

STATE OF NEW YORK

COURT OF CLAIMS

**COURTESY COPY**

CAROLE BULLARD, NORMA BOOTHE-  
DIXON, WANDA BEST-DEVEAUX,  
CORA WILLIAMS, on behalf of  
themselves and all others similarly  
situated,

Claimants,

**DECISION AND  
ORDER**

-v-

THE STATE OF NEW YORK,

Claim No. 103138  
Motion Nos. M-64624  
M-64630

Defendant.

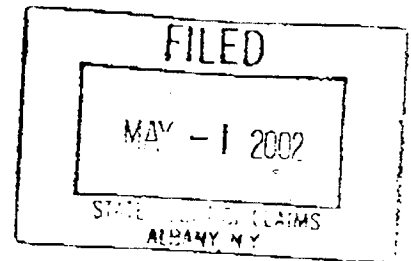
BEFORE:

HON. FRANCIS T. COLLINS  
Judge of the Court of Claims

APPEARANCES:

For Claimants:  
Levy Phillips & Konigsberg, LLP  
By: Brian T. Fitzpatrick  
The Center for Constitutional Rights  
By: Barbara Olshansky, Esquire

For Defendant:  
Honorable Eliot Spitzer, Attorney General  
By: Kathleen M. Resnick, Esquire  
Assistant Attorney General



Defendant has moved for summary judgment seeking an order dismissing the claim on the grounds that the claim fails to state a cause of action, the Court lacks personal and subject matter jurisdiction and that there is another action pending. The claimants have opposed the motion and

cross moved for an order pursuant to article 9 of the CPLR permitting the claim to be maintained as a class action.

For purposes of defendant's motion the Court considers the following facts as alleged by claimants to be true. The New York State Department of Correctional Services (DOCS) operates numerous correctional facilities throughout the State and since April 1, 1996 has permitted telephone contact between inmates and designated persons outside the facilities through a collect call only system established pursuant to an exclusive services contract with MCI Worldcom, Inc. and its subsidiary, MCI Telecommunication Corporation (collectively "Worldcom"). The agreement resulted from a bidding process in which DOCS requested bids from telephone companies in conformity with a request for proposal (RFP) dated October 30, 1995 (defendant's Exhibit A) which detailed the services the bidder was required to provide. The RFP provided, inter alia, for the payment to the defendant of a commission expressed as a minimum of 47% of monthly gross revenue. At the conclusion of the bidding process the contract was awarded to Worldcom which had bid a commission rate of 60% per call.

The RFP required that the system provide for an inmate designated list of persons who would accept collect calls, a blocking mechanism to prevent inmate calls to individuals who did not wish to receive such calls and the ability to detect and to disconnect conference calls and calls forwarded from the number initially called, to limit the length of calls, record multiple calls and to retain such recordings indefinitely. Inmates cannot receive calls from outside the facilities and neither the inmate nor the call recipient have a choice of carrier or calling options. Neither may shop for service or price

State and Federal agencies are or were responsible for approving all of the rates charged for inmate telephone services. The Federal Communications Commission (FCC) approved interstate rates (see 47 USC § 201, *et seq*) and the New York State Public Service Commission approved intrastate rates (Public Service Law § 92). The rates are referred to as tariffs and telephone companies cannot deviate from the rates filed with the PSC or FCC without filing and receiving approval for new rates. Although claimants might have sought rate relief from the PSC for the intrastate calls at issue here, it does not appear that claimants ever chose to do so.

Claimants are persons who reside within the State who have paid for collect phone calls received from one or more inmates housed in DOCS operated facilities. They allege that based upon the restrictive telephone services available to inmates and the high prices for the services provided, including a 60% commission paid on each inmate collect call, the exclusive service agreement entered into between DOCS and Worldcom unfairly benefits the State at claimants' expense. They allege that DOCS and Worldcom cooperated to charge rates far exceeding the costs of providing the telephone and related services and in doing so illegally imposed a tax upon claimants without Legislative approval in violation of the New York State Constitution Article III § 1 and Article XVI § 1. Claimants also allege that because of its high costs, including the commissions received by the State, the system violates their rights of free speech and equal protection under the laws as guaranteed by the New York State Constitution and that the collection of the 60% commission constitutes a deprivation of property without due process. They further allege that the exclusive services contract between DOCS and Worldcom intentionally and tortiously interferes with claimants' existing contractual rights with their individual telephone service providers. Claimants additionally assert that the State violated General Business Law § 349 by engaging in materially

misleading and/or deceptive practices including; failing to inform claimants it was receiving a 60% commission on each inmate collect call, falsely alleging that the single provider/collect only call system was necessary to meet security and penological concerns; profiting from operation of the system during the period March 30, 1996 through December 31, 1998<sup>1</sup> when a filed rate had not been approved by the PSC; and in failing to alert the public and claimants that a filed rate had not been approved by the PSC during the period from March 30, 1996 through December 31, 1998. Finally, claimants allege that by entering into the agreement conditioned upon the payment of a 60% commission on each inmate call the State and Worldcom entered into a continuing contract, agreement, arrangement, and combination creating a monopoly and unreasonably restraining trade in the furnishing of inmate telephone service in violation of General Business Law § 340 (the Donnelly Act). Claimants seek \$90 million in damages and an accounting of funds received by the State, the actual costs incurred in operating the system and of the uses of the revenue generated.

The defendant seeks summary judgment dismissing the claim on the grounds that the Court lacks jurisdiction of the claim, that the claim fails to state a cause of action and that there is another action pending. The alleged lack of jurisdiction is based partially upon claimants' alleged failure to commence this action sounding in tort within 90 days of its alleged accrual on April 1, 1996 as required by Court of Claims Act § 10 (3) and/or § 10 (3-b) and partially upon the preemption of judicial review of a filed telephone tariff pursuant to the filed rate and primary jurisdiction doctrines. The Court's attention is first focused on the issue of the claim's timeliness pursuant to section 10 of the Court of Claims Act

---

<sup>1</sup> Claimants' Exhibit 19 attached to the affidavit of Moshe Maimon demonstrates that an intrastate revised tariff was approved as recommended and so ordered on December 16, 1998, issued and effective December 17, 1998, not December 31, 1998 as alleged in the claim (see, paragraph 88).

In its answer the State set forth two defenses relative to the alleged untimeliness of the claim. The first alleges that the claim is untimely in its entirety while the second asserts that that portion of the claim alleging wrongdoing on the part of the State occurring prior to June 29, 2000 (90 days preceding filing and service of the claim) is untimely.

The Court of Appeals has consistently found that "[b]ecause suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (Dreger v New York State Thruway Auth., 81 NY2d 721, 724; Lichtenstein v State of New York, 93 NY2d 911). As a result it is well established that the time limitations contained in section 10 of the Court of Claims Act are jurisdictional in nature and dismissal is appropriate for failure to comply therewith (Baker v State of New York, 186 AD2d 329). It is equally clear that "[a] claim accrues for purposes of the Court of Claims Act when damages are reasonably ascertainable" (Flushing Natl. Bank v State of New York, 210 AD2d 294; Inter-Power of N.Y. v State of New York, 230 AD2d 405). In the instant case, the claim alleges that the exclusive services contract between Worldcom, Inc. and the State was entered into on or about April 1, 1996 and there is no allegation or argument made that the terms of the agreement have been changed or modified since that date. As applied to the defendant, it was the date of entering into the contract governing the cost and terms of service which gives rise to the claimants' causes of action. It was at that point or shortly thereafter when the charges were actually incurred that the claimants' damages were reasonably ascertainable. It is noted in this regard the claim asserts that since April 1, 1996 each of the named claimants has received collect calls from inmates billed in accordance with the agreement between Worldcom and the defendant. Certainly, at the latest, damages were ascertainable on and after the Public Service Commission's approval of

the Maximum Security Rate Plan on December 16, 1998 (effective December 17, 1998). Having failed to file and serve the claim within 90 days of its accrual as required by Court of Claims Act § 10 (3) and 10 (3-b) (or within six months of accrual relative to any claim subject to the residual time limitation contained in section 10 (4)) the claim which was filed and served on September 27, 2000 should be dismissed.

Claimants attempt to argue that the "continuing violation doctrine" should be applied to save that portion of the claim which accrued within 90 days or six months preceding the filing and service of the claim. "Claimants maintain that this doctrine should be invoked here because they have continued to suffer damages from the date of the State's wrongful acts. This argument does not support the application of the doctrine since it may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct [citations omitted]" (Selkirk v State of New York, 249 AD2d 818, 819). As the damages allegedly suffered as a result of the defendant's actions arise from the assertedly unlawful and unconstitutional contract entered into on or about April 1, 1996 and not from any subsequent unlawful or unconstitutional act on the part of the State the continuing violation doctrine is inapplicable and will not act to render timely any portion of the claim (*see*, Commack Self-Serv. Kosher Meats v State of New York, 270 AD2d 687). Were the Court to reach a contrary conclusion the State would in this case be exposed to potentially unlimited liability in terms of both time and amount. Such a result would be inconsistent with the State's limited waiver of sovereign immunity which is expressly conditioned upon compliance with the time limitations contained within Court of Claims Act § 10 (Alston v State of New York, 97 NY2d 159).

Claimants' argument that dismissal is inappropriate in light of the Court's statutorily conferred discretion to grant late claim relief pursuant to Court of Claims Act § 10 (6) is also

unavailing. Absent service and filing of a notice of motion or order to show cause seeking late claim relief, the Court is powerless to grant claimants' request for such relief (*see*, Court of Claims Act § 10 (6), Sciarabba v State of New York, 152 AD2d 229). A request for late claim relief included in one's opposition to a motion for summary judgment, even if the § 10 (6) statutory factors are addressed, is insufficient to place the application before the Court (CPLR 2215).

Equally unpersuasive is claimants' argument that the State has had notice of the claim since the date of commencement of the companion action in federal district court. It is settled, as noted above, that the time requirements of section 10 of the Court of Claims Act are an integral part of the State's waiver of the immunity afforded a sovereign at common law (Bergman v State of New York, 281 AD2d 731) and cannot be satisfied by the commencement of an action in another court.

Even were the Court to determine that some part of the claim was timely, dismissal would still be appropriate for the reasons that follow. As set forth above, claimants allege that the State's action in implementing its single provider/collect only call system constitutes an illegal tax and violates their rights to free speech and association, equal protection of the law and substantive due process. They seek money damages for such alleged violations on the basis of the Court of Appeals' recognition of a state constitutional tort in Brown v State of New York, 89 NY2d 172.

In Brown, *supra* the claimants were non-white males who were stopped and examined by police officers investigating an assault upon an elderly woman in the City of Oneonta. Claimants sued in this Court for money damages alleging, *inter alia*, causes of action in constitutional tort for violation of their right to freedom from unreasonable search and seizure and to equal protection of the law. The Court of Appeals determined that the Court of Claims has jurisdiction to entertain constitutional tort claims which it defined as "any action for damages for violation of a constitutional

right against a government or individual defendants" (Brown v State of New York, 89 NY2d 172, 177). Although defined broadly, the holding in Brown was a narrow one limited to the recognition of "a cause of action to recover damages may be asserted against the State for violation of the Equal Protection and Search and Seizure clauses of the State Constitution" (Brown v State of New York, *supra* at 188).

Central to the finding of a viable constitutional tort cause of action and dispositive in this matter is the fact that in Brown implying a damage remedy was necessary to ensure the full realization of the claimants' constitutional rights. Because the Brown claimants were not charged with a crime and the alleged constitutional violations were not ongoing exclusion of evidence, injunctive or declaratory relief were unavailable to ensure the effectiveness of the subject constitutional protections. Consequently the Court found that for those claimants "it is damages or nothing" (Brown v State of New York, 89 NY2d at 192; *citing* Bivens v Six Unknown Fed. Narcotics Agents, 403 US 388).

The narrow scope of the holding in Brown and the importance of the unavailability of alternative remedies in stating a cognizable constitutional tort claim was illustrated in Martinez v City of Schenectady, 97 NY2d 78. In that case the plaintiff sought to suppress evidence obtained pursuant to an invalid search warrant. County Court's denial of a motion to suppress was ultimately reversed by the Court of Appeals and the indictment dismissed. Thereafter, the plaintiff brought suit against the City and certain police officers asserting malicious prosecution, false imprisonment and constitutional tort causes of action. The Court of Appeals in that case at page 83-84 found, insofar as relevant here, that a cognizable constitutional tort claim had not been asserted upon the following analysis.

The remedy recognized in Brown addresses two interests: the private interest that citizens harmed by constitutional violations have an avenue of redress, and the public interest that future violations be deterred. In Brown itself, neither declaratory nor injunctive relief was available to the plaintiffs, nor - without a prosecution - could there be suppression of illegally obtained evidence. For those plaintiffs it was damages or nothing. We made clear, however, that the tort remedy is not boundless. Claimants must establish grounds that entitle them to a damages remedy, in addition to proving that their constitutional rights have been violated.

Recognition of a constitutional tort claim here is neither necessary to effectuate the purposes of the State constitutional protections plaintiff invokes, nor appropriate to ensure full realization of her rights. Without question, the cost to society of exclusion of evidence and consequent reversal of plaintiff's conviction notwithstanding proof of guilt beyond a reasonable doubt will serve the public interest of promoting greater care in seeking search warrants. Unlike in Brown, the deterrence objective can be satisfied here by exclusion of the constitutionally challenged evidence.

Jurisdiction of claims asserting a violation of constitutional rights resulting from actions taken by a public regulatory body such as the Public Service Commission is properly vested in Supreme Court in the form of an article 78 proceeding (Cahill, Matter of, v Public Serv. Commn., 113 AD2d 603, *affd* 69 NY2d 265). Standing to seek review of an administrative decision by way of an article 78 proceeding is available to a private party which can meet the following criteria: "(1) the interest asserted must be arguably within the zone of interest to be protected by the statutory or constitutional provisions sought to be enforced; (2) the administrative decision for which review is sought must be shown to have a harmful effect upon the party asserting standing; and (3) there must be no clear legislative intent negating review" (City of New York, Matter of, v City Civ. Serv. Commn., 60 NY2d 436, 442-443).

Exhaustion of administrative remedies is inapplicable to the bringing of an article 78 proceeding asserting a constitutional challenge to public utility rates approved by the PSC (*see, Cahill, Matter of, v Public Serv. Commn., supra*, at 606)

It seems clear that the claimants herein have had available to them a distinct and effective statutory remedy in the form of an article 78 proceeding in Supreme Court. In fact, as the claimants assert a continuing violation of their constitutional rights that avenue may yet remain available to them and thus the Court cannot find that a damage remedy is necessary to ensure the effectiveness of the subject constitutional protections (Cahill, Matter of, v Public Serv. Commn., *supra*, at 606). Unlike the claimants in Brown v State of New York, the instant claimants are not facing a circumstance where their constitutional rights would be left unaddressed but for the availability of money damages. The availability of an article 78 proceeding or, alternatively, declaratory or injunctive relief, provide an adequate alternative remedy to vindicate their rights under the State Constitution and it is therefore unnecessary and inappropriate to imply a constitutional tort cause of action for money damages under the circumstances presented (*see* Remley v State of New York, 174 Misc 2d 523).

With regard to the jurisdiction of this Court relative to the remaining causes of action, the defendant argues that the essence of the claimants' action is an attack upon the rates approved by the PSC cognizable only in an article 78 proceeding in Supreme Court. "Jurisdiction reposes in the Court of Claims where 'the essential nature of the claim [against the State] is to recover money', but not where 'monetary relief is incidental to the primary claim'" (Harvard Fin. Servs. v State of New York, 266 AD2d 685 quoting Matter of Gross v Perales, 72 NY2d 231). The jurisdictional issue is not dependent upon the manner in which a claimant characterizes its claim in the pleadings but, rather, on the actual issues presented (Sidoti v State of New York, 115 AD2d 202, 203). As a general matter, however, it may be stated that the Court of Claims is limited in its jurisdiction to awarding money damages against the State for causes of action sounding in appropriation, contract

or tort (Court of Claims Act § 9 (2)). Although the claimants argue on the motion that the claim centers on the single provider/collect only call system it seems clear, especially in light of the actual relief sought, that the claimants' primary contention is that they have suffered harm resulting from and equivalent to the 60% commission paid to the State.

Public Service Law § 92 (2) (d) applicable to telephone corporations provides that:

(d) No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect and regularly and uniformly extended to all persons under like circumstances for the like or substantially similar service.

The central source of the claimants' alleged injury is that the rate they are charged for receiving inmate collect calls is excessive, a rate authorized by the regulatory body assigned the responsibility of investigating and approving rates charged for intrastate telephone services (Porr v NYNEX Corp., 230 AD2d 564, *appeal denied* 91 NY2d 807).

It appears to the Court that the monetary relief sought by the claimants herein is incidental in that money damages would be simply a consequence of the essentially equitable function of reviewing and annulling a regulatory determination as to the appropriateness of the rates charged

"Fundamentally, although 'in determining claims for money damages against the State, the Court of Claims may apply equitable considerations and perhaps, to some extent, may grant some sort of incidental equitable relief (Psaty v Durvea, 306 NY 413, 417), that court's primary jurisdiction is limited to actions seeking money damages against the State in appropriation, contract or tort cases (*see*, Court of Claims Act § 9 [2]; Psaty v Durvea, *supra*, at 416; Sidoti v State of New York, 115 AD2d 202, 203). As such, the Court of Claims has 'no jurisdiction to grant equitable relief \* \* \* with the

