever places an emergency call.[36] Thus, while there may be some additional benefits to a resident if he or she actually

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[33] *See id.* at 469-74 (2).

[34] (Emphasis supplied).

[35] *See generally T-Mobile*, 305 Ga App. at 469-74 (2).

[36] *Id*. at 472 (2).

places an emergency call, the Counties have never alleged that their 9-1-1 systems are not accessible to the general public. Given the foregoing, the trial court's finding that 9-1-1 charges are fees is foreclosed by binding precedent, and no further evidence is needed to resolve that issue.[37]

But unlike in *T-Mobile*, the issue of whether the 9-1-1 charge authorized by the Act is a tax is not the "dispositive issue in this case."[38] Indeed, in *T-Mobile*, a telephone-service provider sought a tax refund from Forsyth County, and we held that it was authorized to do so under OCGA § 48-5-380, which applies to the overpayment of taxes to counties and municipalities.[39] And as noted by the majority, the

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[37] *See Smith v. Baptiste*, 287 Ga. 23, 25 (1) (694 SE2d 83) (2010) ("The application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence." (punctuation omitted)); *A & A Heating & Air Conditioning Co. v. Burgess*, 148 Ga. App. 859, 860 (1) (253 SE2d 246) (1979) ("Even those who regard 'stare decisis' with something less than enthusiasm recognize that the principle has even greater weight where the precedent relates to interpretation of a statute. Once the court interprets the statute, the interpretation has become an integral part of the statute. This having been done, any subsequent 'reinterpretation' would be no different in effect from a judicial alteration of language that the General Assembly itself placed in the statute." (punctuation and citations omitted)); Ga. Const of 1983, Art. VI, Sec. V, Par. III ("The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.").

[38] *T-Mobile*, 305 Ga App. at 462 (2).

[39] *See id.* at 466; *see also* OCGA § 48-5-380.

Defendants contend that, if the 9-1-1 charge is a tax, the case must be dismissed because a common-law action for the recovery of taxes is impermissible. But here, the Counties are not suing a taxpayer for the recovery of taxes. Instead, they assert a *statutory claim* under OCGA § 51-1-6 for a violation of a legal duty, as well as common-law claims to recover *damages* resulting from alleged negligence, fraud, and breach of fiduciary duty. But while none of these claims directly seek to collect unpaid taxes, "a party cannot survive a motion to dismiss merely by recasting alleged statutory or constitutional violations as torts."[40] Thus, to the extent that any of the Counties' common-law claims do nothing more than seek damages for a violation of

[40] *Best Jewelry Manufacturing, Co.*, 334 Ga. App. at 835 (3) (a); *see Troncalli v. Jones*, 237 Ga. App. 10, 12-13 (1) (514 SE2d 478) (1999) (reversing jury verdict as to a tort claim for civil-stalking because nothing in the statute that defines the crime of stalking creates a private cause of action in tort in favor of the victim); *Rolleston v. Huie*, 198 Ga. App. 49, 50 (2) (400 SE2d 349) (1990) (holding that there is no tort remedy available under OCGA § 16-8-16 for the allegedly unlawful attempt to disseminate information tending to impair appellant's business because that statute does not create a cause of action in tort in favor of the plaintiff).

the 9-1-1 Act, they must be dismissed.[41] The Counties' claim under OCGA § 51-1-6, however, lives to fight another day.

I am authorized to state that Judge Self joins this concurrence in Divisions 1 and 2.

[41] In *Anthony v. Am. Gen. Fin. Servs., Inc.*, 287 Ga. 448 (697 SE2d 166) (2010), the Supreme Court of Georgia held that "a private civil cause of action may not be implied to remedy a violation of OCGA § 45-17-11[,]" which is a criminal statute that regulates the conduct of notaries public. *Id.* at 449 (2) (d). Nevertheless, the Court explained that its holding "d[id] not necessarily mean that the [plaintiffs] [we]re without any remedy, as they may be able to pursue civil liability against [the defendant] under other applicable tort or contract laws of this State." *Id.* The *Anthony* Court expressed "no opinion on the viability of such other potential theories of liability." *Id.* Similarly, here, I express no opinion as to the viability of any potential theories of liability that the Counties might have in addition to their OCGA § 51-1-6 claim.

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Court of Appeal, Sixth District, California.

Harold GRIFFITH, Plaintiff and Appellant,
v.
COUNTY OF SANTA CRUZ,
Defendant and Respondent.

No. H034077.
|
(Santa Cruz County Super. Ct. No. CV162133).
|
Oct. 16, 2009.

Attorneys and Law Firms

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Opinion

PREMO, J.

***1** Petitioner Harold Griffith petitioned the superior court for a writ of mandate directing the County of Santa Cruz (County) to stop collecting a fee intended to fund County's 911 emergency response system (the 911 fee). Petitioner alleged that the 911 fee was invalid because it was a special tax that had not been approved by two-thirds of the electorate as required by the California Constitution. (Cal. Const. arts. XIII A, § 4, XIII C, § 2, subd. (d).) The trial court denied the petition and this appeal followed.

We shall affirm. In *Mancini v. County of Santa Cruz* (Dec. 14, 2005, H028434 [nonpub. opn.]) (*Mancini*), this court decided that County's 911 fee was not a special tax. Petitioner was adequately represented by the litigant in that case. Accordingly, he is estopped from relitigating the same claim in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 2002, County's board of supervisors adopted Santa Cruz County Ordinance No. 4674, establishing the 911 fee, which imposed, with some exemptions, a monthly surcharge of $1.47 upon all persons in the unincorporated areas of County who subscribe to land-line telephone service. [1] (Santa Cruz County Code, ch. 4.28, §§ 4.28.010, 4.28.020.) The surcharge appears on the subscribers' telephone bills. The 911 fee was intended to recover the cost of "acquisition and construction of land, equipment, software, and facilities which are needed to provide an adequate and reliable 911 communication system under a single uniform management structure and to operate that 911 communication system." (*Id.* § 4.28.010(C).)

Petitioner filed the instant mandate petition on December 4, 2008, arguing that the 911 fee was a special tax that had not been approved by two-thirds of the qualified electors as required by our state Constitution. The superior court denied the petition, citing, as one basis for the denial, the doctrine of collateral estoppel. The trial court concluded that the identical issue had been previously litigated and decided, and that petitioner, although not a party to the prior proceeding, was in privity with the plaintiff in that case and was bound by the result.

The prior proceeding to which the trial court referred was the litigation commenced against County on July 26, 2004, by John Mancini, in which Mancini raised the same concern about the 911 fee that petitioner raises here. Mancini, like petitioner, sought a writ of mandate commanding the County to cease collecting the 911 fee. Mancini argued that the fee was either a special tax that had not been approved by the voters or a property-related fee that had not been approved as constitutionally required. The superior court denied Mancini's petition and Mancini appealed. On December 14, 2005, this court affirmed the superior court's decision in an unpublished opinion, holding that the 911 fee was neither a property-related fee nor a special tax. (*Mancini, supra,* H028434 .)

While the *Mancini* case was being litigated, an initiative was placed on the county-wide ballot for the November 2004 election calling for repeal of the 911 fee. The

measure, denominated Measure K, proposed that the 911 fee be repealed and that County be prohibited from imposing "any fee for the improvements to and/or the use or operation of the 911 communication system based upon subscription to telephone services and/or based upon the consumption, subscription and/or use of natural gas, electricty [*sic*], telephone, sewer, or cable television services."

***2** The ballot pamphlet for the 2004 election contained an impartial analysis of Measure K by the County Counsel. That analysis listed the amounts of the 911 fee, explained how the fee was collected, and specified that revenues collected "must be used solely by the 911 system and may not be used for other governmental purposes." The analysis summarized the effect of a "yes" or "no" vote, stating, "A 'YES' vote on Measure K is a vote to repeal the existing emergency response fee, and to prohibit the County from adopting any emergency response fee in the future unless approved by the voters. [¶] A 'NO' vote on Measure K is a vote to continue the existing County emergency response fee in effect."

Measure K was soundly defeated when 71.2 percent of voters voted "no." Only 28.8 percent of the electorate voted to repeal the 911 fee. Given the defeat of Measure K and this court's decision in *Mancini,* County continued to collect the 911 fee.

On April 24, 2008, over two years after *Mancini* was final, our colleagues in the First District Court of Appeal published *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, which held that a fee similar to County's 911 fee *was* a special tax subject to the two-thirds vote requirement. Relying upon *Bay Area Cellular,* petitioner filed the instant action seeking the relief that had been denied Mancini in the prior case. County opposed the petition on three bases. County argued that petitioner was collaterally estopped by *Mancini* from relitigating the issue, that the electorate's 2004 rejection of Measure K was, in effect, a two-thirds approval of the fee, and, in any event, that the fee was not a special tax and that *Bay Area Cellular* was wrongly decided.

The trial court agreed with the County's first two arguments. As to the collateral estoppel issue, the court stated: "Based on the evidence provided by the County (attached to [counsel's] Declaration) concerning the litigation of *John Mancini v. County of Santa Cruz,* and the statements and concessions made by petitioner on the record concerning his relationship with Mr. Mancini with regard to that litigation, the Court finds that all of the elements of collateral estoppel are present in this case and that petitioner was in privity with Mr. Mancini in the prior litigation concerning the issue of whether the County's 911 Fee is a special tax." The court rejected petitioner's argument that the public interest exception to the collateral estoppel doctrine, as set forth in *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251 (*Arcadia*), should apply. Thus, the court found that petitioner was estopped from relitigating the issue of whether the County's 911 fee was a special tax. The court also held that the rejection of Measure K by more than 70 percent of the voters was, in effect, two-thirds voter approval. The court denied the petition for writ of mandate and entered judgment against petitioner. This appeal followed.

II. DISCUSSION

A. Standard of Review

***3** In reviewing the trial court's ruling on a petition for writ of mandate, as in any case, we begin with the presumption that the judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Where the trial court's decision turns upon disputed issues of fact, we determine whether the findings and judgment of the trial court are supported by substantial evidence. (*Abbate v. County of Santa Clara* (2001) 91 Cal.App.4th 1231, 1239.) All inferences and presumptions are indulged to support the judgment and error must be affirmatively shown. (*Atlantic Richfield Co. v. State of California* (1989) 214 Cal.App.3d 533, 538.) Thus, where the record is silent, the evidence is conclusively presumed to support the judgment. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575, citing *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102.) We independently decide questions of law where the facts are undisputed. (*Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700.) Applying these standards, we find no error in the trial court's conclusion that petitioner is barred by the doctrine of res judicata or collateral estoppel from pursuing the instant litigation.

B. The Concepts of Res Judicata and Collateral Estoppel

" ' "Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] 'A predictable doctrine of res judicata benefits both the parties and the courts because it "seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." ' " (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 683.) "A sister doctrine of res judicata is collateral estoppel, under which a prior judgment between the same parties operates as an estoppel as to those issues actually and necessarily decided in the prior action." (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1226.) Whether we consider the matter as one of claim preclusion or one of issue preclusion, the analysis is, for our purposes, functionally the same. The defense must prove: (1) The issue (or the claim) decided in the prior action is identical to that presented in the current action; (2) There was a final judgment on the merits of that issue; and (3) The party against whom the doctrine is asserted was a party to or in privity with a party to the prior action. (*Whittlesey v. Aiello, supra,* at p. 1226; see also, *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299.)

C. Mancini *Actually and Finally Decided the Same Issue*

The first cause of action in the *Mancini* petition alleged that the 911 fee was invalid because County had "approved a special tax in June 2002 by adopting the [911 fee]" without the constitutionally required voter approval. Mancini asked the court to issue a writ of mandate directing the County Tax Collector "to cease collection of this illegal tax...." The instant pleading alleges that the 911 fee "is not distinguishable from the [fee considered by *Bay Area Cellular*], which was declared to be a 'special tax' " and, therefore, that the 911 fee is illegal because it "was not approved by the voters." The petition seeks a writ of mandate "commanding [r]espondent to cease collection of the '911 Emergency Response Fee.' " Thus, the claim in this case-that the 911 fee is invalid because it is a special tax that was not voter-approved-is identical to the claim raised in *Mancini's* first cause of action. And there was a final judgment on the merits of that issue when this court's opinion in *Mancini* was final early in 2006.

D. Petitioner is in Privity with the Litigant in Mancini

***4** The question remains whether petitioner, who was not a party to *Mancini,* was in privity with the petitioner in that case such that he should be bound by the decision. Petitioner maintains that it would violate his right to due process under the Fourteenth Amendment to hold that he is so bound. If there is privity in this case, it is based upon the notion that petitioner's interests were "adequately represented" by the litigant in the prior case, one of the few situations where we may apply the doctrine of res judicata to nonparties without offending constitutional guarantees of due process. (*Taylor v. Sturgell* (2008) --- U.S. ---- [2008 U.S. LEXIS 4885; 171 L.Ed.2d 155].)

The United States Supreme Court has expressed concern about broadening the scope of the res judicata defense in situations involving nonparties. In *Richards v. Jefferson County* (1996) 517 U.S. 793, 797, the Alabama courts had concluded that a lawsuit challenging the constitutionality of a county tax precluded a subsequent taxpayer suit raising similar claims. (*Id.* at pp. 795-796.) In reversing the decision, the United States Supreme Court concluded that the application of res judicata against the second group of taxpayers deprived them of due process. (*Id.* at p. 797.) *Richards* acknowledged that there are exceptions to traditional notions of privity in limited circumstances where a nonparty has had his or her interests adequately represented by someone who is a party but that the Alabama case did not meet the requirements of that exception. (*Id.* at p. 798.) One reason the court gave for its holding was that the parties to the first suit had not provided any notice to the parties in the second suit that their suit was pending. (*Id.* at p. 799.) In addition, the parties in the first suit did not purport to sue on behalf of a class or to assert any claim on behalf of any nonparties and the judgment they received did not purport to bind any other taxpayers. (*Id.* at p. 801.) The court concluded, "Thus, to contend that the plaintiffs in [the first suit] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.' [Citation.] [¶] Because petitioners and the [first suit's] litigants are best described as mere 'strangers' to one another, [citation],

we are unable to conclude that the [first suit's] plaintiffs provided representation sufficient to make up for the fact that petitioners neither participated in, [citation], nor had the opportunity to participate in, the [first] action. Accordingly, due process prevents the former from being bound by the latter's judgment." (*Id.* at p. 802; see also, *Consumer Advocacy Group, Inc. v. ExxonMobil Corp., supra,* 168 Cal.App.4th at pp. 690-692.)

The instant case is very different from *Richards.* Mancini filed his case as a representative of all similarly situated taxpayers. His pleading stated that he was bringing the action as "a citizen and taxpayer of Santa Cruz County" and resident of the unincorporated areas of the County and that he was "acting on behalf of himself and others," including "property owners in the unincorporated area of Santa Cruz County who pay the 911 fee on the service for their telephone bills." That petitioner had notice of the *Mancini* litigation, had the opportunity to participate in it, and was closely involved with its prosecution may be inferred from the fact that petitioner signed several proofs of service of papers filed in *Mancini* both before and after the trial court's ruling and the final opinion of this court. Petitioner's close connection to *Mancini* was also proved to the trial court's satisfaction by petitioner's in-court concessions. Since petitioner has proceeded without a reporter's transcript, we do not have those concessions before us. Accordingly, we presume all matters missing from the record would support the validity of the trial court's finding that petitioner was adequately represented by the petitioner in *Mancini.* (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 564.)

E. Petitioner's Arguments are Unavailing

***5** Petitioner maintains that *Bay Area Cellular* is reason to reopen litigation of the issue decided in *Mancini.* But the decision of another appellate court is not binding upon this court. (Cf. *Santa Monica Hospital Medical Center v. Superior Court* (1988) 203 Cal.App.3d 1026, 1033.) And more to the point, *Mancini* was final years before *Bay Area Cellular* was decided. A final decision on the merits is just that, a *final* decision. Intervening case law typically does not allow civil litigants to reopen litigation that was final years ago. If it did, there would be no end to it. "The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 637.)

The Restatement Second of Judgments explains why we must allow a final judgment its finality: "Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. It rewards the disputatious. It renders uncertain the working premises upon which the transactions of the day are to be conducted. The law of res judicata reduces these burdens even if it does not eliminate them, and is thus the quintessence of the law itself.... [¶] The convention concerning finality of judgments has to be accepted if the idea of law is to be accepted, certainly if there is to be practical meaning to the idea that legal disputes can be resolved by judicial process." (Rest.2d Judgments, ch. 1, Scope, p. 11; see also, *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796-797 [res judicata applies even where law is changed by a later case, contrary rule would wipe out the doctrine].)

Petitioner urges that, notwithstanding the prior judgment, public interest warrants reconsideration of the issue. It is true that where the issue is purely a question of law, a prior determination is not conclusive if injustice would result or if the public interest requires relitigation of the issue. (*Arcadia, supra,* 2 Cal.4th at p. 257.) In *Arcadia,* the Supreme Court held that it would be detrimental to the public interest to apply the re judicata doctrine where there was "continuing and demonstrable uncertainty" about the validity of Education Code section 39807.5, which allowed school districts to charge students for school transportation. (*Arcadia, supra,* at p. 257.) A prior appellate opinion had held that the section was unconstitutional but the Supreme Court, in denying review, had ordered the opinion not to be published. (*Id.* at pp. 255-256, citing *Salazar v. Honig* (May 10, 1988) Cal.App. B026629 [review den. Sept. 1, 1988, and opn. ordered nonpub .) As a result, school districts did not know if they could constitutionally charge for school transportation and had responded to the uncertainty in different ways. (*Arcadia, supra,* at pp. 257-258.) Even though the defendant had been a party in both cases and would have otherwise been bound by the prior decision,

the Supreme Court held that it was in the public interest to reconsider the issue. (*Id.* at p. 258.)

***6** In the present case, the public interest exception does not require us to reconsider the merits of the issue litigated in *Mancini.* Our refusal to reconsider the issue does not create the potential for confusion that the Supreme Court identified in *Arcadia. Bay Area Cellular* is the only published authority on the general question whether a telephone surcharge imposed to fund 911 services is properly characterized as a service fee or as a special tax. Although *Mancini* conflicts with *Bay Area Cellular, Mancini* applies only to the existing 911 fee and, as an unpublished decision, has no precedential effect beyond the facts of its case. Furthermore, the taxpayers are not injured by our refusal to reconsider *Mancini* because, in voting down Measure K, more than two-thirds of the electorate voted to allow County to continue to collect the 911 fee. That does not mean that the results of the Measure K election are equivalent to voter approval of a proposed special tax. But in the unique circumstances of this case, the fact that more than two-thirds of the voters chose not to repeal the 911 fee weighs in favor of our finding petitioner precluded from relitigating the validity of the fee.

III. DISPOSITION

The judgment is affirmed.

WE CONCUR: RUSHING, P.J., and ELIA, J.

All Citations

Not Reported in Cal.Rptr.3d, 2009 WL 3327397

Footnotes

1 There are some exceptions for lifeline customers and coin-operated telephones. In addition, the 911 fee does not apply to cell phone users. (Santa Cruz County Code, ch. 4.28, §§ 4.28.020, 4.28.050.)

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Only the Westlaw citation is currently available.
United States District Court,
N.D. Alabama,
Northeastern Division.

MADISON COUNTY COMMUNICATIONS DISTRICT, Plaintiff,
v.
BELLSOUTH TELECOMMUNICATIONS, INC., Defendant.

Civil Action No. CV–06–S–1786–NE.
|
March 31, 2009.

Attorneys and Law Firms

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MEMORANDUM OPINION

C. LYNWOOD SMITH, JR., District Judge.

***1** This action, originally filed in the Circuit Court of Madison County, Alabama, but subsequently removed to this court on the basis of the parties' diversity of citizenship and the amount in controversy, *see* 28 U.S.C. §§ 1332(a), 1441(a), concerns whether the defendant, BellSouth Telecommunications, Inc. ("BellSouth"), has properly assessed its Madison County, Alabama, service users the emergency telephone service charge mandated by the Alabama Emergency Telephone Services Act, Alabama Code § 11–98–1 *et seq.* (1975) ("the Act").

Plaintiff, the Madison County Communications District, seeks a declaratory judgment that the Act requires, and has required, BellSouth to collect and remit to it one emergency telephone service charge for each voice telephone line or pathway capable of local exchange service, subject to the statutory limitation of 100 charges per person per location. MCCD also alleges claims of breach of fiduciary duty, misrepresentation, suppression, negligence, wantonness, and breach of contract, and it seeks injunctive relief and an accounting of BellSouth's records. [1] This action is before the court on cross motions for summary judgment. [2]

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides, in part, that summary judgment not only is proper, but "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Likewise, "summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party' [if the case proceeded to trial]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal citations omitted).

In either situation, the relevant question is whether the admissible evidence on file "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

> In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment.
>
> The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate

the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

***2** *Chapman v. AI Transport,* 229 F.3d 1012, 1023 (11th Cir.2000) (*en banc*) (quoting *Haves v. City of Miami,* 52 F.3d 918, 921 (11th Cir.1995)). *See also Anderson,* 477 U.S. at 251–52 (asking "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

Because cross motions for summary judgment are presented, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2720, at 335–36 (1998) (footnote omitted). *See also, e.g., Arnold v. United States Postal Service,* 649 F.Supp. 676, 678 (D.D.C.1986). Further, the court is required to "relate all material facts in genuine dispute in the light most favorable to the party resisting summary judgment." *Serrano–Cruz v. DFI Puerto Rico, Inc.,* 109 F.3d 23, 24 (1st Cir.1997) (citing *Sanchez v. Alvarado,* 101 F.3d 223, 225 n. 1 (1st Cir.1996)).

II. SUMMARY OF FACTS

The Madison County Communications District ("MCCD") is a 911 emergency communications district, created by the Madison County Board of Commissioners pursuant to the Alabama Emergency Telephone Services Act, Alabama Code § 11–98–1 *et seq.* (1975) ("the Act"),[3] enacted by the Alabama Legislature in 1984 in order "to shorten the time required for a citizen to request and receive emergency aid." Ala.Code § 11–98–5(3) (1975) (2002 Supp.). The Act provides that the governing body of a municipality or county may create a communications district to provide enhanced 911 ("E911") service, which is defined in the Act as "a telephone exchange communications service whereby a public safety answering point (PSAP) designated by the customer may receive telephone calls dialed to the telephone number 911." Ala.Code § 11–98–1(3). Consequently, MCCD exists to receive E911 calls from residents of Madison County, Alabama, and to direct those calls to the proper emergency response agency.[4]

The Act provides that communications districts, such as MCCD, are political and legal subdivisions of the State of Alabama, fully funded by an emergency telephone service charge ("E911 charge") assessed to telephone service users.[5] *See* Ala.Code § 11–98–2. Telephone "service suppliers"[6] have a duty under the Act to collect the E911 charge from service users, and then to remit it to the appropriate communications district on a monthly basis. *See* Ala.Code § 11–98–5(c) and (e). The Act requires that the E911 charge "shall be added to and may be stated separately in the billing by the service supplier to the service user." Ala.Code § 11–98–5(c).

Defendant BellSouth provides exchange telephone service[7] in Madison County, Alabama, and this action involves whether it collects and remits the E911 charge for its channelized services—Primary Rate Integrated Services Digital Network ("ISDN"), ISDN Business Service, Channelized Trucks, Centrex ISDN, Centrex IP, and MegaLink Channel Service—in accordance with the Act.[8] The so-called "channelized services" were developed with technological advances that allow multiple voice and/or data channels (transmission pathways) to be placed on a single physical exchange line,[9] such as fiber optic cables or cooper wires.[10] The exchange lines typically support "B-channels" and "D-channels." B-channels can either provide local exchange voice service or be used as a digital bit stream for data.[11] Dchannels can only be used as digital bit streams for data.[12] BellSouth began offering various channelized services to its Madison County service users in the mid1990s, after enactment of the Act.

***3** BellSouth has offered its service users Primary Rate ISDN service since November 4, 1996.[13] This channelized service is very useful and cost-effective for entities that need multiple voice pathways to a local exchange, because it provides the service user with the capability of activating up to 23 B-channels and one D-channel on each physical exchange line. Thus, Primary Rate ISDN service provides the capability of 23 simultaneous conversations for each physical exchange line.[14]

BellSouth's "General Exchange Price List" provides that "the required components for BellSouth Primary Rate ISDN are as follows: BellSouth Primary Rate ISDN

Access Line where applicable; Interoffice Channels where applicable; BellSouth Primary Rate ISDN Interface; BellSouth Primary Rate ISDN B–Channels; BellSouth Primary Rate ISDN D-channels; Telephone Numbers; [and] Call Types." [15] One Primary Rate ISDN Interface is required for each Primary Rate ISDN access line because the interface "provides muliplexing to support up to 23 B–Channels ... and one D–Channel." [16]

Each of the B-channels that a service user activates for outward voice transmission may be used to reach the appropriate communications district. [17] A BellSouth service user may also activate one or more telephone numbers for each of its B-channels that are activated for voice transmission. [18] BellSouth assesses service users a fee on each Primary Rate ISDN Access Line, Primary Rate ISDN Interface, B–Channel, and "telephone number requested inward and 2–way." [19]

Each of BellSouth's channelized services at issue utilizes ISDN (Integrated Services Digital Network) technology to support multiple voice paths over one physical exchange line. BellSouth's Channelized Trunks and MegaLink Channel Service provide the service user the capability of activating up to 24 voice channels on each physical exchange line. [20] BellSouth's Centrex ISDN service "supports simultaneous transmission of voice, data, and packet service on the same exchange access lines." [21] BellSouth's ISDN–Business Service provides one or two B-channels and one D-channel on each physical exchange line. [22]

Since 1997 BellSouth has assessed service users of the Primary Rate ISDN service five E911 charges per Primary Rate ISDN interface. [23] BellSouth adopted this policy by reference of the decision of the Federal Communication Commissions ("FCC") that five service user *line charges* should be assessed on a Primary Rate ISDN service user, no matter how many channels the service user used, or how many telephone numbers the service user requisitioned on each physical exchange line. [24] For purposes of the Act's provision that "[n]o service charge shall be imposed upon more than 100 exchange access facilities per person, per location," BellSouth bills a maximum of 20 Primary Rate ISDN interfaces per service user, per location. [25]

Primary Rate ISDN is the only service in Alabama for which BellSouth applies the five E911 charges per interface methodology. [26] On its Channelized Trunks and Centrex ISDN services, BellSouth applies the E911 charge for each network access register ("NAR"). [27] One of BellSouth's Federal Rule of Civil Procedure 30(b)(6) representatives, Bruce Benizer, testified that "a NAR is the equivalent of a telephone line, but we really don't need wires. It's just a software configuration that allows [a service user] an individual talk path." [28]

***4** In a sixteen-count amended complaint, MCCD alleges that a justiciable controversy exists between MCCD and BellSouth concerning the legal requirements under the Act for collection and remittance of the E911 charge. [29] MCCD seeks a judgment declaring that the Act requires BellSouth to collect and remit to MCCD one emergency telephone service charge for each voice telephone line or pathway capable of local exchange service, subject to the statutory limitation of 100 charges per person per location. [30] Alternatively, MCCD seeks a judgment declaring that the Act requires BellSouth to collect and remit to MCCD the emergency telephone service charge for each 10–digit access number assigned to the service user. [31]

MCCD also alleges claims of breach of fiduciary duty, misrepresentation, suppression, negligence, wantonness, and breach of contract arising from BellSouth's alleged failure to collect and remit to MCCD the E911 charge in accordance with the Act. [32] MCCD asserts that BellSouth had a statutory and common law duty to collect and remit to MCCD the emergency telephone service charges to support MCCD. [33] MCCD also seeks an accounting of BellSouth's records regarding the E911 charge. [34] Finally, MCCD requests that the court permanently enjoin BellSouth from failing to collect and remit to MCCD one emergency telephone service charge for each voice telephone line or pathway capable of local exchange service, subject to the statutory limitation of 100 charges per person per location. [35]

BellSouth has moved for summary judgment as to all of MCCD's claims. [36] In response, MCCD concedes that its claim for breach of contract, and claims of

misrepresentation and suppression as to its Primary Rate ISDN service are due to be dismissed.[37] Judgment will be entered in favor of BellSouth on those aspects of MCCD's case without further discussion. As outlined below, however, the court concludes that the remainder of BellSouth's motion for summary judgment should be denied.

MCCD has moved for summary judgment as to its claims for declaratory judgment, negligence, breach of fiduciary duty, and injunctive relief[38] As discussed below, the court concludes that MCCD's motion should be granted in part and denied in part.

III. DISCUSSION

A. BellSouth's Motion for Summary Judgment

1. MCCD's Claim for a Declaratory Judgment

BellSouth argues that the Act should not be interpreted to require it to collect one E911 charge on each voice pathway capable of local exchange service. Rather, BellSouth contends that the Act requires providers of exchange telephone service to assess the E911 charge on each *physical exchange access line,* whereas providers of telephone service *via* Voice over Internet Protocol ("VoIP") or similar technology are to assess the E911 charge on each *10–digit access number* assigned to a service user.

Section 11–98–5 of the Act sets out the E911 charge and provides, in pertinent part:

> ***5** (a)(1) The board of commissioners of the district may, when so authorized by a vote of a majority of the persons voting within the district, in accordance with law, levy an emergency telephone service charge in an amount not to exceed five percent of the maximum tariff rate charged by any service supplier in the district,.... Any service charge shall have uniform application and shall be imposed throughout the entire district, to the greatest extent possible, in conformity with availability of such service in any area of the district....
>
> ...
>
> (b) If the proceeds generated by an emergency telephone service charge exceed the amount of moneys necessary to fund the district, the board of commissioners shall, by ordinance or resolution, as provided in this chapter, reduce the service charge rate to an amount adequate to fund the district. In lieu of reducing the service charge rate, the board of commissioners may suspend the service charge, if the revenues generated therefrom exceed the district's needs. The board of commissioners may, by resolution or ordinance, reestablish the original emergency telephone service charge rate, or lift the suspension thereof, if the amount of moneys generated is not adequate to fund the district.
>
> (c) An emergency telephone service charge shall be imposed only upon the amount received from the tariff rate for exchange access lines.... No service charge shall be imposed upon more than 100 exchange access facilities per person, per location. Every billed service user shall be liable for any service charge imposed under this subsection until it has been paid to the service supplier. The duty of the service supplier to collect the service charge shall commence upon the date of its implementation, which shall be specified in the resolution calling the election. That emergency telephone service charge shall be added to and may be stated separately in the billing by the service supplier to the service user....

Ala.Code § 11–98–5 (1975) (2002 Supp.).

The Alabama Legislature amended the Act in 2005 to add § 11–98–5.1, the pertinent part of which provides that:

> The emergency communication district fee authorized and levied in each district pursuant to Section 11–98–5 shall apply to all wired telephone service utilized within the district, including such service provided through Voice–Over–Internet Protocol (VoIP) or other similar technology. It shall be the duty of each provider of VoIP or similar service to collect the fee for each 10–digit access number assigned to the user and to remit such fee as provided in Section 11–98–5.

Ala.Code 1975 § 11–98–5.1(c).

VoIP technology enables voice telephone calls over the Internet using hardware that a service user purchased for Internet service. [39] Before the 2005 amendment to the Act, VoIP service users did not have to pay an E911 charge, even if they were able to call 911. Consequently, BellSouth asserts that VoIP users were able to "free ride" off the 911 system. *See* doc. no. 23, at 15. This problem was exacerbated by an FCC order in 2005 that required VoIP providers to connect their service users to a 911 center, provided that the service user had a 10–digit telephone number. The Alabama legislature subsequently amended the Act to add § 11–98–5.1, and thereby required providers of VoIP to collect the E911 charge for each 10–digit access number assigned to a service user and to remit the charge to the appropriate communications district. [40]

***6** BellSouth argues that the first and third sentences of § 11–98–5(c) plainly limit the E911 charge to *physical* exchange access lines and, therefore, the Act should not be interpreted to require an E911 charge on each channel (voice pathway) that flows on a physical exchange access line. *See* § 11–98–5(c) ("An emergency telephone service charge shall be imposed *only* upon the amount received from the tariff rate for *exchange access lines* .... No service charge shall be imposed upon more than 100 *exchange access facilities* per person, per location." (emphasis added)). The Act does not define the term "exchange access lines," and the term "channel" is not found anywhere in the Act, but BellSouth argues that other defined terms in the Act and BellSouth's tariffs demonstrate that an *exchange access line* is something quite different from a *channel. See* § 11–98–1(4) (defining the term "exchange access facilities" as "[a]ll lines, provided by the service suppliers for local exchange service, as defined in existing general subscriber services tariffs."); § 11–98–1(10) (defining the term "uniform application" as "[t]he rate to be charged or applied by the communication district to the exchange access rate charged to business and residential access lines."); and doc. no. 25, Exhibit K (Primary Rate ISDN tariff) (defining "BellSouth Primary Rate ISDN Access Line" as "a four-wire access loop"). BellSouth particularly argues that a *channel* is not encompassed in the term "exchange access line" because a *channel* is not a *physical line.* BellSouth also argues that if the Alabama Legislature had wanted to assess a surcharge on each channel, it could have.

This court follows the principles of statutory construction set out by the Alabama Supreme Court. As that Court has explained:

> When interpreting a statute, this Court must read the statute as a whole because statutory language depends on context; we will presume that the Legislature knew the meaning of the words it used when it enacted the statute. *Ex parte Jackson,* 614 So.2d 405, 406–07 (Ala.1993). Additionally, *when a term is not defined in a statute, the commonly accepted definition of the term should be applied. Republic Steel Corp. v. Horn,* 268 Ala. 279, 281, 105 So.2d 446, 447 (1958).

Bean Dredging, L.L.C. v. Alabama Dept. of Revenue, 855 So.2d 513, 517 (Ala.2003) (emphasis added). The Alabama Supreme Court has also held that, when terms are not defined in a statute, " 'we first consider the intent and purpose of the Legislature in the enactment ... and then, if necessary resort to the definition as found in the dictionaries, which usually give us the common understand [*sic*] and to which our courts usually resort.' " *State v. Advertiser Co.,* 257 Ala. 423, 428, 59 So.2d 576, 579 (1952) (adopting and quoting the opinion of the trial court). Accordingly, this court must determine the commonly accepted definition of the term "exchange access *line* " as part of the determination of how the E911 charge should be assessed.

***7** This court's careful review of the state statutes, as well as the parties' briefs, record evidence, and oral argument, demonstrates that the commonly accepted definition of term "exchange access line" does not only refer to *physical lines* between service users and the local exchange network, but rather refers to all *voice pathways* capable of *accessing local exchange service.* The report from MCCD's expert, Philip H. Enslow, Jr., Ph.D., states:

> "Line" is a term widely used in the art. "Line" has many meanings as exemplified by [BellSouth's] list of definitions; however, the Act[ ] ha[s] imparted a very specific meaning to "line"—*A line provides access to "local exchange service.*" The function or role of a line is quite specific; however, it is general with regard to the technology or actual means utilized to provide

> that connection to the local exchange .... sometimes the *exchange access line* might be provided by a multi-pair cable or by a derived channel in a time division or frequency division multiplexed system. Although, "circuit" has a very specific definition in the field of electricity, we also see the terms "circuit" and "communication path"; used to describe the access line.

MCCD's Exhibit S, at 12 (emphasis original).[41]

The "Telephone Rules of the Alabama Public Service Commission" define "access lines" as: "*A circuit* directly connecting a central office line with the customer's termination point, including all dial tone lines, basic telephone connections, key system trunks, private branch exchange trunks, pay stations and special circuits. *Each customer on a multi -party line is an access line.* " Doc. no. 25, Exhibit CC, at 2 (emphasis added). The Alabama Public Service Commission further defines the term "Circuit" as "A *channel* used for transmission of energy in the furnishing of telephone and other communications service" and the term "channel" as a "*path for communication* between two or more stations or telephone central offices...." *Id.* at 3 (emphasis added).

The *Communications Standard Dictionary* defines "access line" as the "part of a circuit between a user and a switching center." Martin H. Weik, *Communications Standard Dictionary* 8 (1983). Additionally, the book *Engineering and Operating in the Bell System,* prepared by members of the technical staff at AT & T Bell Laboratories, states that a "network access line" is "*the connection* to a local switching system for local calling and for access to the network." The Technical Staff and the Technical Publication Department of AT & T Bell Laboratories, *Engineering and Operating in the Bell System* 39 (R.F. Rey, technical ed., 2d ed.1983) (emphasis added). The book further states: "Ordinary channels (circuits) that connect customers' station equipment to a switching station are called *lines or loops.*" *Id.,* at 86 (emphasis original).

Moreover, many state statutes concerning an E911 charge also define "access line" as encompassing any voice pathway capable of accessing a local exchange network or emergency communications district.[42]

***8** The Alabama Supreme Court has stressed the importance of not viewing the words of the statute in isolation, but considering them in context: " '[O]ur rules of statutory construction direct us to look at the statute as a whole to determine the meaning of certain language that is, when viewed in isolation, susceptible to multiple reasonable interpretations.' " *Ex parte Alfa Financial Corp.,* 762 So.2d 850, 853 (Ala.1999) (quoting *McRae v. Security Pacific Housing Services, Inc.,* 628 So.2d 429 (Ala.1993)). In this action, the Alabama Legislature's express statement that the "[E911] service charge shall have uniform application" evidences its intent that the E911 charge be uniformly imposed upon all voice pathways that provide access to the local exchange network and, thus, the communications district. Stated in another way, collection of only five E911 charges on each Primary Rate ISDN interface capable of supporting up to 23 simultaneous E911 calls, regardless of the number of B-channels a service user activates for outward voice transmission, is not uniform.

The Legislature's amendment to the Act in 2005 to impose the E911 charge on each ten-digit access number assigned to a user of VoIP or similar technology also evidences its intent for the E911 charge to be assessed on each voice pathway to the local exchange network.[43]

For all the foregoing reasons, BellSouth is not entitled to summary judgment as to MCCD's claim for a declaratory judgment that the Act requires BellSouth to collect and remit to MCCD one E911 charge for each voice telephone line or pathway capable of local exchange service, subject to the statutory limitation of 100 charges per person per location.

2. MCCD's private right of action

BellSouth next argues that the Act does not give MCCD a private right of action. This argument is without merit because the Act expressly states that communications districts, such as MCCD, "shall be political and legal subdivisions of the state, with *power to sue* and be sued in their corporate names." Ala.Code § 11–98–2 (emphasis added). The Act further anticipates that a communications district can sue telephone service suppliers, such as BellSouth, because it provides service suppliers the following affirmative defense: "Good faith compliance by the service supplier shall constitute a complete defense to any legal action or claim that may result from the service supplier's determination of

nonpayment or the identification of service users, or both." Ala.Code § 11–98–5(d).

3. Statute of Limitations as to MCCD's claims of misrepresentation and suppression

BellSouth next argues that MCCD's claims of misrepresentation and suppression are barred by the two-year statute of limitations for fraud claims. *See* Ala.Code. § 6–2–3.[44] BellSouth argues that MCCD's fraud claims accrued on the date it discovered or should have discovered how BellSouth assessed and collected the E911 charge and that the record establishes that MCCD knew how it assessed the E911 charge no later than August 26, 2002. On that date, the director of MCCD wrote BellSouth to question its E911 charge policy as to its Primary Rate ISDN service.[45] MCCD concedes that its fraud claims as to its Primary Rate ISDN service are time-barred, but it argues that there is a genuine issue of material fact whether it discovered, or should have discovered, BellSouth's E911 billing and collection practices as to its other services—Channelized Trunks, ISDN–Business Service, and Centrex ISDN. The court finds that there is a genuine issue of material fact as to whether MCCD's misrepresentation and suppression claims as to these services are time-barred because the director of MCCD, Ernie Blair, testified that he was not aware of BellSouth's billing practices for these services until the commencement of this action. *See* doc. no. 33, Exhibit MM, ¶¶ 14–15. Whether MCCD should have discovered the alleged fraud with respect to all of BellSouth's channelized services is a question of fact for a jury. Accordingly, BellSouth is not entitled to summary judgment on MCCD's claims of misrepresentation and suppression as to Channelized Trunks, ISDN–Business Service, and Centrex ISDN.

4. Statute of Limitations as to MCCD's claims of negligence, wantonness, and breach of fiduciary duty

***9** BellSouth next argues that MCCD's claims of negligence, wantonness, and breach of fiduciary duty are likewise time-barred. BellSouth argues that the statute of limitations for these claims is two years from the date the injury occurred, and that MCCD was allegedly injured when BellSouth interpreted the Act to develop its contested *policy* for assessing the E911 charge. *See Brooks v. Hill,* 717 So.2d 759, 764 (Ala.1998) ("a claim alleging breach of fiduciary duty is governed by the two-year limitations period of § 6–2–38(l), Ala.Code 1975"); and *Cunningham v. Langston, Frazer, Sweet & Freese, P.A.,* 727 So.2d 800, 805 (Ala.1999) ("an action alleging negligence or wantonness must be brought within two years of the accrual of the cause of action"). BellSouth contends that MCCD's tort claims are time-barred because it interpreted the Act with respect to each of its channelized services at issue in the 1990s, more than two years before MCCD's filing of this action on August 8, 2006.

In response, MCCD argues that its claims of negligence, wantonness, and breach of fiduciary duty do not arise from BellSouth's development of its contested policy for assessment of the E911 charge, but rather from BellSouth's failure to collect and remit to MCCD the E911 charges each month in accordance with the Act. Thus, MCCD contends that each failure to collect the E911 charge and remit it to MCCD is an independently actionable violation of BellSouth's statutorily-created duty.

MCCD further argues—and the court agrees—that its claims fit within Alabama's theory of a "continuing tort." The Alabama Supreme Court has explained that a continuing tort occurs when a defendant engages in "repeated tortious conduct which has repeatedly and continuously injured a plaintiff." *Moon v. Harco Drugs, Inc.,* 435 So.2d 218, 220 (Ala.1983). The Court has cautioned that a continuing tort does not exist where a single act is followed by multiple consequences, but rather requires "repetitive acts or ongoing wrongdoing." *Payton v. Monsanto Co.,* 801 So.2d 829, 835, n. 2 (Ala.2001). Here, MCCD's claims of negligence, wantonness, and breach of fiduciary duty are based BellSouth's alleged *ongoing* failure to properly collect and remit to MCCD the E911 charge pursuant to the Act. In its complaint, MCCD alleges that BellSouth negligently and wantonly "failed to collect and remit ... charges to MCCD and failed to accurately account for the same to MCCD for these services" and breached its fiduciary duty "by failing to collect and remit to MCCD the amounts that BellSouth know were due to MCCD."[46] A new statute of limitations accrues as to MCCD's tort claims each time BellSouth collects the E911 charge.

MCCD also contends that the appropriate statute of limitations for its claims for damages is five years, because Alabama Code § 6–2–35 provides a five-year limitation period for "all actions by the state or any subdivision

thereof for the recovery of amounts claimed for licenses, other than business licenses defined in Section 11–51–90.1, municipal or county franchise taxes, or other taxes." Ala.Code § 6–2–35(2) (1975).

***10** Although MCCD is a subdivision of the state alleging claims of damages, this court finds that the five-year statute of limitations prescribed in § 6–2–35(2) does not apply to its claims, because the E911 charge is not a "tax." This court could not find that the Alabama Legislature has defined the term "tax" in § 6–2–1 *et seq.,* or anywhere else within the Alabama Code. However, in *State v. Commercial Loan Co.,* 251 Ala. 672, 38 So.2d 571, 573 (Ala.1948), the Alabama Supreme Court held that "the word tax, unless expressly defined, is inclusive of both levies for revenue purposes and levies for regulatory purposes." *Commercial Loan,* 251 Ala. At 675, 38 So.2d at 573–74. More recently, the Alabama Supreme Court expressly agreed with the decision of the United States District Court for the Southern District of Alabama that a lack of correlation between a fee related to a service and the cost of that service "militates in favor of a finding that the ... fee is a revenue-raising 'tax under State law.' " *Lightwave Technologies, LLC v. Escambia County,* 804 So.2d 176, 180 (Ala.2001) (quoting *Lightwave Technologies, LLC v. Escambia County,* 43 F.Supp.2d 1311, 1314 (S.D.Ala.1999)). The district court in *Lightwave Technologies,* further explained:

> "A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue to a general fund, and is spent for the benefit of the entire community. A user fee, by contrast, is a payment given in return for a government provided benefit and is tied in some fashion to the payor's use of the service."

Lightwave Technologies, 43 F.Supp.2d at 1314 (quoting *Folio v. City of Clarksburg,* 134 F.3d 1211 (4th Cir.1998)) (internal quotation marks and citations omitted). *See also City of Tullahoma v. Bedford County,* 938 S.W.2d 408, 412 (Tenn.1997) ("A tax is a revenue raising measure levied for the purpose of paying the government's general debts and liabilities."); *Bolt v. City of Lansing,* 459 Mich. 152, 161, 587 N.W.2d 264, 269 (1998) ("Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." (internal quotations omitted)); *Safety Net for Abused Persons v. Segura,* 692 So.2d 1038, 1041 (La.1997) ("[A] tax is a charge that is unrelated to or materially exceeds the special benefits conferred upon those assessed").

Because the E911 charge is based on provision of telephone service, and is used to fund a specific service (911 service), the charge is not a revenue-raising measure and, therefore, not a tax. MCCD's claims of negligence, wantonness, and breach of fiduciary duty are subject to a two-year statute of limitations under Alabama Code § 6–2–38(l). Accordingly, MCCD possesses a valid and timely claim for damages from August 8, 2004 (two years prior to commencement of this action) forward.

5. Whether BellSouth acted reasonably in interpreting the Act

***11** BellSouth also argues that MCCD's negligence and breach of fiduciary duty claims fail because it acted reasonably, or in good faith, in interpreting the Act. As noted above, § 11–98–5 provides the following affirmative defense: "Good faith compliance by the service supplier shall constitute a complete defense to any legal action or claim that may result from the service supplier's determination of nonpayment or the identification of service users, or both." Ala.Code § 11–98–5(d). BellSouth argues that it reasonably modeled its interpretation of the Act on the FCC's approach because the Act was not clearly worded. MCCD responds that BellSouth's application of a federal policy to the Act does not demonstrate reasonable care. MCCD further notes that an account manager for BellSouth, Ray Preston, testified that he did not "understand the correlation between how the FCC determination of five access charges on PRI applies to Alabama law that determines the number of surcharges that are collected on E911." [47]

Whether BellSouth had reasonable grounds for believing that it was collecting the E911 charge and remitting it to MCCD in accordance with the Act is a mixed question of law and fact. *See Dybach v. Florida Department of Corrections,* 942 F.2d 1562, 1566 (11th Cir.1991) (citing 20 C.F.R. § 790.22(c) (stating "[w]hat constitutes good faith on the part of an employer and whether [the employer] had reasonable grounds for believing that [its] act or omission

was not a violation of the Fair Labor Standards Act are mixed questions of fact and law.") (bracketed alterations original); and *U.S. v. Travers,* 233 F.3d 1327, 1331 (11th Cir.2000) ("Whether the officers acted in subjective good faith in obtaining and executing the warrant is a mixed question of fact and law. While the ultimate conclusion of good faith is a legal one, findings of fact serve as the predicate for this conclusion."). The court finds that the question of whether BellSouth had good-faith intentions to collect the E911 charge in accordance with the Act is an issue for resolution by a jury. Accordingly, BellSouth is not entitled to summary judgment as to MCCD's claims of negligence and breach of fiduciary duty.

6. Relief

Finally, BellSouth argues that MCCD cannot recover money damages for uncollected E911 charges because MCCD is adequately funded. This argument is based on § 11–98–5, which reads as follows:

> If the proceeds generated by an emergency telephone service charge exceed the amount of moneys necessary to fund the district, the board of commissioners shall, by ordinance or resolution, as provided in this chapter, reduce the service charge rate to an amount adequate to fund the district. In lieu of reducing the service charge rate, the board of commissioners may suspend the service charge, if the revenues generated therefrom exceed the district's needs. The board of commissioners may, by resolution or ordinance, reestablish the original emergency telephone service charge rate, or lift the suspension thereof, if the amount of moneys generated is not adequate to fund the district.

***12** Ala.Code § 11–98–5(b) (1975) (2002 Supp.).

BellSouth argues its current method of collecting the E911 charge—*e.g.,* five E911 charges on each Primary Rate ISDN interface—has been sufficient to provide "top-of-the-line" 911 service to Madison County residents. *See* doc. no. 23, at 16. BellSouth characterizes MCCD's facility as "state-of-the-art," and notes that it has retained earnings of $4,919,798, including approximately $1,200,000 in certificates of deposit. *See* doc. no. 23, at 16–17. Lastly, BellSouth contends that MCCD has not only funded the 911 operations at its facility, but has also provided equipment and facility space to other agencies, such as the Madison County Fire Department and Huntsville Emergency Medial Sercices, Inc. ("HEMSI").

This court finds that BellSouth's argument that MCCD cannot recover money damages because it is adequately funded is premised on an erroneous reading of the Act. The plain language of § 11–98–5(b) provides that the Madison County Board of Commissioners has two options if the proceeds of the E911 charge exceed the amount of moneys necessary to fund the district: (1) reduce the *rate* of the E911 charge, or (2) suspend the E911 charge. Both of these options are prospective cures that should be applied uniformly to all service users within the district after the district is found to be over-funded. The Act does not release telephone service suppliers from past liability when the communications district is over-funded, or would be over-funded if it received past-due E911 charges. Accordingly, BellSouth is not entitled to summary judgment on the ground that MCCD cannot recover money damages for uncollected E911 charges.

B. MCCD's Motion for a Partial Summary Judgment

MCCD seeks summary judgment as to its claims for declaratory judgment, negligence, breach of fiduciary duty, and injunctive relief.

1. MCCD's claims for declaratory judgment and injunctive relief

Based on this court's interpretation of the Act as discussed above, MCCD is entitled to a declaration that BellSouth has a duty under the Act to collect one E911 charge for each voice pathway capable of local exchange service, subject to the statutory limit of 100 charges per person, per location. *See* § 11–98–5(c) ("No service charge shall be imposed upon more than 100 exchange access facilities per person, per location."). Consequently, MCCD is further entitled to an injunction permanently enjoining BellSouth from failing to collect and remit to MCCD the E911 charge for each voice pathway capable of local exchange service, subject to the statutory limit of 100 charges per person, per location.

2. MCCD's claims of negligence

MCCD also argues that it is entitled to summary judgment on its negligence claims. A negligence claim based upon Alabama law requires a plaintiff to prove four elements: (1) the defendant owed plaintiff a duty; (2) defendant breached that duty; (3) plaintiff suffered a loss or injury; and (4) the defendant's breach was the actual and proximate cause of the plaintiff's loss or injury. *See Ford Motor Co. v. Burdeshaw,* 661 So.2d 236, 238 (Ala.1995). " 'It is settled that for one to maintain a negligence action the defendant must have been subject to a legal duty,' " *Thompson v. Mindis Metals, Inc.,* 692 So.2d 805, 807 (Ala.1997) (quoting *Morton v. Prescott,* 564 So.2d 913, 915 (Ala.1990)), because "where there is no duty, there can be no negligence." *City of Bessemer v. Brantley,* 258 Ala. 675, 681, 65 So.2d 160, 165 (1953).

***13** This court finds that MCCD has proven each of the elements of its negligence claims. First, BellSouth was subject to a statutory duty to collect the E911 charge and remit it to MCCD. Second, it is undisputed that BellSouth has breached that duty by failing to collect an E911 charge for each voice pathway capable of local exchange service. Third, MCCD has suffered financial losses due to BellSouth's failure to collect and remit the E911 charge in accordance with the Act. [48] Fourth, MCCD's financial loss is the proximate result of BellSouth's breach of its statutory duty.

Nevertheless, MCCD is not entitled to summary judgment on its negligence claims because, as discussed in Part III(A)(5) of this opinion *supra,* a genuine issue of material facts exists as whether BellSouth acted in good faith. *See* Ala.Code § 11–98–5(d).

3. MCCD's claims of breach of fiduciary duty

MCCD likewise argues that it is entitled to summary judgment on its breach of fiduciary duty claims. The definition of a "fiduciary" relationship under Alabama law is defined as follows:

> [Such a relationship is one in which] one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other's interests, or when one person has gained the confidence of another and purports to act or advise with the other's interest in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible. It arises in cases in which confidence is reposed and accepted, or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another.

Power Equipment Co., Inc. v. First Alabama Bank, 585 So.2d 1291, 1297–98 (Ala.1991) (quoting *Bank of Red Bay v. King,* 482 So.2d 274 (Ala.1985) (in turn citing C.J.S. *Confidential* (1967))) (bracketed alternation original).

MCCD argues that it has demonstrated that it had reposed its trust and confidence in BellSouth to assess correctly the E911 charge to its service users because, each month, MCCD had to trust that BellSouth correctly collected and remitted the E911 charge in accordance with the Act. BellSouth has submitted monthly statements to MCCD stating that it has billed and collected the E911 charge in accordance with the Act, and monthly checks that reflect the amount billed to BellSouth service users for the E911 charge. *See* doc. no. 25, Exhibit G, at 51.

BellSouth vaguely replied that MCCD is not entitled to summary judgment on its claim of breach of fiduciary duty because BellSouth has no superior knowledge over MCCD with respect to its policy. However, one party's superior knowledge over another is not a required element to finding a fiduciary relationship between the parties, but only one factor in the determination. *See Power Equipment Co., Inc.,* 585 So.2d at 1297–98. This court finds that MCCD has established that BellSouth breached its fiduciary duty to MCCD to collect and remit the E911 charge in accordance with the Act.

***14** Nevertheless, MCCD is not entitled to summary judgment on its claim of breach of fiduciary duty because, as discussed in Part III(A)(5) of this opinion *supra,* a genuine issue of material facts exists as whether BellSouth acted in good faith. *See* Ala.Code § 11–98–5(d).

IV. CONCLUSION

For all of the foregoing reasons, BellSouth's motion for summary judgment is due to be GRANTED on MCCD's claims of breach of contract and misrepresentation and suppression as to BellSouth's Primary Rate ISDN service. BellSouth's motion is due to be DENIED on all other claims.

MCCD's motion for a partial summary judgment is due to be GRANTED as to its claims for declaratory judgment and injunctive relief. MCCD's motion is due to be DENIED as to its negligence and breach of fiduciary duty claims. As to BellSouth's claims of negligence and breach of fiduciary duty, the only remaining issue is whether MCCD is entitled to the good-faith affirmative defense set out in § 11–98–5(d).

An appropriate order and partial judgment consistent with this memorandum opinion will be entered contemporaneously herewith.

All Citations

Not Reported in F.Supp.2d, 2009 WL 9087783

Footnotes

1 *See* doc. nos. 1 (Notice of removal) and 18 (Amended complaint).

2 *See* doc. nos. 23 (BellSouth's motion for summary judgment) and 24 (MCCD's motion for summary judgment).

3 *See* doc. no. 25, Statement of Undisputed Facts, ¶ 1. Section 11–98–2 of the Alabama Code provides:

> The creating authority may by ordinance or resolution, as may be appropriate, create within its respective jurisdiction communications districts composed of the territory lying wholly within the municipality or of any part or all of the territory lying wholly within the county. The districts shall be political and legal subdivisions of the state, with power to sue and be sued in their corporate names and to incur debt and issue bonds. The bonds shall be negotiable instruments and shall be solely the obligations of the district and not the State of Alabama.

Ala.Code § 11–98–2 (1975) (2002 Replacement Volume).

4 *Id.*

5 *See* doc. no. 23, Statement of Undisputed Facts, ¶¶ 3–5. Section 11–98–5(a)(1) provides:

> The board of commissioners of the district may, when so authorized by a vote of a majority of the persons voting within the district, in accordance with law, levy an emergency telephone service charge in an amount not to exceed five percent of the maximum tariff rate charged by any service supplier in the district....”

Ala.Code § 11–98–5(a)(1) (1975)(2002 Supp.).

6 The Act defines “Service supplier” as: “Any person providing exchange telephone service to any service user throughout the county or municipality.” Ala.Code § 11–98–1(7).

7 “Exchange service is a general term describing as a whole the facilities provided for local intercommunication....” *See* doc. no. 25, Exhibit Z (General exchange price list definition of terms). The Alabama Public Service Commission defines the term “exchange” as “the entire telephone plan and facilities used in furnishing local telephone service to customers located in an exchange service area.” *See* doc. no. 25, Exhibit CC (“Telephone Rules of the Alabama Public Service Commission”).

8 *See* doc. no. 23, Statement of Undisputed Facts, ¶¶ 2, 4. MCCD concedes that there appear to be no BellSouth service users in Madison County for Centrex IP, and that such service is only a part of this case with respect to its claims for declaratory and injunctive relief. *See* doc. no. 33, at 24, n. 32. BellSouth's MegaLink Channel Service is also only a part of this case with respect to MCCD's claims for declaratory and injunctive relief. *See* doc. no. 37, at 1 (“MCCD agrees that its claims for compensatory damages do not address MegaLink Channel Service.”).

9 The “Communications Standard Dictionary” defines the term “exchange line” as “a *line* that joins a *user's* (customer's, subscriber's) *end-instrument* in a *closed user group,* or a *switch-board,* to an *exchange.* ” *See* doc. no. 25, at 326. BellSouth's “General Exchange Price List” defines the term “exchange line” as “[a]ny line (circuit) directly or indirectly connecting an exchange station with a central office.” *See* doc. no. 25, Exhibit Z, at original page 8.1.

10 *See* doc. no. 25, Exhibit S, at 14–15.

11 *Id.* and doc. no. 23, Exhibit 9, at 8.
12 *See* doc. no. 25, Exhibit S, at 14–15.
13 *Id.,* Statement of Undisputed Facts, ¶ 9.
14 *Id.,* Statement of Undisputed Facts, ¶ 10.
15 *See* doc. no. 23, Exhibit 9, at 1.
16 *See* doc. no. 23, Exhibit 9, at 8 (definition of "BellSouth Primary Rate ISDN Interface").
17 *See* doc. no. 25, Statement of Undisputed Facts, ¶ 11.
18 *See* doc. no. 32, Exhibit 16 (Affidavit of Dwight Rice), ¶ 7.
19 *See* doc. no. 23, Exhibit 9, at 10–11.
20 *See* doc. no. 25, Statement of Undisputed Facts, ¶¶ 25, 28, 51 and Exhibit O, at 1.
21 *Id.,* Exhibit R, at 1 and Statement of Undisputed Facts, ¶¶ 36–40.
22 *Id.,* Statement of Undisputed Facts, ¶¶ 44–48.
23 *Id.,* Statement of Undisputed Facts, ¶¶ 22–23.
24 *See* doc. no. 23, Statement of Undisputed Facts, ¶¶ 6–7 and Exhibit 4 (Expert report of Dr. Carl Danner, ¶¶ 38–39) (citing FCC, First Report and Order, CC Docket No. 96–262, released May 16, 1997).
25 *See* doc. no. 25, Statement of Undisputed Facts, ¶ 21.
26 *See* doc. no. 25, Statement of Undisputed Facts, ¶ 23.
27 *Id.,* Statement of Undisputed Facts, ¶ 31, 40.
28 *Id.,* Exhibit H (Deposition of Bruce Benizer), at 83.
29 *See* doc. no. 18 (Amended complaint).
30 *Id.,* ¶ 74.
31 *Id.*
32 *See* doc. no. 18 (Amended complaint).
33 *Id.,* ¶ 76.
34 *Id.*
35 *Id,* ¶ 105.
36 *See* doc. no. 23.
37 *See* doc. no. 33, at 24 ("MCCD concedes that it became aware of BellSouth's E911 billing practices as regards Primary Rate ISDN service in 2002, and thus its misrepresentation and suppression claims as to that service are time-barred.") and at 30, n. 38 ("MCCD acknowledges that it does not have substantial evidence to create a disputed question of fact as to its claim for breach of contract, and concedes BellSouth's motion on that ground.").
38 *See* doc. no. 24.
39 *See* doc. no. 25, Statement of Undisputed Facts, ¶ 53.
40 *See* doc. no. 23, at 15 (citing Danner Report, ¶ 30).
41 The report of BellSouth's expert, Carl R. Danner, focuses on the definition of "exchange access line" in *BellSouth's* tariffs, *not* the commonly accepted definition of the term. *See* doc. no. 23, Exhibit 9, ¶¶ 16, 17
42 *See* Colorado Rev. Stat. § 40–17–102 (" 'Telephone access line' means the access to the local exchange network, as defined in tariffs approved by the commission, from the premises of an end user customer of a local exchange company to the telecommunications network to effect the transfer of information."); Idaho Code Ann. § 31–4802(1) (" 'Access line' " means any telephone line, trunk line, network access register, dedicated radio signal, or equivalent that provides switched telecommunications access to a consolidated emergency communications system from either a service address or a place of primary use within this state. In the case of wireless technology, each active dedicated telephone number shall be considered a single access line."); Iowa Code § 34A.2 (" 'Access line' " means an exchange access line that has the ability to access dial tone and reach a public safety answering point."); 807 Ky. Admin. Regs. 5:061(" 'Access line' means wires or channels used to connect network interface at the subscriber premises with the central office."); Mich. Comp. Laws § 484.2102(n) (" 'Line' or 'access line' means the medium over which a telecommunication user connects into the local exchange."); Nev. Admin. Code § 703.2502 (" 'Access line' means any connection between a customer and a carrier that provides the customer with access to telecommunication in Nevada."); N.D. Cent.Code § 57–40.6–01(10) (" 'Telephone access line' means the principal access to the telephone company's switched network, including an outward dialed trunk or access register."); N.M. Stat. § 63–9D–3(c) (" 'access line' means a telecommunications company's line that has the capability to reach local public safety agencies by dialing 911, but does not include a line used for the

provision of interexchange services or commercial mobile radio service"); Tex. Admin. Code § 255.4 ("The terms 'local exchange access line' or 'equivalent local exchange access line' mean the physical voice grade telecommunications connection or the cable or broadband transport facilities, or any combination of these facilities, owned, controlled, or relied upon by a service provider, between an end user customer's premises and a service provider's network that, when the digits 9–1–1 are dialed, provides the end user customer access to a public safety answering point through a permissible interconnection to the dedicated 9–1–1 network."); Utah Code Ann. § 69–2–2(3) (1953) (" 'Local exchange service switched access line' means the transmission facility and local switching equipment used by a wireline common carrier to connect a customer location to a carrier's local exchange switching network for providing two-way interactive voice, or voice capable, services."); Va.Code Ann. § 58.1–1730 (" 'Access lines' are defined to include residence and business telephone lines and other switched (packet or circuit) lines connecting the customer premises to the public switched telephone network for the transmission of outgoing voice-grade-capable telecommunications services. Centrex, PBX or other multistation telecommunications services will incur an E–911 tax charge on every line or trunk (Network Access Registrar or PBX trunk) that allows simultaneous unrestricted outward dialing to the public switched telephone network. ISDN Primary Rate Interface services will be charged five E–911 tax charges for every ISDN Primary Rate Interface network facility established by the customer. Other channelized services in which each voice-grade channel is controlled by the telecommunications provider shall be charged one tax for each line that allows simultaneous unrestricted outward dialing to the public switched telephone network.").

43 The court agrees with BellSouth that § 11–98–5.1 only imposes the E911 charge on each *10–digit telephone number* provided to a user of VoIP or similar technology, and that channelized service is not a similar technology to VoIP. In contrast to the channelized services at issue, which are circuit-switched technologies, VoIP is a packet-switched technology.

44 Section 6–2–3 of the Alabama Code provides:

> In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action.

Ala.Code. § 6–2–3 (1975).

45 *See* doc. no. 23, Exhibit 7 (Letter from Ernie Blair, the director of MCCD, to BellSouth stating: "It is my understanding that BellSouth collects only five (5) fees for 9–1–1 service on PRI (Primary Rate ISDN) lines each month.").

46 Doc. no. 18 (amended complaint), ¶¶ 93, 97, 80.

47 Doc. no. 25, Exhibit LL, at 26.

48 *See* doc. no. 25, Exhibit HH, (Expert report of Gary Lavender), at 4.

2016 WL 2638829 (Pa.Com.Pl.Civil Div.) (Trial Order)
Court of Common Pleas of Pennsylvania, Civil Division.
Allegheny County

PHONE RECOVERY SERVICES, LLC, for itself and on behalf of Allegheny County, Plaintiff and Relator,
v.
VERIZON PENNSYLVANIA, INC., et al., Defendants.

No. GD-14-021671.
April 21, 2016.

Memorandum and Order of Court

Timothy J. Carson, Esquire, Dilworth Paxson LLP, Suite 3500E, 1500 Market Street, Philadelphia, PA 19102-2101.

R. Stanton Wettick, Jr., Judge.

***1** WETTICK, J.

Defendants' Joint Preliminary Objections to Phone Recovery Services, LLC's Amended Complaint are the subject of this Memorandum and Order of Court.

Defendants are telephone communications companies. Pennsylvania enacted legislation governing 911 services throughout the state, which requires phone companies operating in Pennsylvania to collect a set monthly amount from their subscribers to help pay for the costs of County 911 services. [1] See the 911 Emergency Communication Services Act, 35 Pa.C.S.A. § 5301 *et seq.* This money, which the phone companies collect from their subscribers, is to be given to Allegheny County.

This lawsuit arises out of plaintiff's allegations that defendants are not charging, collecting, reporting, and remitting proper 911 amounts to Allegheny County.

It is not claimed that the defendants are withholding from Allegheny County money received from their subscribers. Instead, it is claimed that defendants are not charging their subscribers the amount that the subscribers should be paying, and defendants are paying to Allegheny County only the lesser amounts billed to their subscribers. Thus, Allegheny County is not receiving the full amount that it would receive if the phone companies were charging their subscribers the amount that should be collected under the 911 Act.

Defendants have filed eight preliminary objections to Plaintiff's Amended Complaint.

PRELIMINARY OBJECTION I—PLAINTIFF'S FCA CLAIM MUST BE DISMISSED UNDER THE FCA's PUBLIC DISCLOSURE BAR

Plaintiff brings this lawsuit as a *qui tam* relator, acting on behalf of Allegheny County, pursuant to the Allegheny County False Claims Act ("FCA"), Allegheny County Code § 485-1 *et seq.*, see Allegheny County, Ordinance No. 06-11-OR, Bill No. 6325-11 (May 18, 2011). Under the FCA, any person may submit a proposed civil complaint alleging violations of the FCA to the County Solicitor, and may thereafter file a complaint in a court of competent jurisdiction if the County Solicitor declines to pursue the action. [2] However, the FCA does not permit an "opportunistic plaintiff" to simply collect

allegations that have already been publicly disclosed and package them into a lawsuit for pecuniary gain. See § 485-3(C)(2)(a), which provides that the court shall dismiss the action if the allegations and transactions alleged in the lawsuit are substantially the same as allegations or transactions that were publicly disclosed "in a legislative or administrative report, hearing, audit, or investigation; or by the news media, unless … the person bringing the action is an original source of the information."

In this case, defendants contend that plaintiff's allegations that phone companies are under-collecting 911 surcharges from their customers is substantially the same as those revealed in a 2012 Legislative Report ("Report") prepared by a committee of the Pennsylvania General Assembly, a legislative hearing that was based on that Report, and several news media articles.

***2** Although the 2012 Report and hearing discussed the possibility that phone companies were not collecting the proper amounts required by the 911 Act, neither the Report nor the hearing named specific companies or the particular scheme by which the companies were under-collecting. Additionally, news media from Allegheny County cited by defendants referred to 911 funding issues arising out of problems posed by new technology, and does not identify a particular scheme by which the phone companies under-collected the 911 fees. The other news media defendants rely on reported under-collection by phone companies in other states.

In its Amended Complaint, plaintiff proceeds (i) to name the phone companies that are allegedly under-collecting in Allegheny County, (ii) to describe the scheme, and (iii) to furnish estimated amounts of the under-collecting. Thus, Preliminary Objection I is overruled.

PRELIMINARY OBJECTION II—PLAINTIFF HAS FAILED TO PLEAD ITS FCA CLAIM WITH PARTICULARITY

This preliminary objection is overruled. The Amended Complaint complies with the pleading requirements of Pa.R.C.P. No. 1019.

PRELIMINARY OBJECTION III—THE AMENDED COMPLAINT DOES NOT PLEAD THE REQUIRED ELEMENTS OF A FCA CLAIM

RELEVANT CONDUCT

STEP1

The phone company bills its customers for the 911 surcharge at less than the amount that should have been billed.

STEP 2

The customer pays the phone company only the amount which it is billed.

STEP 3

The full amount that the customers pay the phone company as a 911 surcharge is turned over to Allegheny County.

RELEVANT LAW

Plaintiff may proceed to pursue its under-collection claim if the conduct described in Steps 1-3 violates any provisions of Allegheny County Code § 485-2 Prohibited Conduct, which reads as follows:
A. Any person who commits any of the following prohibited acts shall be liable to the County for three times the amount of damages which the County sustains because of such action, and shall be liable for attorneys' fees and costs for any civil action brought to recover such damages:

(1) Knowingly presents or causes to be presented a false claim for payment or approval;

(2) Knowingly makes, uses or causes to be made or used a false record or statement material to a false or fraudulent claim;

(3) Conspires to commit a violation of Subsection A(1), (2), (4), (5), (6) or (7);

(4) Has possession, custody or control of property or money used or to be used by the County and, intending to defraud the County or willfully to conceal the property, delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;

(5) is authorized to make or deliver a document certifying receipt of property used or to be used by the County and, intending to defraud the County, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys or receives, as a pledge of an obligation or debt, public property from an officer or employee of the County knowing that such officer or employee lawfully may not sell or pledge the property; or

(7) Knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the County.

B. The court may assess less than three times the amount of damages sustained by the County because of the act of any individual if the court determines that such individual has fully cooperated with any government investigation of the violation, but in no circumstance may the court assess less than the full amount of the damages sustained by the County.

Section 485-2(A)(7) reaches an actor, the phone company, who knowingly makes and uses a false statement for the purpose of decreasing the phone company's obligation to transmit money to Allegheny County. The false statement is the phone company's use of an invoice that does not charge the customers the full amount due under the law. Because the phone company only transfers to Allegheny County the decreased amount that it charged its customers on its invoices—and not the full amount that should be charged—the phone company's use of the false statements on the invoices avoids and decreases the phone company's obligation to transfer money to Allegheny County.

***3** For these reasons, I overrule defendants' preliminary objections raising the failure to set forth a cause of action under the FCA.

PRELIMINARY OBJECTION IV—PLAINTIFF'S FCA CLAIM ALSO FAILS UNDER THE FCA'S EXPRESS TAX BAR

Section 485-3(C) provides that actions under the FCA may not include claims made pursuant to federal, state, or local tax law. Defendants contend that the surcharge is a tax. Plaintiff contends that it falls into the category of a license fee under Pennsylvania case law.

Both parties agree that *White v. Commonwealth of Pennsylvania*, 571 A.2d 9 (Pa. Commw. 1990), discussed at pages 9-11 of this Memorandum, is the last word from the Pennsylvania appellate courts on whether a revenue-producing statute is imposing a license fee or a tax. Obviously, they disagree over which party *White* supports.

Prior to *White*, it appears that revenue-producing legislation fell into two categories: a true license fee or a tax.[3] A true license fee provided revenue for the purpose of covering the costs a governmental body incurred in licensing and regulating private entities. If legislation produced significant revenue that was not related to the cost of regulation, it was not a true license fee and, thus, it was a tax.

The *White* Opinion included a four-prong test for determining what is a true license fee that was initially used in *National Biscuit Co. v. City of Philadelphia*, 98 A.2d 182 (Pa. 1953), and was subsequently used in *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247, 251-52 (Pa. Commw. 1973) (hereinafter "*SEPTA*").

In *National Biscuit*, a Philadelphia ordinance imposed a mercantile license tax on persons engaging in certain businesses in the City of Philadelphia. Several businesses, including National Biscuit, brought this lawsuit. They relied on state legislation that did not permit Philadelphia to levy a tax on a privilege, transaction, subject, or occupation that was subject to a state tax or license fee. The businesses that brought this lawsuit contended that Philadelphia could not subject these businesses to its three mill tax because these businesses were subject to several state taxes and license fees.

The Court stated that the controlling issue is whether the fee or charge paid to the state covered only registration costs or whether it also included the cost of regulating a business's particular industry. If it covered only registration fees, the business was not subject to a state requirement requiring payment of a license fee.

National Biscuit was a company licensed under Pennsylvania legislation governing the operation of bakeries. This legislation provided for the Pennsylvania Department of Agriculture to inspect bakeries and their operations, to forbid the continuance of any violations, and to suspend licenses issued to the bakeries. The legislation imposed an annual fee between $5 and $20. The Court stated that these flat charges could not have been legislatively intended to cover the cost of regulating the bakery industry. Thus, bakeries were subject to the City's tax.

***4** Several other plaintiffs were corporations engaged in the business of offering mutual savings funds. They were subject to the supervision of the Pennsylvania Department of Banking through legislation that directed the Department to examine all such institutions at least once a year and to order them to cease any violations of the law or whenever they were conducting their business in an unsafe and unsound manner. The act provided for the expenses that the Department of Banking incurred in conducting the investigation to be charged to the institutions supervised by the Department in equitable amounts as the Department prescribed.

The Court ruled that a legislative purpose was to defray the expense involved in the regulatory activities of the Department of Banking. This was a true license fee, which the state imposed. Thus, these plaintiffs were exempt from liability under the City's ordinance.

In making its rulings, which varied from business-to-business, the Court stated that it was applying the following four-prong test:

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it. If, therefore, even though the charge be labeled a "license fee," it cannot be regarded as such if, being merely

> nominal in amount and not apparently equated to the probable cost of supervision and regulation of the licensee's activities, it presumably was not legislatively intended to provide for such cost; in such a case it must be considered as merely a registration charge intended to cover clerical costs of the issuance of the license certificate and general office expenses, and in that event it does not, of course, prevent municipal taxation under the grant of power made in the Sterling Act.

Id. at 615-16.

In *SEPTA, supra*, the City of Philadelphia enacted legislation imposing an annual license fee of $50 per bus. Because of its governmental status, the City could not tax SEPTA. The City, however, contended that its ordinance was a true license fee rather than a tax.

The Court's Opinion applied the four-prong test describing the distinguishing features of a license fee. The Court rejected Philadelphia's characterization of the charge as a license fee because the City never inspected and never did anything else with respect to SEPTA buses. In other words, the "license fees" demanded by the City were not used to reimburse the City for expenses of supervision and regulation. Thus, the ordinance was a tax.

I now consider the *White* Opinion. In *White*, the petitioner was a licensed physician covered by Section 1301.701(a) of the Health Care Services Malpractice Act (40 P.S. § 1301.701(a)). Under the Act, a healthcare provider conducting over 50% of his or her practice in the Commonwealth must contribute to a contingency fund that would pay all awards, judgments, and settlements for loss or damages against a participating healthcare provider resulting from any professional liability claims against the provider, to the extent that the provider's share exceeded his or her basic coverage insurance.

The petitioner argued that the surcharge levied by the Fund was a tax rather than a license fee or other permissible exercise of the Commonwealth's power. As such, the petitioner contended that the surcharge violated the uniformity provisions of Article VIII, Section 1, of the Pennsylvania Constitution because it discriminated in favor of physicians maintaining only one-half or less of their practice within the Commonwealth. The respondents, on the other hand, contended that the surcharge was not a tax governed by Article VIII, Section 1, but rather a permissible exercise of the police power of the Commonwealth.

***5** The Court's Opinion in *White* stated that the first issue to be resolved was whether the surcharge is in actuality a tax, and that the question of whether an enactment is a tax or a regulatory measure is determined by the purposes for which it is enacted and not by its title. The Court cited case law holding that:
The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.

Philadelphia v. Southeastern Pennsylvania Transportation Authority, 8 Pa.Commonwealth Ct. 280, 287, 303 A.2d 247, 251 (1973).

White at 11.

Before discussing the holding in *White*, I will analyze the facts in *White* using the *National Biscuit* test cited by the Court. I find that these features described in *National Biscuit* were not present in the legislation in *White.* The surcharge would appear to be a tax because it is not used to regulate the medical profession.

The first requirement for a charge to be a license fee is that the fee applies to a business or occupation that is subject to supervision and regulation by a licensing authority under its police power. I find that in *White*, the legislation did not involve the supervision and regulation of the practice of medicine.

I find that the second requirement cannot be met if the first requirement is not met.

I find that the fourth requirement was not met because the legislative purpose in exacting a charge was not to reimburse a licensing authority for the expense of supervision and regulation. Its purpose, instead, was to create a fund that would ensure that victims of medical malpractice would be paid and that healthcare providers were protected when their insurance is exhausted.

While the above case law that the *White* Opinion cites, including *SEPTA*, did not support a characterization of the surcharge as a license fee, the Court reached the opposite result—that the surcharge was not a tax. The ruling appeared to be based on the following rationale:
This Court however finds that the surcharge is not a tax as its purpose is not to raise revenues for public purposes or to defray the necessary expenses of government. Section 1301.701(e)(2) in fact specifically provides that all funds raised by the surcharge are to be "held in trust, deposited in a segregated account, invested and reinvested by the director, and shall not become a part of the General Fund of the Commonwealth." Any income realized by investment remains the exclusive property of the Fund, and any claims and expenses against the Fund are specifically deemed not to be debts of the Commonwealth. *See* Section 1301.701 (e)(4) of the Act.

Id. at 11 (footnote omitted, emphasis added).

It appears that the Court in *White* has created another category of charges that are not characterized as "taxes," this being funds raised to be held in trust and deposited in a segregated account for a specific purpose. This is the only apparent explanation for *White's* ruling that the surcharge was not a tax. This broadened definition of what is not a tax is more fully set forth in *T-Mobile South, LLC v. Bonet*, 85 So.3d 963 (Ala. 2011).

The issue that the Alabama Supreme Court addressed was whether Alabama's 911 Service Charge was an impermissible tax or a true service charge. The service provider argued that the 911 surcharge was a revenue-raising measure and therefore a tax. The Court, however, did not frame the issue in terms of a revenue-producing measure being a tax unless the funds are used to pay for the cost of regulating a business or occupation. It instead held that a fee imposed to defray the costs of a specific service is not a tax.

***6** The Court stated that revenue-producing legislation is not imposing a tax, but rather a user fee, where the revenue is related to defraying the cost of a specific service and the money collected from imposition of that fee is earmarked for a specific service and not as general revenue for the municipality. The Court explained its ruling that the 911 surcharge was not a tax:
In the present case, the service charge is based on providing telephone service, whether it be through a landline connection or a wireless connection, and the money from the service charge is used to fund the emergency 911 service provided via that connection. The money collected from the service charge does not provide general revenue that can be used for any purpose. Section 11-98-7 sets out the disbursements of the 911 service charge, which are used to defray the costs of implementing and operating the emergency 911 system. In *Madison County Communications District v. BellSouth Telecommunications, Inc.*, Civil Action 06-S-1786-NE (N.D. Ala. decided, April 15, 2009) (unpublished memorandum opinion), the federal district court addressed whether the defendant had properly assessed its service users the service charge set out in the Act. Among other things, the court addressed whether the service charge was a tax or fee, holding that "[b]ecause the E911 charge is based on provision of telephone service, and is used to fund a specific service (911 service), the charge is not a revenue-raising measure and, therefore, not a tax." We agree.

Id. at 984-85.

Defendants rely on a Memorandum issued by the Superior Court of the Commonwealth of Massachusetts in *Phone Recovery Services, LLC v. Verizon of New England, Inc.*, 33 Mass. L. Rptr. 102 (Mass. Sup. Oct. 27, 2015). In that case, Phone Recovery Services brought an action on behalf of the Commonwealth of Massachusetts under the Massachusetts False Claims Act against various mobile telecommunications or telephone exchange companies contending that they failed to collect, report, and remit Massachusetts' required 911 surcharge amounts. The defendants filed a motion to dismiss on the ground that the 911 surcharges were taxes.

The Court stated that in determining whether a charge is a fee or a tax, the courts recognize that there are two types of fees: "user fees," where the fee is asserted for the use of the governmental entity's property or services; and "regulatory fees," where a fee is assessed as part of a government regulation of private conduct. *Id.* at 4.

Approximately three years before the Memorandum Decision and Order was issued by the Massachusetts Superior Court in *Phone Recovery Services LLC v. Verizon of New England, Inc.*, the Supreme Judicial Court of Massachusetts in *Murphy v. Massachusetts Turnpike Auth.*, 971 N.E.2d 231 (Ma. 2012), considered, *inter alia*, whether Massachusetts Turnpike Authority tolls should be characterized as fees or taxes from users of toll roads and tunnels in the Boston metropolitan highway system ("MHS"). The plaintiffs contended, *inter alia*, that the tolls were taxes rather than user fees because certain of the tolls were used to pay for overhead, maintenance, and capital costs associated with non-tolled roads, bridges, and tunnels.

The Supreme Judicial Court of Massachusetts ruled that the charge should be characterized as a user fee, rather than a tax, if (1) it is charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society, (2) it is paid by choice and if the party paying the fee has the option of not utilizing government service and thereby avoiding the charge, and (3) it is not collected to raise revenue but to compensate the government entity providing the service for its expenses.

***7** *Murphy* concluded that the first factor was met in that those who paid the tolls enjoyed a particularized benefit because only toll payers could travel on the Boston Extension and the Sumner and Williams Tunnels, whereas non-toll paying drivers needed to reach the central artery by other means. The plaintiffs conceded that the second factor was satisfied in that the drivers had the option of not driving on tolled MHS roads and tunnels, thereby avoiding paying the tolls. The Court concluded that the third factor was satisfied because the tolls were collected to compensate the Authority for expenses it incurred in operating the MHS and not to raise revenues for the Commonwealth. The Court stated that its purpose did not shift from expense reimbursement to revenue raising simply because the total revenues exceeded the cost of maintaining only the tolled portions of the integrated system.

For these reasons, the Court concluded that the tolls collected by the Authority on the MHS were fees.

In the Superior Court of Massachusetts ruling in *Phone Recovery Services v. Verizon of New England, Inc.*, the Court described the threshold issue as whether the 911 surcharges are fees or taxes, and looked to the same three factors to distinguish fees from taxes that the Supreme Judicial Court of Massachusetts utilized in *Murphy*. However, the Superior Court of Massachusetts reached the opposite result. [4]

With respect to the first factor, the service providers in *Phone Recovery Services v. Verizon of New England* stated that this factor was not met because those who paid the 911 surcharge were not assessed in exchange for a particular use of a government service. The benefit to them for paying the fee was the same as all other members of society. This was so because any subscribers or other end users of "9-1-1" had access to the same emergency services communications

regardless of whether he or she paid the surcharge. I disagree. In the case at bar, nonsubscribers who do not own or have access to a telephone do not have the same protections. See *Murphy, supra* at 239, where the Supreme Judicial Court of Massachusetts said that the purpose of revenue-producing legislation does not shift from expense reimbursement to revenue raising simply because the toll revenues exceeded the cost of maintaining only the tolled portions of the MHS.

The service providers in *Phone Recovery Services v. Verizon of New England* also contended that the third factor was not met because the surcharge revenues may be used for a variety of purposes, including administration, salaries, enhanced 911 programs, enhanced 911 public education, the creation of PSAP customer premises, and equipment for and maintenance of primary and regional PSAPs. According to the service providers, this established that the Massachusetts Legislature clearly intended for the monies collected from 911 surcharges to benefit the general welfare and not to compensate for a particular service to a particular group.

I disagree. In the case at bar, all expenditures in Pennsylvania may be used only in connection with a scheme for enhancing the 911 Program.

CONCLUSION

White is the most recent Pennsylvania appellate court case addressing whether a revenue-producing law will be characterized as a tax or a license/user fee. In *White*, the Court ruled that the surcharge imposed on physicians was not a tax in the fact situation in which the legislation specifically provided that all funds raised by the surcharge were to be "held in trust, deposited in a segregated account, invested and reinvested by the director, and shall not become a part of the General Fund of the Commonwealth." *White* at 11. The Court stated: "Although the surcharge may not fit squarely within the four-part test of *National Biscuit*, it falls more logically into the category of a license fee as opposed to any other category." *Id.* at 11.

***8** Defendants have not cited any Pennsylvania appellate court case law with similar facts (i.e., payments made solely into a special fund) that suggests a different result. Furthermore, defendants have not explained how any ruling in their favor could be reconciled with the result the Court reached in *White.*

For these reasons, the exemption under the FCA for claims made pursuant to federal, state, or local tax law does not apply.

PRELIMINARY OBJECTION V—ANY ALLEGATIONS OF FALSE CLAIMS ALLEGEDLY SUBMITTED PRIOR TO JULY 23, 2011 ARE BARRED AS A MATTER OF LAW

I am sustaining this preliminary objection. Chapter 485 was enacted on July 23, 2011. There are no provisions suggesting that this legislation shall be retroactive. To the contrary, the Ordinance enacting Chapter 485 provides that the Act applies to claims filed on or after July 23, 2011 (Ord. No. 06-11-OR, Bill No. 6325-11).

PRELIMINARY OBJECTION VI—PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM (COUNT II) SHOULD BE DISMISSED

Plaintiff has withdrawn this claim.

PRELIMINARY OBJECTION VII—PLAINTIFF IS NOT ENTITLED TO AN ACCOUNTING AS A MATTER OF LAW (COUNT III)

I am sustaining this preliminary objection and dismissing Count III. The cause of action for an accounting depends upon a showing of a breach of fiduciary duty, a breach of a promise, or possibly some sort of an "equitable accounting." Plaintiff has withdrawn its breach of fiduciary duty claim. Plaintiff does not rely on any contractual law or cause of action that includes promises to make payments. There are no equitable grounds because any right to examine the records depends upon the discovery rules.

PRELIMINARY OBJECTION VIII—THE COMPLAINT MUST BE DISMISSED AS TO DEFENDANTS' UNNAMED "SUBSIDIARY AND RELATED ENTITIES"

This preliminary objection limiting defendants to those specifically named in the caption of the Amended Complaint is sustained. Plaintiff's Amended Complaint and Brief addresses only its claims against the named defendants. Plaintiff never discusses (or explains) why it can proceed against "subsidiaries or related entities." Furthermore, in arguing why Preliminary Objection I should not be overruled, plaintiff states that it has identified wrongdoers.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 21st day of April, 2016, it is hereby ORDERED that plaintiff's breach of fiduciary duty claim is withdrawn, Preliminary Objections V, VII, and VIII are sustained, and the remaining preliminary objections are overruled.

Attorney Timothy J. Carson shall furnish copies of the Memorandum and Order of Court to all other counsel.

BY THE COURT:

<<signature>>

WETTICK, J.

Footnotes

1 The term "phone companies" includes, but is not limited to, wireline and wireless communication services, exchange companies, and providers of VoIP services.

2 While Allegheny County never authorized plaintiff to bring this action, the record includes a letter from the County stating, in response to defendants' preliminary objections, that the action should not be dismissed.

3 A statute imposing a nominal registration fee was not revenue-producing legislation.

4 When considering the three factors, the Court correctly stated that the second factor, voluntariness, is relevant only when applied to user fees.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 6A EXECUTIVE OFFICES

Section 18E CIVIL PROCEEDINGS BY ATTORNEY GENERAL

Section 18E. The attorney general may, at the request of the department or on the attorney general's own initiative, institute civil proceedings against any municipality or other governmental body operating a PSAP, or any enhanced 911 service provider or communication services provider, to enforce sections 18A to 18J, inclusive.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 6A EXECUTIVE OFFICES

Section 18H WIRELESS ENHANCED 911 SERVICE SURCHARGE; COLLECTION; ADJUSTMENT; EXPENDITURES; REVENUES; MONTHLY REPORTS; FORWARDING AND USE OF CALL DATA; DISPOSITION OF CALL VOLUME

Section 18H. (a) There shall be imposed on each subscriber or end user whose communication services are capable of accessing and utilizing an enhanced 911 system, a surcharge in the amount of 75 cents per month for expenses associated with services provided under sections 18A to 18J, inclusive, and sections 14A and 15E of chapter 166. For wireline enhanced 911 service, the charge shall be imposed on each voice grade exchange telephone line of business and residence customers within the commonwealth, but the surcharge applicable to centrex service and ISDN primary rate interface service shall be based on an equivalency ratio provided to each private branch exchange trunk. For wireless enhanced 911 service, the charge shall be imposed per wireless mobile telephone

number, based on the area code chosen by the subscriber or end user. With the approval of the department, a wireless carrier may impose this surcharge based on the subscriber's or end user's billing address or other manner consistent with federal law. For interconnected VoIP provider service, the charge shall be imposed on each voice grade telephone line of business and residence customers within the commonwealth, but the surcharge applicable to such interconnected VoIP provider service that is comparable to centrex service and ISDN primary rate interface service associated with wireline enhanced 911 service shall be based on an equivalency ratio similar to that used for wireline enhanced 911 service. For IP-enabled service, the charge shall be imposed based on the subscriber's or end user's billing address in the commonwealth except for interconnected VoIP provider service, unless a different method is approved by the department. For prepaid wireless service, the department shall promulgate regulations establishing an equitable and reasonable method for the remittance and collection of the surcharge or surcharge amounts for such service. For all other services not identified above, the surcharge shall be imposed based on the subscriber's billing address in the commonwealth, unless a different method is approved by the department.

The surcharge shall be collected by the communication service provider and shall be shown on the subscriber's or end user's bill as "Disability Access/Enhanced 911 Service Surcharge", or an appropriate abbreviation. The surcharge shall not be subject to sales or use tax. The subscriber or end user shall be liable for the surcharge imposed under this section, and the communication service provider shall not be financially liable for surcharges billed on behalf of the commonwealth but not collected from subscribers or end users. Partial subscriber or end user payments shall be first applied to outstanding communication service provider charges.

(b) The department may petition the department of telecommunications and cable for an adjustment in the surcharge established in subsection (a). The department of telecommunications and cable shall be responsible for establishing the new surcharge, and all future surcharges, upon petition of the department. The department of telecommunications and cable, at its discretion but not more than once per calendar year, may investigate the prudence of the department's revenue and expenditures for the purpose of recalculating the surcharge, and may hire experts to assist in its investigation. The reasonable cost of such experts shall be charged to the Enhanced 911 Fund, but in no event shall such cost exceed $200,000, which may be adjusted to reflect changes in the consumer price index. The department of telecommunications and cable shall conduct its review and issue a decision within 90 days of the date of the commencement of the investigation, but the surcharge shall be deemed approved if the department of telecommunications and cable does not issue its decision within such 90 days. The department of telecommunications and cable shall adopt rules that provide for the funding of prudently incurred expenses associated with services provided by sections 18A to 18J, inclusive, and sections 14A and 15E of chapter 166, by means of the surcharge. The department shall report annually to the department of telecommunications and cable on the financial condition of the Enhanced 911 Fund and on the department's assessment of new developments affecting the enhanced 911 system. The report shall be submitted to the department of telecommunications and cable within 60 days of the end of each fiscal year. The department of telecommunications and cable shall file an annual report with the clerks of the house of representatives and the senate relative to the financial condition of the Enhanced 911 Fund.

(c) The department shall seek the approval of the department of telecommunications and cable for projected total expenditures that exceed

total expenditures of the previous fiscal year by 10 per cent or more. The department of telecommunications and cable may investigate the reasonableness of the expenditures and shall conduct its review and issue a decision within 90 days from the date the department files its request for approval, but the request for approval shall be deemed approved if the department of telecommunications and cable does not issue its decision within such 90 days. The department of telecommunications and cable shall notify the department of its intent to investigate within 20 days of the date the department files its request for approval. The department's request for approval shall be deemed approved in the absence of the department of telecommunication and cable's notification to the department of its intent to investigate. If the department of telecommunication and cable notifies the department that it intends to investigate an expenditure, the department of telecommunications and cable may hire experts to assist in its investigation. The reasonable cost of the experts shall be charged to the Enhanced 911 Fund, but in no event shall such cost exceed $200,000, which may be adjusted to reflect changes in the consumer price index.

(d) Each communication service provider shall remit the surcharge revenues collected from its subscribers or end users to the state treasurer for deposit in the Enhanced 911 Fund. The surcharge revenues shall be expended for the administration and programs of the department including, but not limited to, salaries, enhanced 911 training programs, enhanced 911 public education programs, the creation of PSAP customer premises equipment for, and maintenance of, primary and regional PSAPs, the programs mandated by section 18B and sections 14A and 15E of chapter 166, and for the implementation and administration of enhanced 911 service in the commonwealth.

(e) Each communication service provider required to remit surcharge

revenues shall submit to the department and the department of telecommunications and cable information on its business entity including, but not limited to, name, business address, contact person and the telephone number, fax number and e-mail address of such contact person. Each such provider shall update this information annually.

(f) Each communication service provider shall report to the department on a monthly basis the total surcharge revenues collected from its subscribers or end users during the preceding month, the total uncollected surcharge revenues from subscribers or end users during the preceding month, the total amount billed to the department for administration costs to cover the expenses of billing, collecting and remitting the surcharge during the preceding month, and the total amount billed to the department for non-recurring and recurring costs associated with any service, operation, administration or maintenance of enhanced 911 service during the preceding month. Such monthly report shall not be a public record under clause Twenty-sixth of section 7 of chapter 4 or section 10 of chapter 66.

(g) A communication service provider shall forward to any PSAP or any other answering point equipped for enhanced 911 service, or upon request consistent with federal law, to a municipal, state, or federal law enforcement agency, the department of telecommunications and cable, the FCC or the department, the telephone number and street address or location of any telephone used to place a 911 call, and any other call data or information required by the FCC to be transmitted to a PSAP.

Subscriber or end user information or data provided in accordance with this section shall be used, consistent with federal law, only for the purpose of responding to emergency calls, administering and operating the enhanced 911 system and providing enhanced 911 service, or for use in any ensuing investigation or prosecution, including the investigation of

false or intentionally misleading reports of incidents requiring emergency service. No communication service provider or officers, directors, employees, vendors or agents shall be liable in any action to any person for releases of information authorized by this section or for civil action resulting from or caused by such providers for participation or omissions in the development, installation, operation, maintenance, performance or provision of enhanced 911 service except for wanton or willful misconduct. Release to or use by any person of a communication service provider's subscriber or end user information or data for any use other than the purposes enumerated in this subsection shall be prohibited. Notwithstanding any general or special law to the contrary, such information or data shall not be a public record under clause Twenty-sixth of section 7 of chapter 4 or section 10 of chapter 66, except that aggregated information that does not identify or effectively identify specific subscriber or end user information or data may be made public.

(h) The department shall examine call volumes of all primary, regional and regional secondary PSAPs, and the population changes of the municipalities they serve, and may use such information in determining the disbursement of funds as set forth in section 18B.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5A FALSE CLAIMS; DEFINITIONS APPLICABLE TO SECS. 5A TO 5O

Section 5A. As used in sections 5A to 5O, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

"Claim", a request or demand, whether pursuant to a contract or otherwise, for money or property, whether or not the commonwealth or a political subdivision thereof has title to the money or property, that: (1) is presented to an officer, employee, agent or other representative of the commonwealth or a political subdivision thereof; or (2) is made to a contractor, subcontractor, grantee or other person, if the money or property is to be spent or used on behalf of or to advance a program or interest of the commonwealth or political subdivision thereof and if the commonwealth or any political subdivision thereof: (i) provides or has provided any portion of the money or property which is requested or

demanded; or (ii) will reimburse directly or indirectly such contractor, subcontractor, grantee or other person for any portion of the money or property which is requested or demanded. A claim shall not include requests or demands for money or property that the commonwealth or a political subdivision thereof has paid to an individual as compensation for employment with the commonwealth or a political subdivision thereof or as an income subsidy with no restrictions on that individual's use of the money or property.

"False claims action", an action filed by the office of the attorney general or a relator under sections 5A to 5O, inclusive.

"False claims law", sections 5A to 5O, inclusive.

"Knowing" or "knowingly", possessing actual knowledge of relevant information, acting with deliberate ignorance of the truth or falsity of the information or acting in reckless disregard of the truth or falsity of the information; provided, however, that no proof of specific intent to defraud shall be required.

"Material", having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

"Obligation", an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation or from the retention of any overpayment after the deadline for reporting and returning the overpayment under paragraph (10) of section 5B.

"Original source", an individual who: (1) prior to a public disclosure under paragraph (3) of section 5G, has voluntarily disclosed to the commonwealth or any political subdivision thereof the information on

which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly-disclosed allegations or transactions, and who has voluntarily provided the information to the commonwealth or any political subdivision thereof before filing a false claims action.

"Overpayment", any funds that a person receives or retains, including funds received or retained under Title XVIII or XIX of the Social Security Act, to which the person, after applicable reconciliation, is not entitled.

"Person", a natural person, corporation, partnership, association, trust or other business or legal entity.

"Political subdivision", a city, town, county or other governmental entity authorized or created by law, including public corporations and authorities.

"Relator", an individual who brings an action under paragraph (2) of section 5C.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5B FALSE CLAIMS; LIABILITY

Section 5B. (a) Any person who: (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (2) knowingly makes, uses or causes to be made or used a false record or statement material to a false or fraudulent claim; (3) conspires to commit a violation of this subsection; (4) knowingly presents, or causes to be presented, a claim that-includes items or services resulting from a violation of section 1128B of the Social Security Act, 42 U.S.C. 1320a-7b, or section 41 of chapter 118E; (5) has possession, custody or control of property or money used, or to be used, by the commonwealth or a political subdivision thereof and knowingly delivers, or causes to be delivered, to the commonwealth or a political subdivision thereof less than all of that property or money; (6) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the commonwealth or

a political subdivision thereof and, with the intent of defrauding the commonwealth or a political subdivision thereof, makes or delivers the receipt without completely knowing that the information on the receipt is true; (7) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the commonwealth or a political subdivision thereof, who may not lawfully sell or pledge such property; (8) enters into an agreement, contract or understanding with an official of the commonwealth or a political subdivision thereof knowing the information contained therein is false; (9) knowingly makes, uses or causes to be made or used a false record or statement material to an obligation to pay or to transmit money or property to the commonwealth or a political subdivision thereof, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the commonwealth or a political subdivision thereof; or (10) is a beneficiary of an inadvertent submission of a false claim to the commonwealth or a political subdivision thereof, or is a beneficiary of an overpayment from the commonwealth or a political subdivision thereof, and who subsequently discovers the falsity of the claim or the receipt of overpayment and fails to disclose the false claim or receipt of overpayment to the commonwealth or a political subdivision by the later of: (i) the date which is 60 days after the date on which the false claim or receipt of overpayment was identified; or (ii) the date any corresponding cost report is due, if applicable, shall be liable to the commonwealth or political subdivision for a civil penalty of not less than $5,500 and not more than $11,000 per violation, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410 section 5, 104 Stat. 891, note following 28 U.S.C. section 2461, plus 3 times the amount of damages, including consequential damages, that the commonwealth or a political subdivision thereof sustains because of such violation. A person

violating sections 5B to 50, inclusive, shall also be liable to the commonwealth or a political subdivision thereof for the expenses of the civil action brought to recover any such penalty or damages including, without limitation, reasonable attorneys' fees, reasonable expert fees and the costs of investigation, as set forth below. Costs recoverable under said sections 5B to 5O, inclusive, shall also include the costs of any review or investigation undertaken by the attorney general, or by the state auditor or the inspector general in cooperation with the attorney general.

(b) Notwithstanding subsection (a), if the court finds that: (1) the person committing the violation of subsection (a) furnished an official of the office of the attorney general responsible for investigating a false claims law violation with all the information known to such person about the violation within 30 days after the date on which the person first obtained the information; (2) such person fully cooperated with any commonwealth investigation of such violation; and (3) at the time such person furnished the commonwealth with the information about the violation, no civil action or administrative action had commenced under sections 5B to 5O, inclusive, or no criminal prosecution had commenced with respect to such violation, and such person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than 2 times the amount of damages, including consequential damages, that the commonwealth or a political subdivision thereof sustains because of the act of that person.

(c) A corporation, partnership or other person shall be liable to the commonwealth under sections 5B to 5O, inclusive, for the acts of its agent where the agent acted with apparent authority, regardless of whether the agent acted, in whole or in part, to benefit the principal and regardless of whether the principal adopted or ratified the agent's claims, representation,

statement or other action or conduct.

(d) Sections 5B to 5O, inclusive, shall not apply to claims, records or statements made or presented to establish, limit, reduce or evade liability for the payment of tax to the commonwealth or other governmental authority.

(e) A person who has engaged in conduct described in subsection (a) prior to payment shall only be entitled to payment from the commonwealth of the actual amount due less the excess amount falsely or fraudulently claimed.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5C VIOLATIONS UNDER SECS. 5B TO 5O; INVESTIGATION BY ATTORNEY GENERAL; RELATORS; CIVIL ACTIONS

Section 5C. (1) The attorney general shall investigate violations under sections 5B to 5O, inclusive, involving state funds or funds from any political subdivision. If the attorney general finds that a person has violated or is violating said sections 5B to 5O, inclusive, the attorney general may bring a civil action in superior court against the person.

(2) An individual, hereafter referred to as relator, may bring a civil action in superior court for a violation of said sections 5B to 5O, inclusive, on behalf of the relator and the commonwealth or any political subdivision thereof. The action shall be brought in the name of the commonwealth or the political subdivision thereof. The action may be dismissed only if the attorney general gives written reasons for consenting to the dismissal and the court approves the dismissal. Notwithstanding any general or special

law to the contrary, it shall not be a cause for dismissal or a basis for a defense that the relator could have brought another action based on the same or similar facts under any other law or administrative proceeding.

(3) When a relator brings an action under said sections 5B to 5O, inclusive, a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses shall be served on the attorney general pursuant to Rule 4(d) (3) of the Massachusetts Rules of Civil Procedure. The complaint shall be filed under seal and shall remain so for 120 days after service upon the attorney general. Notwithstanding any other general or special law or procedural rule to the contrary, service on the defendant shall not be required until the period provided in paragraph (5). The attorney general may, for good cause shown, ask the court for extensions during which the complaint shall remain under seal. Any such motions may be supported by affidavits or other submissions under seal. The attorney general may elect to intervene and proceed with the action on behalf of the commonwealth or political subdivision within the 120-day period or during any extension, after the attorney general receives both the complaint and the material evidence and information. Any information or documents furnished by the relator to the attorney general in connection with an action or investigation under said sections 5B to 5O, inclusive, shall be exempt from disclosure under section 10 of chapter 66.

(4) Before the expiration of the initial 120 day period or any extensions obtained under paragraph (3), the attorney general shall; (i) assume control of the action, in which case the action shall be conducted by the attorney general; or (ii) notify the court that he declines to take over the action, in which case the relator shall have the right to conduct the action.

(5) If the attorney general decides to proceed with the action, the

complaint shall be unsealed and served promptly thereafter. The defendant shall not be required to respond to any complaint filed under said sections 5B to 5O, inclusive, until 20 days after the complaint is unsealed and served upon the defendant pursuant to rule 4 of the Massachusetts rules of civil procedure.

(6) When a relator brings an action pursuant to this section, no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action.

(7) With respect to any federal, state or local government that is named as a co-plaintiff with the commonwealth in an action brought pursuant to sections 5B to 5O, inclusive, a seal on the action ordered by the court under paragraph (3) shall not preclude the commonwealth or the relator from serving the complaint, any other pleadings or the written disclosure of substantially all material evidence and information possessed by the relator on the law enforcement authorities that are authorized under the law of that federal, state or local government to investigate and prosecute such actions on behalf of such governments, except that such seal shall apply to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5D PROSECUTION BY ATTORNEY GENERAL; RELATOR'S RIGHT TO CONTINUE AS PARTY TO ACTION

Section 5D. (1) If the attorney general proceeds with the action, he shall have primary responsibility for prosecuting the action, and shall not be bound by any act of the relator. The relator shall have the right to continue as a party to the action, subject to the limitations in sections 5B to 5O, inclusive.

(2) The attorney general may dismiss the action notwithstanding the objections of the relator if the relator has been notified by the attorney general of the filing of the motion and the court has provided the relator with an opportunity for a hearing on the motion. Upon a showing of good cause, such hearing may be held in camera.

(3) The attorney general may settle the action with the defendant notwithstanding the objections of the relator if the court determines, after a

hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(4) Upon a showing by the attorney general that unrestricted participation during the course of the litigation by the relator initiating the action would interfere with or unduly delay the attorney general's prosecution of the case, or would be repetitious, irrelevant or for purposes of harassment, the court may, in its discretion, impose limitations on the relator's participation, including but not limited to: (i) limiting the number of witnesses the relator may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the relator's cross examination of witnesses; or (iv) otherwise limiting the participation by the relator in the litigation.

(5) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the relator would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the relator in the litigation.

(6) If the attorney general elects not to proceed with the action, the relator who initiated the action shall have the right to conduct the action. If the attorney general so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the attorney general's expense. When a relator proceeds with the action, the court, without limiting the status and rights of the relator initiating the action, may nevertheless permit the attorney general to intervene at a later date upon a showing of good cause.

(7) Whether or not the attorney general proceeds with the action, upon a showing by the attorney general that certain acts of discovery by the relator initiating the action would interfere with the attorney general's

investigation or prosecution of a criminal or civil matter arising out of the same or similar facts, the court may stay such discovery for a period of not more than 60 days. Such showing by the attorney general shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the attorney general has pursued the criminal or civil investigation or proceedings with reasonable diligence and may stay any proposed discovery in the civil action that will interfere with the ongoing criminal or civil investigations or proceedings.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5E ALTERNATE REMEDIES AVAILABLE TO DETERMINE CIVIL PENALTY

Section 5E. Notwithstanding the provisions of section 5C, the attorney general may elect to pursue its claim through any alternate remedy available to the attorney general, including any administrative proceeding, to determine a civil penalty. If any such alternate remedy is pursued in another proceeding, a relator shall have the same rights in such proceeding as said relator would have had if the action had continued under said section 5C. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under sections 5B to 5O, inclusive. For purposes of this section, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the commonwealth, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5F PAYMENTS TO RELATORS; LIMITATIONS

Section 5F. (1) If the attorney general proceeds with an action brought by a relator pursuant to section 5C, the relator shall receive at least 15 per cent but not more than 25 per cent of the proceeds recovered and collected in the action or in settlement of the claim depending upon the extent to which the relator substantially contributed to the prosecution of the action.

(2) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, auditor or inspector general hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 per cent of the proceeds, taking into account the significance of the information and the role of the relator bringing the action in advancing the

case to litigation.

(3) Any payment to a relator pursuant to this section shall be made only from the proceeds recovered and collected in the action or in settlement of the claim. Any such relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses, fees and costs shall be awarded against the defendant.

(4) If the attorney general does not proceed with an action pursuant to section 5C, the relator bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the commonwealth or any political subdivision thereof. The amount shall be not less than 25 per cent nor more than 30 per cent of the proceeds recovered and collected in the action or settlement of the claim, and shall be paid out of such proceeds. The relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses, fees and costs shall be awarded against the defendant.

(5) Whether or not the attorney general proceeds with the action, if the court finds that the action was brought by a relator who planned and initiated the violation of sections 5B to 5O, inclusive, upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce or eliminate the share of the proceeds of the action which the relator would otherwise receive pursuant to this section, taking into account the role of the relator in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the relator bringing the action is convicted of criminal conduct arising from his role in the violation of this section, the relator shall be dismissed from the civil

action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to continue the action.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5G ACTIONS BROUGHT AGAINST GOVERNOR, LIEUTENANT GOVERNOR, ATTORNEY GENERAL, TREASURER, SECRETARY OF STATE, ETC.; JURISDICTION

Section 5G. (a) No court shall have jurisdiction over an action brought pursuant to section 5C against the governor, the lieutenant governor, the attorney general, the treasurer, the secretary of state, the auditor, a member of the general court, the inspector general or a member of the judiciary, if the action is based on evidence or information known to the commonwealth when the action was brought.

(b) An individual may not bring an action pursuant to paragraph (2) of said section 5C that is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the commonwealth or any political subdivision thereof is already a party.

(c) The court shall dismiss an action or claim pursuant to sections 5B to 5O, inclusive, unless opposed by the commonwealth or any political subdivision thereof, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Massachusetts criminal, civil or administrative hearing in which the commonwealth is a party; (2) in a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or (3) from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5H MONEY RECOVERED BY COMMONWEALTH; FALSE CLAIMS PROSECUTION FUND

Section 5H. (1) All money recovered by the commonwealth, as a result of actions brought by the attorney general or a person pursuant to sections 5B to 5O, inclusive, other than costs and attorney's fees awarded pursuant to paragraph (2), shall be credited by the state treasurer to the False Claims Prosecution Fund, established by section 2YY of chapter 29.

(2) Costs and attorney's fees awarded to a relator by final judicial order in an action under this section shall be paid directly by the defendant to the relator.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5I AWARDS OF ATTORNEY GENERAL FEES AND EXPENSES; AWARDS OF COSTS AND ATTORNEY FEES AGAINST RELATORS; LIABILITY

Section 5I. (1) If the attorney general initiates an action or assumes control of an action brought by a person pursuant to sections 5B to 5O, inclusive, the attorney general shall be awarded his reasonable attorney's fees and expenses incurred in the litigation, including costs, if he prevails in the action.

(2) If the attorney general does not proceed with an action pursuant to sections 5B to 5O, inclusive, and the defendant is the prevailing party, the court may award the defendant reasonable attorneys' fees and costs against the relator upon a written finding that such action was pursued in bad faith or was wholly insubstantial, frivolous, and advanced for the purpose of causing the defendant undue burden, unnecessary expense or harassment.

(3) No liability shall be incurred by the commonwealth, the affected agency or the attorney general for any expenses, attorney's fees or other costs incurred by any person in bringing or defending an action under said sections 5B to 5O, inclusive.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5J EMPLOYERS PREVENTING EMPLOYEES FROM ACTING TO FURTHER FALSE CLAIM ACTIONS; LIABILITY

Section 5J. (1) No employer shall make, adopt or enforce any rule, regulation or policy preventing an employee, contractor or agent from disclosing information to a government or law enforcement agency or from acting to further efforts to stop 1 or more violations of sections 5B to 5O, inclusive. No employer shall require as a condition of employment, during the term of employment or at the termination of employment that any employee, contractor or agent agree to, accept or sign an agreement that limits or denies the rights of such employee, contractor or agent to bring an action or provide information to a government or law enforcement agency pursuant to said sections 5B to 5O, inclusive. Any such agreement shall be void.

(2) An employee, contractor or agent shall be entitled to all relief

necessary to make that employee, contractor or agent whole if that employee, contractor or agent is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or a person associated with the employee, contractor or agent in furtherance of an action under sections 5B to 5O, inclusive, or other efforts to stop a violation of said sections 5B to 5O, inclusive.

(3) Notwithstanding any general or special law to the contrary, relief under paragraph (2) shall include reinstatement with the same seniority status the employee, contractor or agent would have had but for the discrimination, twice the amount of back pay, interest on the back pay and compensation for any special damages sustained as a result of the discrimination. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee, contractor or agent may bring an action in the appropriate superior court, the superior court of the county of Suffolk or any other appropriate court for the relief provided in this section.

(4) A civil action under this section may not be brought more than 3 years after the date when the violation of this section occurred.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5K LIMITATION OF ACTIONS; INTERVENTION BY ATTORNEY GENERAL; FINAL JUDGMENTS IN CRIMINAL PROCEEDINGS

Section 5K. (1) A civil action pursuant to sections 5B to 5O, inclusive, for a violation of section 5B may not be brought (i) more than six years after the date on which the violation occurred; or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official within the office of the attorney general charged with responsibility to act in the circumstances, but in no event more than ten years after the date on which the violation is committed, whichever occurs last. A civil action pursuant to sections 5B to 5O, inclusive, may be brought for acts or omissions that occurred prior to the effective date of this section, subject to the limitations period set forth in this section.

(2) If the attorney general elects to intervene and proceed with an action

brought pursuant to sections 5B to 5O, inclusive, for a violation of section 5B, the attorney general may file a complaint or amend the complaint of a person who has brought an action pursuant to said sections 5B to 5O, inclusive, to clarify or add detail to the claims in which the attorney general is intervening and to add any additional claims with respect to which the commonwealth or a political subdivision thereof contends it is entitled to relief. For statute of limitations purposes, any such pleading shall relate back to the filing date of the complaint of the person who originally-brought the action, to the extent that the claim of the attorney general arises out of the conduct, transactions or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(3) Notwithstanding any other general or special law, rule of procedure or rule of evidence to the contrary, a final judgment rendered in favor of the commonwealth in a criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same act, transaction or occurrence as in the criminal proceedings and which is brought under section 5B.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5L PREPONDERANCE OF THE EVIDENCE STANDARD

Section 5L. In any action brought pursuant to sections 5B to 5O, inclusive, the party bringing the action shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5M RULES, REGULATIONS OR GUIDELINES; ATTORNEY GENERAL

Section 5M. The attorney general may promulgate any rules, regulations or guidelines that, in the attorney general's judgment, are necessary and appropriate to the effective administration of this chapter.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5N CIVIL INVESTIGATIVE DEMANDS; ATTORNEY GENERAL

Section 5N. (1) Notwithstanding any general or special law, procedural rule or regulation to the contrary, whenever the attorney general or a designee has reason to believe that a person may be in possession, custody or control of documentary material or information relevant to a false claims law investigation, the attorney general or a designee may, before commencing a civil action under paragraph (1) of section 5C or other false claims law, or making an election to intervene under paragraph (3) of said section 5C, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person to: (i) produce such documentary material for inspection and copying; (ii) answer written interrogatories, in writing and under oath; (iii) give oral testimony under oath; or (iv) furnish any combination of such material, answers or testimony. The attorney general may delegate to an assistant attorney

general the authority to issue civil investigative demands under this section.

(2) Service of a demand pursuant to paragraph (1) may be made by: (i) delivering a copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (ii) delivering a copy thereof to the principal place of business or the last and usual place of abode in the commonwealth of the person to be served; or (iii) mailing by registered or certified mail a copy thereof addressed to the person to be served at the person's last and usual place of abode, the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to the person's principal office or place of business.

(3) Each such demand requesting documentary material or oral testimony shall (i) state the time and place of the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; (ii) state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated; (iii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; (iv) prescribe a return date within which the documentary material is to be produced; (v) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying; and (vi) if such demand is for the giving of oral testimony, notify the person receiving the demand of the right to be accompanied by an attorney and any other representative, prescribe a date, time and place at

which oral testimony shall be commenced, identify the assistant attorney general who shall conduct the examination and to whom the transcript of such examination shall be submitted, specify that such attendance and testimony are necessary to the conduct of the investigation, and describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand. Notice of the time and place of taking oral testimony shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination, unless the attorney general or an assistant attorney general designated by the attorney general determines that exceptional circumstances are present which warrant such taking of testimony within a lesser period of time.

(4) The oral examination of all persons pursuant to sections 5B to 5O, inclusive, shall be conducted before a person duly authorized to administer oaths by the law of the commonwealth. Rule 30(e) of the Massachusetts Rules of Civil Procedure shall be applicable to oral examinations conducted pursuant to said sections 5B to 5O, inclusive.

(5) Any person compelled to appear for oral testimony under a civil investigative demand issued under said sections 5B to 5O may be accompanied, represented and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not

directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a motion may be filed for an order compelling such person to answer such question.

(6) The production of documentary material in response to a civil investigative demand served under sections 5B to 5O, inclusive, shall be made under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody or control of the person to whom the demand is directed has been produced and made available to the members of the attorney general's staff identified in the demand.

(7) Each written interrogatory served under sections 5B to 5O, inclusive, shall be answered separately and fully in writing under the penalties of perjury. The person upon whom the interrogatories have been served shall serve the answers and objections, if any, upon the attorney general within 14 days after service of the interrogatories.

(8) Any documentary material or other information produced by a person pursuant to sections 5B to 5O, inclusive, shall not, unless otherwise ordered by a justice of the superior court for good cause shown, be disclosed to any other person other than the authorized agent or representative of the attorney general and any officer or employee of the commonwealth who is working under their direct supervision with respect to the false claims law investigation, unless with the consent of the person producing the same, except that any information obtained by the attorney general under this section may be shared with any qui tam relator if the

attorney general determines it is necessary as part of a false claims act investigation. Such documentary material or information may be disclosed by the attorney general in court proceedings or in papers filed in court. Nothing in this section shall preclude the attorney general from disclosing information and evidence secured pursuant to said sections 5B to 5O, inclusive, to officials of the United States, other states, the commonwealth or any political subdivision thereof charged with the responsibility for enforcement of federal, state or local laws respecting fraud or false claims upon federal, state or local governments. Prior to any such disclosure, the attorney general shall obtain a written agreement from such officials to abide by the restrictions of this section.

(9) At any time prior to the date specified in the civil investigative demand, or within 21 days after the demand has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county.

(10) Whenever any person fails to comply with any civil investigative demand issued under sections 5B to 5O, inclusive, the attorney general may file, in the superior court of the county in which such person resides, is found, or transacts business, a motion for the enforcement of the civil investigative demand. The Massachusetts Rules of Civil Procedure shall apply to any such motion. Any final order entered pursuant to such petition may also include the assessment of a civil penalty of not more than $5,000 for each act or instance of noncompliance.

(11) All such information and documentary materials as are obtained by

the attorney general pursuant to sections 5B to 5O, inclusive, shall not be public records and are exempt from disclosure under section 10 of chapter 66 or any other law.

(12) For purposes of sections 5B to 5O, inclusive, "documentary material" shall include the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart or other document or graphic representation, or data stored in or accessible through a computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data.

(13) Nothing in sections 5B to 5O, inclusive, shall be construed to authorize the attorney general to compel the production of information or documents from the state auditor or from the inspector general, unless otherwise authorized by law. Nothing in this chapter shall bar the attorney general from referring matters or disclosing information or documents to the state auditor or to the inspector general for purposes or any review or investigation they may deem appropriate.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 5O AGENCY REPORTING REQUIREMENTS

Section 5O. Nothing in sections 5B to 5M, inclusive, shall be construed to relieve an agency of its reporting requirements regarding matters within that agency under chapter 647 of the acts of 1989.

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U.S. Code › Title 31 › Subtitle III › Chapter 37 › Subchapter III › § 3729

31 U.S. Code § 3729 - False claims

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410 [1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

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(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms “knowing” and “knowingly”—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term “claim”—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property;

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—
Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—
This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99–562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103–272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub. L. 111–21, § 4(a), May 20, 2009, 123 Stat. 1621.)

[1] So in original. Probably should be “101–410”.

Cornell Law School

U.S. Code › Title 31 › Subtitle III › Chapter 37 › Subchapter III › § 3730

31 U.S. Code § 3730 - Civil actions for false claims

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—
The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) [1] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have

the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of

the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—
The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—
In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—
Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in

furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—
Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—
A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99–562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub. L. 100–700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub. L. 101–280, § 10(a), May 4, 1990, 104 Stat. 162; Pub. L. 103–272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub. L. 111–21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub. L. 111–148, title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub. L. 111–203, title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

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[1] So in original. Probably should be a reference to Rule 4(i).

[1] So in original. Probably should be "General".

Code of Massachusetts Regulations Currentness
Title 220: Department of Public Utilities
Chapter 16.00: Rules Governing the Recovery of Expenses Relating to the Provision of Wireline Enhanced 911 (E-911) Services, Dual Party Tdd/Tty Message Relay Services, and Adaptive Equipment Services by Telecommunications Carriers. (Refs & Annos)

220 CMR 16.02

16.02: Definitions

As used in 220 CMR 16.00, the terms set forth in 220 CMR 16.02 shall have the following meanings, unless the context requires otherwise,

Adaptive Equipment Services means a system of administration and record keeping, as well as distribution, repair and replacement of adaptive equipment for certified subscribers, as described in 220 CMR 273.00, including specialized customer premises equipment such as artificial larynxes, signaling devices, amplified handsets, large number dial overlays, direct telephone dialers, telebrailles, TDD/TTY and other devices which provide access to telephone networks for people with hearing, speech, vision and/or mobility impairments. It also includes the controls for sound amplification of incoming transmissions at public coin and coinless telephones as described in 220 CMR 273.00.

Department means the Department of Telecommunications and Energy.

Dual Party TDD/TTY Message Relay Service means a telephone system which uses third party intervention to connect certified deaf, hard of hearing and speech impaired persons, who use TDD/TTY equipment, with each other and/or with persons of normal hearing and speech.

Local Exchange Service means voice-grade telephone exchange lines or channels that provide local access from the premises of a subscriber in Massachusetts to the local telecommunications network to effect the transfer of information.

Private Safety Agency is any entity, except for a municipality or a public safety agency, providing emergency police, fire, ambulance or medical services.

Public Safety Agency is a functional division of a municipality or the state that provides fire fighting, law enforcement, ambulance, medical or other emergency services.

Public Safety Answering Point (PSAP) means a facility assigned the responsibility of receiving wireline 911 calls and, as appropriate, directly dispatching emergency response services or transferring or relaying wireline emergency 911 calls to other public or private safety agencies.

Statewide Emergency Telecommunications Board (SETB) means the board within the executive office of public safety that is currently responsible for coordinating and effecting the implementation of wireline enhanced 911 in Massachusetts and for administering the service, including but not limited to the promulgation of technical and operational standards in the design, implementation and operation of public safety answering points that utilize the wireline enhanced 911 network features.

Subscriber means an end user who receives telephone exchange access service.

TDD/TTY means a telecommunications device for the deaf consisting of terminals that permit two-way, typed telephone conversations with or between deaf or hearing-impaired people.

Telecommunications Company means all persons, firms, corporations, associations and joint stock associations or companies, as defined in M.G.L. c. 159, furnishing or rendering local telephone exchange service to subscribers in Massachusetts, including resellers and facilities-based carriers.

Voice Grade Exchange Telephone Line means any retail dial-tone line capable of accessing 911 service. For purposes of 220 CMR 16.00, this refers only to wireline services.

Wireline Enhanced 911 Service means a service consisting of telephone network features provided for users of the public telephone system enabling such users to reach a public safety answering point by dialing the digits 911. Such service directs wireline 911 calls to appropriate public safety answering points based on selective routing. Wireline Enhanced 911 also provides the service capability for automatic number identification (*i.e.*, the automatic display of the seven-digit number used to place a 911 call) and automatic number location (*i.e.*, the automatic display of information relating to the geographical location of the telephone used to place a 911 call).

Wireline Enhanced 911 System means a distinct entity or geographical segment in which enhanced 911 service is provided. It consists of an electronic switching system serving as a control office, trunking connecting all central offices within a geographical segment, and the public safety answering points and circuits from such public safety answering points to a database for retrieval of location information.

Currency of the Update: June 30, 2017

Mass. Regs. Code tit. 220, § 16.02, 220 MA ADC 16.02

End of Document

Code of Massachusetts Regulations Currentness
Title 220: Department of Public Utilities
Chapter 16.00: Rules Governing the Recovery of Expenses Relating to the Provision of Wireline Enhanced 911 (E-911) Services, Dual Party Tdd/Tty Message Relay Services, and Adaptive Equipment Services by Telecommunications Carriers. (Refs & Annos)

220 CMR 16.03

16.03: Application of the Telephone Surcharge

(1) Description. The surcharge is intended to recover prudently incurred costs associated with the provision of wireline enhanced 911 service, dual party TDD/TTY message relay service, and adaptive equipment services.

(2) Application. The surcharge will be applied by all telecommunications companies on a monthly basis to residence and business voice grade exchange telephone lines or their equivalent. This will be reflected as a separate and distinct line item on the telephone subscriber's bill, which shall read “911/Disability Access Fee.” The surcharge will be initially established for a five-year period, ending December 31, 2007.

(3) Collection of Revenues. The SETB shall establish and administer a fund relating to wireline enhanced 911 service, dual party TDD/TTY message relay service, and adaptive equipment services in Massachusetts, beginning January 1, 2003, in accordance with M.G.L. c. 166, § 18H. Each telecommunications company will remit to the SETB surcharge revenues generated under 220 CMR 16.00. Any proceeds and interest relating to the collection of this surcharge shall only be used for the provision of such services.

(4) Level of Surcharge. The Department will determine the level of the surcharge based on the estimated program costs provided by the SETB, as well as information provided by the telecommunications companies. The surcharge must be sufficient to recover not only prudently incurred costs associated with the provision of enhanced 911 service, dual party TDD/TTY message relay service, and wireline adaptive equipment services in Massachusetts, but also prudent capital improvements to be made to the wireline enhanced 911 system. The surcharge may also recover a portion of the deficit associated with the provision of wireline enhanced 911, TDD/TTY relay, and adaptive equipment services, under the statutory funding mechanism previously provided for in M.G.L. c. 166, § 15E (St. 1990, c. 291, § 7).

(a) Upon request by the Department, the SETB will provide a five-year projection of the reasonable, customary, or necessary program costs expected to be incurred by the SETB in the provision of wireline enhanced 911 service for all wireline customers in Massachusetts, including but not limited to a detailed explanation of any related administrative, training and public education costs contained in those cost projections.

(b) Upon request by the Department, each telecommunications company will provide historical data verifying its participation in the statutory funding mechanism.

(c) Upon request by the Department, each telecommunications company will provide the total number of retail end user voice grade and voice-grade equivalent lines currently served by that company. When determining voice grade-equivalent lines, the telecommunications companies shall use an equivalency factor for Centrex station lines and private branch exchange (PBX) trunks. The applicable station-to-trunk equivalency ratio for Centrex service is 9:1, and the equivalency ratio for each ISDN Primary Rate Interface system is 5:1. Non-voice-grade lines and

lines that are not equipped for outgoing calls (*e.g.*, Direct Inward Dialing trunks and 800 service) will be excluded. Each telecommunications company will identify those services excluded from this line count and the basis for that exclusion.

(d) Upon request by the Department, each telecommunications company will provide a five-year projection of the reasonable, customary, or necessary program costs that the company expects to incur in the provision of TDD/TTY relay service in Massachusetts. In addition, each telecommunications company will provide the estimated five-year costs of its adaptive equipment services, where applicable.

(e) Upon request by the Department, each telecommunications company will provide data identifying the level of the deficit associated with the provision of wireline enhanced 911, TDD/TTY relay, and adaptive equipment services under the statutory funding mechanism previously provided for in M.G.L. c. 166, § 15E (St. 1990, c. 291, § 7).

(5) Interim Surcharge. For the purposes of continuity of service, the Department may establish an interim surcharge to allow for the collection of funds to operate the programs identified in 220 CMR 16.00. The interim surcharge will be based on estimated reasonable, customary, or necessary program costs, and estimated line count data. The Department shall review the level of the interim surcharge and adjust the level of the surcharge once actual data become available.

(6) Recalculation. The Department shall have the option to review the level of the surcharge at any time. At the end of each calendar year, the SETB or a telecommunications company may petition the Department for a review of the level of the surcharge. The party requesting that the surcharge be adjusted bears the burden to prove the need for such adjustment. If, upon investigation, the Department determines to adjust the surcharge, it will provide telecommunications companies with at least 120 days written notice of that adjustment.

(7) Discontinuance of Service. Telecommunications companies may not discontinue a subscriber's telephone service for failure to pay the monthly surcharge. Partial customer payments are to be first applied to outstanding local exchange carrier charges. Telecommunications companies are not required to institute collections procedures on unpaid surcharge amounts.

(8) Other Fees. Surcharge receivables are collected by the telecommunications companies for the sole purpose of supporting the programs identified in 220 CMR 16.00. All receivables shall pass directly through the telecommunications companies to the SETB. These receivables shall not be used to calculate utility assessments. Telecommunications companies shall only be obligated to remit the actual amount collected from subscribers to the SETB.

Currency of the Update: June 30, 2017

Mass. Regs. Code tit. 220, § 16.03, 220 MA ADC 16.03

End of Document

560 CMR 3.00: ESTABLISHING AN EQUITABLE AND REASONABLE METHOD FOR THE REMITTANCE AND COLLECTION OF A SURCHARGE ON PREPAID WIRELESS TELEPHONE SERVICE

Section

3.01: Purpose
3.02: Scope and Applicability
3.03: Definitions
3.04: Surcharge
3.05: Calculation and Remittance of the Surcharge
3.06: Reports and Recordkeeping
3.07: Information Disclosure Requirements
3.08: Enforcement
3.09: Severability

3.04: Surcharge

On or after July 1, 2009, there shall be imposed on each subscriber, end user, or customer of prepaid wireless telephone services whose communications services are capable of accessing and utilizing an enhanced 911 system, a surcharge for expenses associated with services provided under M.G.L. c. 6A, §§ 18A through 18J, and M.G.L. c. 166, §§ 14A and 15E, in the amount of .75 cents per month through June 30, 2015; $1.25 per month commencing July 1, 2015 through June 30, 2016; and $1.00 per month effective July 1, 2016.

The surcharge shall apply to any and all prepaid wireless telephone services or minutes, whether such services or minutes are included with the initial purchase or receipt of a wireless telephone or other device or are recorded on a wireless telephone or other device by the purchase of a calling card, through an internet transaction, by means of a wireless communication directly to the subscriber, end user, or customer's wireless telephone or other device, by means of services supported by a universal service fund, or by any other means.

The surcharge shall apply to all sales by a prepaid wireless telephone service provider at retail or wholesale and shall include the resale of services by a prepaid wireless telephone service provider who purchases telecommunications services from another telecommunications service provider and then resells the services, or uses the services as a component part of, or integrates the purchased services into a wireless telecommunications service.

The surcharge shall not be subject to sales or use tax.

The surcharge shall be subject to adjustment in accordance with M.G.L. c. 6A, § 18H.