

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

TracFone Wireless, Inc.)
)
Verified Petition for Declaratory Ruling) Docket No. 07-0023
finding that Section 17 of the)
Wireless Emergency Telephone Safety Act)
50, ILCS 751/17, does not apply to require)
TracFone Wireless, Inc. to remit)
monthly wireless carrier surcharges)
to the Illinois Commerce Commission)

**RESPONSE TO
STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
MOTION FOR SUMMARY JUDGMENT**

**I.
Introduction**

TracFone Wireless, Inc. (“TracFone”) seeks a declaratory ruling that the Wireless Emergency Telephone Safety Act (“WETSA” or the “Act”) did not require TracFone to remit monthly wireless carrier surcharges to the State of Illinois from the Act’s effective date of December 22, 1999 until January 1, 2004, when the Illinois General Assembly extended WETSA to prepaid wireless telephone service. The Illinois Commerce Commission (the “Commission”) enforces WETSA. TracFone and the Staff of the Commission (the “Staff”) disagree on TracFone’s rights under the Act. Thus, TracFone has asked the Commission to declare its rights under WETSA, which is precisely the function of declaratory relief.

On March 16, 2004, TracFone filed its Motion for Summary Judgment in the instant proceeding on the single declaratory claim raised in its Verified Petition for Declaratory Ruling. That claim turns on the interpretation and application of WETSA to TracFone during the relevant

time period. As Staff acknowledges: “[D]eclaratory judgment is an appropriate method to resolve a controversy related to statutory construction or interpretation.” (Staff S.J. Mot., ¶ 19).

On the same date, Staff also sought summary judgment. Specifically, Staff sought summary judgment as to the four affirmative defenses listed in Staff’s unverified Answer (Ans., pp. 5-7). Not content with these grounds, Staff also attacked the facial sufficiency of TracFone’s claim (notwithstanding that Staff already had answered without objection). As detailed below, the Commission should deny Staff’s motion on all of these grounds, which either fail as a matter of law or are the subject of factual dispute between the parties.

First, Staff argues that declaratory relief is unavailable because TracFone’s claim “fails to satisfy nearly every one of the requisites of a declaratory action.” (Staff S.J. Mot., ¶¶ 13-21). Staff’s argument, of course, is not an affirmative defense at all. It merely attacks the viability of TracFone’s claim. Nonetheless, TracFone responds to Staff’s argument here, assuming the Commission will consider it in connection with TracFone’s request for summary judgment. In that context, Staff is simply wrong. A declaratory ruling is the proper mechanism to articulate and fix TracFone’s legal rights under WETSA.

Second, Staff argues that the Commission cannot provide declaratory relief because the Department of Central Management Services (“DCMS”)—which enforced WETSA from its enactment until the Commission assumed that responsibility in July 2004—has no declaratory judgment procedure. (Staff S.J. Mot., ¶¶ 22-25). Because DCMS has not promulgated a procedural rule for summary judgment, Staff concludes that the Commission cannot follow its own Rules of Practice. This argument presupposes that by amending WETSA the Illinois General Assembly intended to limit the Commission’s application of its own procedural rules

while enforcing the Act. TracFone is unaware of any authority supporting this novel theory, and Staff offers none.

Third, Staff asserts that TracFone's Petition is time barred under Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205. (Staff S.J. Mot., ¶¶ 26-29). Staff asserts that the five-year limitations period under Section 13-205 bars any claim arising prior to January 5, 2002. TracFone's claim, however, pertains to the entire period from December 22, 1999 through December 31, 2003. Thus, Staff only is seeking partial summary judgment. More pointedly, Staff is incorrect about the start date for purposes of any limitations period. It is undisputed that TracFone first discovered that it mistakenly had processed and made payments to the State of Illinois under WETSA in late 2003. (TracFone S.J. Mot., ¶ 17). TracFone promptly sought relief, initially from DCMS and later from the Commission, albeit without success in either case. Thus, the five-year limitations period either had not run or was equitably tolled when TracFone filed the instant action.

Fourth, Staff asserts that the Commission's grant of the declaratory relief sought by TracFone would result in TracFone's unjust enrichment. (Staff S.J. Mot., ¶¶ 30-33). This conclusory argument does no more than take issue with the General Assembly's determination to exclude "prepaid wireless telephone service" from WETSA as originally enacted. (*Compare* P.A. 91-660, eff. December 22, 1999 and P.A. 93-507, eff. Jan. 1, 2004). This equitable defense does not apply to usurp and retroactively amend statutory law.

Finally, Staff argues that TracFone cannot obtain the declaratory relief sought, because TracFone remitted the underlying payments to the State of Illinois "voluntarily." This factual matter, however, is subject to dispute. TracFone did not *voluntarily* make the payments to the State of Illinois under WETSA that are pertinent to TracFone's petition. As stated in its verified

motion, TracFone processed and made those payments *in error*. (TracFone S.J. Mot., ¶¶ 15-17). This fact-based defense—which was not identified for briefing on summary judgment at the January 30, 2007 status hearing or in the parties agreed Statement of Certain Undisputed Facts on Cross-Motions for Summary Judgment filed on March 12, 2007—merits no further discussion here.

II. **Argument**

A. The Commission Can Issue The Declaratory Relief Sought (Staff S.J. Mot., § IV)

1. A Declaratory Ruling Is Proper Here (Staff S.J. Mot., § IV.A)

A declaratory judgment requires: “(1) a plaintiff with a tangible, legal interest; (2) a defendant with an opposing interest; and (3) an actual controversy between the parties concerning such interests.” *N. Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 273, 818 N.E.2d 389, 394 (2d Dist. 2004) (citing 735 ILCS 5/2-701). As Staff agrees, a declaratory action is appropriate for determining controversies relating to the construction and interpretation of statutes. *Emerald Casino, Inc. v. Ill. Gaming Bd.*, 346 Ill. App. 3d 18, 26, 803 N.E.2d 914, 921 (1st Dist. 2004); *Lake County State’s Atty. v. Ill. Human Rights Comm’n*, 200 Ill. App. 3d 151, 155, 558 N.E.2d 668, 671 (2d Dist. 1990). (Staff S.J. Mot., ¶ 19, citing *Bd. of Trs. of Addison Fire Prot. Dist. No. 1 Pension Fund v. Stamp*, 241 Ill. App. 3d 873, 881, 608 N.E.2d 1274, 1281 (2d Dist. 1993)).

TracFone’s action satisfies all the requirements for declaratory relief. TracFone has an interest in obtaining a determination that WETSA did not apply to require TracFone to remit the wireless 9-1-1 surcharge to the State of Illinois for the December 22, 1999 through December 31, 2003 time period. Staff, in turn, opposes TracFone’s reading of the Act and any further relief that may be necessary or proper based on a declaration in TracFone’s favor. Thus, an actual

controversy exists regarding TracFone's statutory rights, which the Commission may resolve as a matter of law upon summary judgment. *N. Trust Co.*, 353 Ill. App. 3d at 273, 818 N.E.2d at 394 (“For an actual controversy to exist, the case must present a concrete dispute admitting of an immediate and definitive determination of the parties’ rights, the resolution of which will aid in the termination of the controversy or some part thereof.”).

Contrary to Staff's assertions, TracFone is not barred from obtaining declaratory relief concerning its rights under WETSA simply because the disputed payments took place in the past. *See, e.g., Lake County State's Attorney*, 200 Ill. App. 3d at 158, 558 N.E.2d at 673 (trial court had subject matter jurisdiction to consider complaint for declaratory judgment where State's Attorney requested ruling that it did not discriminate, suspend and terminate former employee) (cited in TracFone's S.J. Mot., at p. 9). Staff's own cases demonstrate this point. *See Lampe v. Ascher*, 59 Ill. App. 3d 755, 758, 376 N.E. 2d 74, 76 (4th Dist. 1978) (even though detainees filed declaratory judgment action against police based on past conduct, dispute was “actual controversy” that could be resolved by declaratory ruling). *Commw. Edison Co. v. Cmty. Unit Sch. Dist. No. 200 et al.*, 44 Ill. App. 3d 665, 670, 358 N.E.2d 688, 692 (2d Dist. 1976) (school districts had standing to seek declaratory judgment regarding amounts owed under tax ordinance after the school districts refused to pay).

Staff's misapplication of the case law regarding declaratory judgment actions is equally unavailing. Staff asserts that “Illinois courts have repeatedly held that declaratory judgment is *not* available to adjudicate non-liability for past acts.” (*See* Staff S.J. Mot., ¶ 18) (original emphasis). Here, however, TracFone is *not* seeking a declaration of non-liability for any past conduct. As the Illinois Supreme Court has explained: “Normally, a declaration of nonliability for past conduct is not a function of the declaratory judgment statute...for in those cases a

potential defendant's institution of a declaratory action deprives the potential plaintiff of his right to determine whether he will file, and, if so, when and where." *Howlett v. Scott*, 69 Ill. 2d 135, 143, 370 N.E.2d 1036, 1039 (1977). The parties' posture in this case is completely different and inapplicable to the *Howlett* decision.¹ TracFone is not a potential defendant racing to the courthouse to shield itself from liability; it is a jurisdictional entity pursuing a proper administrative remedy.

Staff also baldly asserts that *all* declaratory judgment cases involving statutory construction address the version of a statute in effect at the time the plaintiff filed its action. (Staff S.J. Mot., ¶ 19). This assertion is an incorrect statement of the law. While the cases that Staff cites involve such a scenario, merely listing a number of cases does not make it an exclusive rule. Even a cursory review of the decisional law proves otherwise. *See, e.g., Hoffman Estates Prof'l Firefighters Ass'n v. Vill. of Hoffman Estates*, 305 Ill. App. 3d 242, 245, 711 N.E.2d 1109, 1111 (1st Dist. 1999) (reversing declaratory ruling finding that defendant municipality had violated tax regulation prior to 1990 amendment); *Czerkies v. AG Acceptance Corp.*, 354 Ill. App. 3d 205, 206, 820 N.E.2d 1133, 1134 (3d Dist. 2004) (affirming declaratory judgment finding that landlord's lien had priority under lien statute both as applied prior to 2002 amendment and afterward); *Coronado v. Fireman's Fund Ins. Co.*, 131 Ill. App. 3d 450, 451,

¹ Staff's other cases cited for this proposition are equally inapposite. *See Pincham v. Cunningham*, 285 Ill. App. 3d 780, 781-83, 674 N.E.2d 898, 900-01 (1st Dist. 1996) (where Judicial Inquiry Board filed charges with Illinois Courts Commission against plaintiff in separate action for violating Code of Judicial Conduct Rules but later dismissed charges because plaintiff stepped down from bench, plaintiff could not in turn file declaratory judgment ruling he had not violate Conduct Rules in fear that Board would reinstate complaint against him); *Eyman v. McDonough Dist. Hosp.*, 245 Ill. App. 3d 394, 395-96, 613 N.E.2d 819, 820-21 (3d Dist. 1993) (after breaching recruitment contract, plaintiff sought declaration that she properly terminated agreement and could keep monies already paid to her); *Delano Law Offices v. Choi*, 154 Ill. App. 3d 172, 173, 506 N.E.2d 723, 724 (4th Dist. 1987) (plaintiffs essentially sought legal advice on whether they could properly refuse paying \$50 copying fee after having received records); *Chic. & E. Ill. R.R. Co. v. Reserve Ins. Co.*, 99 Ill. App. 3d 433, 437, 425 N.E.2d 429, 433 (1st Dist. 1981) (knowing that defendants were preparing to bring action for reimbursement, plaintiffs "raced to the courthouse first and filed [the declaratory judgment action]").

475 N.E.2d 1048, 1049 (1st Dist. 1985) (affirming declaratory ruling holding that defendant insurer had complied with provision of Illinois Insurance Code that was later amended and therefore not in effect in its prior form at time of declaratory judgment).

2. The Commission Has Declaratory Authority (Staff S.J. Mot., § IV.B)

Staff incorrectly asserts that the Commission does not have the authority to issue a ruling in this matter because DCMS has no declaratory judgment procedure. (Staff S.J. Mot., ¶¶ 22-25). Without citing any pertinent authority, Staff concludes that TracFone’s “right to a declaratory ruling regarding the application of WETSA prior to January 1, 2004, is whatever it might have been on June 30, 2004,” prior the statutory amendments which transferred administration and distribution of the funds collected under WETSA’s 9-1-1 surcharge to the Commission. (Staff S.J. Mot., ¶ 25). Staff’s argument, however, finds no basis in the Act or otherwise under Illinois law.

WETSA contains no such limitation on TracFone’s right to relief before the Commission. Contrary to Staff, the General Assembly did not limit the Commission to enforcing WETSA in the same manner that DCMS previously had enforced the Act. Rather, the legislature transferred “the rights, functions, powers and duties of the Department of Central Management Services *as set forth in this Act*” to the Commission. (P.A. 93-0839, § 10-160, eff. July 1, 2004) (emphasis provided). Thus, the Act controls, not the procedural rules of either DCMS or the Commission. If Staff’s reasoning were correct, then no wireless carrier would have the ability to obtain relief for the alleged improper enforcement of WETSA prior to July 1, 2004, which was not and could not have been the legislature’s intent in amending the Act.

Finally, Staff’s reliance on *Harrisonville Tel. Co. v. Ill. Commerce Comm’n*, 176 Ill. App. 3d 389, 531 N.E.2d 43 (5th Dist. 1988) (“*Harrisonville*”) is misplaced. As Staff concedes, the

issue in *Harrisonville* was whether the Commission at the time had promulgated a rule for declaratory action. *Id.* at 393, 531 N.E.2d at 45-46. Unquestionably, the Commission now has a rule—Section 200.220—that permits the Commission in its discretion to issue a declaratory ruling with respect to “the applicability of any statutory provision enforced by the Commission ... to the person(s) requesting a declaratory ruling.” 83 Ill. Adm. Code 200.220(a)(1). *See generally* *MidAm. Energy Corp. v. Ill. Commerce Comm’n*, 367 Ill. App. 3d 163, 854 N.E.2d 238 (3rd Dist. 2006) (discussing proper declaratory ruling under Section 200.220). TracFone is requesting such a ruling. *Harrisonville* in no way undermines this request.

B. Any Limitations Period Is Equitably Tolloed (Staff S.J. Mot., § V)

TracFone did not discover that it was paying monthly 9-1-1- wireless surcharges in error until the end of 2003. (TracFone S.J. Mot., ¶ 17.) TracFone promptly took action to determine whether it was legally required to remit payments under WETSA, and by May 17, 2004, TracFone had contacted DCMS seeking to resolve the payment dispute. (*See* TracFone’s May 17, 2004 letter to DCMS attached hereto as Ex. 1.) Due to the DCMS’ failure to respond, TracFone contacted the Staff of the Commission in December of 2004, after administration of WETSA’s 9-1-1 surcharge program had been transferred from the DCMS to the Commission. Staff directed TracFone to contact its WETSA manager, which TracFone promptly did. (*See* TracFone’s December 2004 correspondence with Commission Staff attached as Exs. 2(a), 2(b) and 2(c) hereto).

Staff delayed addressing TracFone’s request until August 2006. At that time, Staff’s WETSA manager advised TracFone that: “We have completed our review of the issues raised in your letter dated December 29, 2004 Regrettably, we must inform you that we cannot fulfill this request.” (*See* Staff’s undated letter to TracFone, attached hereto as Ex. 3, which was sent in

or about August 2006). Even up to October 2006, Staff and TracFone continued to discuss potential resolution of the WETSA dispute. (See Commission Executive Dir. Tim Anderson's Oct. 25, 2006 letter to TracFone, attached hereto as Ex. 4). Only then did Staff recommend filing a claim with the Commission to resolve the dispute. (See Mr. Anderson's Oct. 25, 2006 letter, Ex. 4, at p. 7, stating "Staff would recommend that the Commission review the issues in a docketed proceeding before any refunds would be issued.").

Thus, at all times from May 17, 2004 until October 25, 2006, TracFone was actively pursuing its dispute with the DCMS and then with the Staff of the Commission. To the extent any limitations period applies to TracFone's action, it has not run or is equitably tolled. Illinois courts allow for equitable tolling "if the defendant has actively misled the plaintiff, the plaintiff has been prevented from asserting rights in some extraordinary way, or the plaintiff has timely asserted rights mistakenly in the wrong forum." 25 Ill. Law & Prac. Limitations of Actions § 69. TracFone promptly brought its WETSA claim to DCMS' attention on May 17, 2004, but DCMS failed to respond. Staff then engaged in nearly two years of discussions with TracFone before advising TracFone to file the instant action. Staff's argument now that TracFone's request for relief is untimely is, at best, inequitable and incorrect.

C. Unjust Enrichment Does Not Apply (Staff S.J. Mot., § VI)

As demonstrated in TracFone's Motion for Summary Judgment, WETSA until amended effective January 1, 2004 contained no reference whatsoever to "prepaid wireless telephone service," the only type of "wireless telephone service" TracFone ever has provided in Illinois. (TracFone S.J. Mot., *passim*). WETSA's inapplicability to TracFone during the relevant time period is patent on the face of the Act. Even assuming the Act was ambiguous, the legislative history demonstrates that the General Assembly amended WETSA to make the surcharge

applicable to prepaid wireless telephone service for the first time *beginning* January 1, 2004.

The equitable defense of unjust enrichment, to the extent it could be said to apply here at all—and it does not—does not function to usurp and retroactively amend statutory law. In any event, whether TracFone received “a real and significant benefit from the existence of the facilities supported by the WETSA surcharge” (Staff S.J. Mot., ¶ 33) is a fact question, which cannot be resolved on summary judgment.

III. Conclusion

WHEREFORE, for all these reasons and as supported in its pending Motion for Summary Judgment, TracFone Wireless, Inc. respectfully requests that the Illinois Commerce Commission deny Staff’s Motion for Summary Judgment; grant TracFone’s Motion for Summary Judgment; and provide such other relief as is just and proper.

Dated: April 6, 2007

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, hereby certify that I caused a copy of the Response to Staff of the Illinois Commerce Commission's Motion for Summary Judgment to be served upon the service list in Docket No. 07-0023 by email on April 6, 2007.

Thomas A. Andreoli

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