

No. 1-11-3350

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SAMUEL CAHNMAN, for himself and on behalf of all persons similarly situated,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellant, and)	
)	
WAYNE UNDERWOOD,)	No. 10 CH 32892
)	
Proposed Intervener,)	Honorable
)	Stuart E. Palmer,
v.)	Judge Presiding.
)	
SBC ILLINOIS d/b/a AT&T ILLINOIS, ILLINOIS BELL,)	
)	
Defendant-Appellee.)	

JUSTICE PIERCE delivered the judgment of the court.
Justice Sterba and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The Illinois Commerce Commission has exclusive subject matter jurisdiction where a plaintiff alleges an overcharge by a public utility and when the action constitutes a claim for reparations.

¶ 2 Plaintiff, Samuel Cahnman, appeals an order of the circuit court dismissing his putative class action complaint pursuant to section 2-619 of the Civil Code of Procedure (the Code) (735 ILCS 5/2-619 (West 2010)), on the basis that the Illinois Commerce Commission had exclusive

jurisdiction over the claims. In a separate appeal before this court (*In re Illinois Bell Telephone Link-Up II and Late Charge Litigation*, No. 1-11-3349) (the Morrison Litigation), class counsel filed a motion to consolidate these two appeals. This court denied the motion to consolidate on June 21, 2012, instead designating the cases as related. A motion to reconsider the ruling was denied on July 3, 2012. After oral argument this court permitted supplemental briefing on the issue of whether disgorgement is an appropriate remedy under the facts of this case.

¶ 3

BACKGROUND

¶ 4 Plaintiff extensively briefed the history of the 1991 Morrison Litigation. Our decision in the related case to this appeal recited the sufficient factual and legal background about these related cases that need not be repeated in this order. *In re Illinois Bell Telephone Link-Up II and Late Charge Litigation*, 2013 IL App (1st) 113349, ¶¶ 1-15. Plaintiff filed a class action complaint on July 30, 2010 against defendant SBC Illinois d/b/a AT&T Illinois, d/b/a Illinois Bell ("AT&T"). Plaintiff alleged that defendant violated section 735.160(a) of title 83 of the Illinois Administrative Code (83 Ill. Adm. Code 735.160(a)(d), amended at 8 Ill. Reg. 5161 (eff. Apr. 13, 1984)) in omitting a dated postmark on the exterior of its billing envelopes sent to customers and subsequently charging late fees on the bills it considered past due. This omission, plaintiff alleged, was a change in AT&T's previous policy of printing a postmark on the exterior of the billing envelope. Plaintiff alleged AT&T made this change without seeking a waiver from the "postmark" requirement. Plaintiff alleged that by placing the dated postmark on the indicia position of the envelope, an implicit and automatic audit would occur by the United States Postal Service as it regularly rejects any mail received more than 24 hours outside of the dated

postmark. Plaintiff alleged that because AT&T sent bills to its customers without the required postmark, AT&T violated the requirements of the regulation and was not permitted to charge late fees on these bills. Plaintiff refers to the 1991 Morrison Litigation in citing AT&T's history of failing to properly date its billing envelopes and bills.

¶ 5 Plaintiff alleged AT&T updated its billing procedures in July of 2002 to place the mailing date on the phone bill, visible through the window of the envelope, rather than on the exterior of the envelope. Plaintiff alleged he has been a customer of the defendant since July 1, 2002, receives his bills by mail, has paid at least one late charge and proposed to be named class representative. Plaintiff asserts AT&T should be required to forfeit all late charges, totaling over \$100 million dollars, assessed from July of 2002 to March of 2010 due to the lack of an official postmark on the envelope.

¶ 6 In addition to the above-referenced prefatory allegations, plaintiff alleged in his claim for declaratory relief in count I, that AT&T intentionally violated the regulation. In count II, Cahnman incorporated the prior allegations and asserted a claim for unjust enrichment alleging AT&T violated a public duty to abide by the provision of the Illinois Administrative Code as reflected in 83 Ill. Adm. Code 735.160(a)(d), amended at 8 Ill. Reg. 5161 (eff. Apr. 13, 1984). Plaintiff sought an order in the circuit court that AT&T disgorge all late fees obtained during the time period of July 1, 2002, through February 28, 2010, and award additional restitution and/or damages to the class.

¶ 7 In response to the complaint, AT&T filed a motion to dismiss pursuant to section 2-619 of the Code asserting three arguments. First, AT&T argued that the 1994 settlement agreement in

1-11-3350

the Morrison Litigation bars plaintiff's complaint because he was a member of the class and, under the terms of the settlement, he was barred from asserting this claim. Second, AT&T argued that the claim for unjust enrichment was inapplicable because the tariff governs AT&T's practices and an adequate remedy at law exists. Third, AT&T argued that jurisdiction over plaintiff's claims rest exclusively with the Illinois Commerce Commission (ICC or Commission) because the claims involve issues of compliance with an ICC regulation.

¶ 8 In response to the motion to dismiss, plaintiff argued that the circuit court had jurisdiction over the claims pursuant to section 5-201 of Public Utilities Act and requested leave to file an amended complaint to specifically allege a third count for violation of section 735.160 of title 83 of the Administrative Code pursuant to section 5-201 of the Civil Code of Procedure. 220 ILCS 5/5-201 (West 2000).

¶ 9 On September 22, 2011, the circuit court granted the motion to dismiss as to both counts and denied leave to file an amended complaint. The circuit court held it lacked subject matter jurisdiction over the claim in count I; and that count II could be pursued administratively before the ICC. The circuit court did not rule on whether Cahnman was barred by the settlement agreement from bringing the claims or whether the unjust enrichment claim was inapplicable because AT&T's tariff governed its conduct. Subsequently, the Court denied plaintiff's request to file a first amended complaint. Plaintiff filed a motion to reconsider, which was denied on November 3, 2011.

¶ 10 This appeal was timely filed on November 23, 2011. Plaintiff appeals the circuit court's dismissal pursuant to section 2-619 of the Code.

¶ 11

ANALYSIS

¶ 12 Plaintiff argues the circuit court erred in dismissing his complaint on the basis that the ICC had exclusive jurisdiction over the claims. Defendant argues in response that the question of a refund or reparation for late payment charges can only be brought before the ICC. Defendant argues that the record supports an alternative ground for dismissal of the complaint because the claims are part of AT&T's filed tariff and the ICC has exclusive jurisdiction over issues concerning a public utility's tariff.

¶ 13 Section 2-619(a)(1) of the Code allows for involuntary dismissal of an action where "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2-619(a)(1) (West 2010). We review *de novo* a court's grant of a motion to dismiss for lack of subject matter jurisdiction. *Id.*

¶ 14 Illinois courts have original jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, § 9. AT&T is a public utility governed by the Illinois Public Utilities Act. 220 ILCS 5/3-105(a) (West 2000) (defining public utility); 220 ILCS 5/13-101 (West 2000).

¶ 15 Claims against a public utility may be brought before either the ICC or in the circuit court pursuant to the Illinois Public Utilities Act (the Act). 220 ILCS 5/9-252 (West 2000); 220 ILCS 5/5-201 (West 2000); *Sheffler v. Commonwealth Edison Co.*, 299 Ill. App. 3d 51, 62 (2010). Section 9-252 of the Act confers exclusive and primary jurisdiction with the ICC over claims brought by customers regarding any rate or other charge by a public utility that is excessive or discriminatory. It further provides that the Commission may order reparations to the claimant for such conduct. *Id.* The Act supersedes any common law liability of a public utility regarding

illegal rates and unreasonable discrimination. *Klopp v. Commonwealth Edison Co.*, 54 Ill. App. 3d 671, 674 (1977). The Act also precludes a common law right to reparations. *Terminal R.R. Ass'n v. Public Utilities Comm'n.*, 304 Ill. 312, 317 (1922); *West v. Batavia*, 155 Ill. App. 3d 925, 928 (1987)(decisions under Illinois Public Utilities Act § 72, now 220 ILCS 5/9-252, *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810, 813 (1988)).

¶ 16 Section 5-201 of the Act vests jurisdiction in the circuit court where complainant seeks damages for a loss, actual damages or injury from a public utility's violation of an act, rule or regulation of the Commission. 220 ILCS 5/5-201 (West 2000). Attorney's fees and damages for purposes of making an example and as a punishment may also be assessed under section 5-201. *Id.* Generally, a claim is for reparations where the utility assessed an excessive charge or overcharge for a service. Where the claim involves conduct that otherwise wronged a claimant, the damages are considered other damages, not reparations, and a civil remedy then exists. *City of Chicago v. Commonwealth Edison Co.*, 159 Ill. App. 3d 1076, 1080 (1987); *Thomas v. Peoples Gas Light and Coke Co.*, 2011 IL App (1st) 102868, ¶ 15.

¶ 17 In determining whether the action brought is within the exclusive jurisdiction of the Commission or whether it can be brought in the circuit court, the nature of the relief sought is the focus rather than the claim or type of damages sought. *Thomas* 2011 IL App (1st) 102868, ¶ 16.

¶ 18 The Commission has supervisory authority over a public utility to ensure compliance with the tariffs and regulations. 220 ILCS 5/5-101 *et seq.* (West 2000). Rates and charges assessed by a public utility are subject to the tariffs approved by the Commission and the regulations set forth by the Commission. *Id.* The Commission has exclusive jurisdiction over claims involving or

relating to an excessive or unjust "rate." *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 990-991 (1993). A rate is defined under the Act, as "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility *** or tariff thereof, and any rule regulation, charge practice or contract relating thereto." 220 ILCS 5/3-116 (West 2000).

¶ 19 Plaintiff's complaint requested a refund of the late fees and an award for restitution and/or other damages for AT&T's violation of the ICC regulation that required the placement of a postmark on the exterior of the billing envelopes and then assessing late fees for the bills AT&T considered past due. According to AT&T's filed tariff, a late payment fee was authorized if an amount remained unpaid after the due date shown on the bill. AT&T Tariff (excerpts), Ill. Comm. Comm'n. No. 20 (term sheets issued 1985-2008). The Act vests the Commission with supervising and regulating public utilities. 220 ILCS 5/5-101 *et seq.* (West 2006). Therefore, AT&T, as a public utility, must adhere to the Commission's regulations in acting according to their filed tariff. *Id.*

¶ 20 Section 735.160(a) was effect in 2002. It reads in pertinent part:

"a) Due Date.

The due date printed on the monthly bill may not be less than twenty-one (21) days after the date of the postmark on the bill, if mailed, or the date of delivery as shown on the bill if delivered by other means.

* * *

d) Late Payment Charges.

The company may assess a late payment charge in accordance with tariffs

approved by the Commission against the amount which is considered past due under this Section." 83 Ill. Adm. Code 735.160(a)(d), amended at 8 Ill. Reg. 5161 (eff. Apr. 13, 1984).

On appeal, plaintiff asserts that he is not attacking the legitimacy of the tariff or the rate charged in assessing a late fee. Plaintiff argues the late fees were unlawfully assessed since compliance with the regulation is a necessary precondition to the assessment of a late payment charge: without the postmark, the bills were not past due and any late payment fees were unlawfully assessed. Plaintiff relies on this court's decision in *Thomas v. Peoples Gas Light and Coke Co.*, 2011 IL App (1st) 102868, to support his position.

¶ 21 In *Thomas*, the plaintiff alleged defendant Peoples Gas Light and Coke Co. ("Peoples Gas") unlawfully attempted to collect a debt for service fees previously discharged in bankruptcy. *Id.*, ¶ 3. After several winters and many attempts at reconnecting services, plaintiff filed a class action complaint asserting several common law causes of action pursuant to section 5-201 of the Public Utilities Act. *Id.*, ¶¶ 4-7; 220 ILCS 5/5-201 (West 2000). The circuit court dismissed the complaint finding that her claims fell within the exclusive jurisdiction of the Commission. *Id.* at 10. This court reversed finding the claims were not related to "the utility's infrastructure, adequacy of service, or rate structure." *Id.*, ¶ 22. We found that the plaintiff's claims alleged an unlawful charge based on other conduct by Peoples Gas in attempting to unlawfully collect a debt, as opposed to an overcharge, and, therefore, jurisdiction was proper in the circuit court. *Id.*

¶ 22 Here, defendant argues that the complaint is seeking a mass refund, or, in other words, reparations. Defendant distinguishes the ruling in *Thomas* by arguing that the conduct alleged in

Thomas occurred after the charges were assessed and involved only the collection of those fees. In addition, defendant argues that even though plaintiff is attempting to characterize the assessment of the late fees as unlawful, plaintiff is in fact attacking the assessment of a rate (charge) which is listed in its filed tariff and, therefore, the claim involves subject matter which lies within the exclusive jurisdiction of the ICC.

¶ 23 Plaintiff's claim is distinguishable from *Thomas* in that *Thomas*'s claims involved purely legal matters regarding the public utility's conduct outside of the purview of the Commissions' regulations and oversight. *Thomas*'s debts were discharged in bankruptcy, yet collection was still sought by the defendant. *Thomas*, 2011 IL App (1st) 102868, ¶ 22. The issue in *Thomas* was not the assessment of the charges in the first instance: the issue was the collection of those fees through discontinuation of services and debt collection practices, even though such conduct was barred by a prior bankruptcy proceeding. In the case *sub judice*, the only basis for plaintiff's claims is in the assessment of the charges in the first instance.

¶ 24 A secondary basis for affirming the circuit court's dismissal of the complaint is that the damages requested, refund of collected late fees and restitution, constitute a claim for reparations which can only be brought before the ICC. Jurisdiction rests exclusively with the Commission in an action for refunds or an action for overcharges by a public utility. *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810, 813-814 (1998); *Klopp v. Commonwealth Edison Co.*, 54 Ill. App. 3d 671, 674 (1977). When it is evident that a remedy sought is a refund for charges paid to a public utility, the claim alleged is for reparations under section 252 of the Public Utilities Act. 220 ILCS 5/9-252 (West 2000); *Village of Evergreen Park*, at 817.

¶ 25 Plaintiff alleges no injury or damages other than the improper assessment of the late fee charges. Plaintiff's complaint contests AT&T's assessment of these charges and fails to plead the basis for a remedy that is not preempted by the Act. Plaintiff's claims of a violation of the regulation dealing with placing a postmark on the envelope and requests a refund of the charges assessed. In essence, this is a claim for reparations and, therefore, is a matter within the exclusive jurisdiction of the ICC.

¶ 26 Lastly, plaintiff in the circuit court moved to file a first amended class action complaint to add a new plaintiff to address whether Cahnman was a proper party plaintiff. Because we find that the claim alleged constitutes a claim for reparations which is exclusively within the subject matter jurisdiction of the ICC, we find no further amendment to the complaint would cure this deficiency. As a result, leave to file an amended complaint was property denied by the trial court.

¶ 27 **CONCLUSION**

¶ 28 For the foregoing reasons, we affirm the circuit court's order finding that it lacked subject matter jurisdiction to adjudicate the claim.

¶ 29 Affirmed.