

STATE OF MICHIGAN
COURT OF APPEALS

ALLTEL COMMUNICATIONS, INC.,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and MICHIGAN BELL TELEPHONE d/b/a
AT&T MICHIGAN,

Appellees.

UNPUBLISHED

January 22, 2009

No. 278864

Public Service Commission

LC No. U-15166

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Appellant Alltel Communications, Inc. appeals an order of appellee Michigan Public Service Commission that granted summary disposition to appellee AT&T Michigan. For the reasons set forth below, we affirm.

I. Facts

AT&T Michigan is an incumbent local exchange carrier and Alltel is a wireless telecommunications provider in Michigan. VeriSign is a third-party vendor under contract to transmit signaling system seven (SS7) messages for Alltel. SS7 messages provide call processing and routing information and are essential to the exchange of traffic between carriers, allowing the network to establish and reserve the necessary call path.

In 2004, the PSC approved an interconnection agreement (ICA) between AT&T Michigan and Alltel, which provided that that the parties would reciprocally compensate each other for traffic exchanged within the same major trading area (intraMTA traffic). Reciprocal compensation was governed by an amendment to the ICA covering traffic bound for an internet service provider (the ISP amendment), executed at the same time as the ICA itself, which provided that the parties would use the rate structure set out in the Federal Communications Commission's order governing intercarrier compensation for ISP-bound traffic. The ISP amendment to the parties' ICA thus set the rate paid by the parties for the traffic at issue at \$0.0007 per minute of use.

Alltel filed a complaint and alleged that AT&T Michigan was collecting more than the FCC-mandated amount by imposing inappropriate charges on VeriSign for SS7 services. Alltel

alleged that AT&T Michigan had billed VeriSign, pursuant to its access tariffs, a per-message charge for receiving and processing SS7 messages for interconnection traffic originated by Alltel's customers and terminating with AT&T Michigan's customers. Alltel asserted that intraMTA traffic between a wireless provider and an incumbent local exchange carrier is not subject to access tariffs, because such traffic is interconnection traffic subject to reciprocal compensation. See 47 USC 251(b)(5). Alltel further alleged that VeriSign paid the charges and, in turn, demanded and received reimbursement from Alltel. Alltel reported that it has been charged the required \$0.0007 per minute by AT&T Michigan, and disputes the charges placed upon VeriSign.

Count I of Alltel's three-count complaint alleged that the charges to VeriSign were inappropriate as not properly subject to AT&T Michigan's access tariffs. Count II alleged that the charges to VeriSign were a breach of the ICA between Alltel and AT&T Michigan. Under these counts, Alltel sought the refund of all disputed amounts to VeriSign. Count III alternatively asked, if the charges in question were found to be proper for purposes of counts I and II, that the PSC allow Alltel to impose identical charges on AT&T Michigan.

AT&T Michigan sought summary disposition of counts I and III on the ground that Alltel lacked standing to bring them, and of counts II and III on the ground that Alltel failed to state a claim for which the law provides a remedy. The PSC in turn dismissed count I for lack of standing, count II for failure to state a claim, and count III as obviated by the resolution of counts I and II. The PSC alternatively concluded that count III failed for want of standing, and for failure to state a claim upon which relief could be granted. This appeal followed.

II. Standards of Review

In general, a final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

However, decisions on motions for summary disposition are reviewed de novo as questions of law. See *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Likewise, "[w]hether a party has standing to bring an action involves a question of law that is reviewed de novo." *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004). Review of a determination concerning a party's lack of capacity to sue requires consideration of the pleadings, along with the documentary evidence submitted by the parties, in the light most favorable to the nonmoving party. See *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). Review of a determination concerning a party's failure to state a claim requires consideration of the pleadings alone, with all well pleaded allegations accepted as true. See *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

III. AT&T and VeriSign (Count I)

To have standing to press a civil claim, the plaintiff must have suffered an actual or imminent, concrete and particularized, invasion of a legally protected interest. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739-740; 629 NW2d 900 (2001), citing *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992). That injury must be fairly traceable to the defendant, and be likely to be redressed by a favorable decision. *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004), citing *Lee, supra* at 739; *Lujan, supra* at 560-561.

Here, Alltel brought suit over the relationship between VeriSign and AT&T Michigan, and sought an order requiring AT&T Michigan to reimburse VeriSign for certain charges. However, Alltel must demonstrate that it has standing to maintain this claim.

Alltel briefly argued below that, for present purposes, VeriSign was its agent, but Alltel does not rely on this argument on appeal. Further, Alltel has never expressly suggested that VeriSign was a third-party beneficiary of the parties' ICA. Instead, Alltel suggests that its own contract with VeriSign created an interest in VeriSign's course of dealing with AT&T Michigan sufficient to confer standing. Alltel sets forth the pertinent provision from its contract with VeriSign:¹

All charges contained herein are strictly for transport of ISUP and TCAP Messages and Responses through the [VeriSign] network. Any other charges levied by database owners or Signaling Node owners are the Customer's responsibility. Arrangements for payment of such other charges should be made directly with the billing party by customer, or if billed to [VeriSign], such charges will be passed through to Customer.

Alltel highlights the "passed through" language as establishing its obligation to reimburse VeriSign's payments of SS7 charges to AT&T Michigan.

Assuming the truth of Alltel's position, i.e., that Alltel has indeed reimbursed VeriSign through a direct pass-through provision of their contract for charges AT&T Michigan has improperly assessed against VeriSign by tariff, those assumptions still do not place Alltel in VeriSign's shoes so that Alltel may demand certain relief from AT&T Michigan on VeriSign's behalf. If Alltel was injured from having contractually reimbursed SS7 charges paid by VeriSign to AT&T Michigan, that injury was fairly traceable to VeriSign, not to AT&T Michigan.

Moreover, were Alltel to obtain the relief sought—a refund of disputed amounts from AT&T Michigan to VeriSign—that result would not guarantee any improvement in Alltel's own position. Although, as Alltel suggests, such a result would provide ground upon which Alltel

¹ This contract language was not included in Alltel's original complaint, but was quoted in the proposed amended complaint, which the PSC did not formally accept. However, as the PSC noted, Alltel disclosed this contractual provision in the course of stating its exceptions to the administrative law judge's proposal for decision. Moreover, the entire contract was made available to the PSC, and to this Court, as a confidential appendix.

might seek refunds from VeriSign for itself, it would not be the automatic result of the relief requested in this case, but would follow only from other legal action.

Had VeriSign agreed that any of its charges from AT&T were invalid, and refused to pay them, AT&T could have litigated the issue through a suit against VeriSign; but VeriSign's contract with Alltel would not have allowed AT&T to sue Alltel for charges assessed against, but unpaid by, VeriSign. Alltel's dispute is with its own contracting partner, VeriSign, not with VeriSign's separate relationship with AT&T Michigan.

Alltel contends that the doctrine of equitable subrogation applies here. We disagree. Our Supreme Court described equitable subrogation as

a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a mere volunteer. [*Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999) (internal quotation marks and citations omitted).]

“To avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty.” *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 574; 683 NW2d 242 (2004). Here, Alltel paid its own debts to VeriSign, not VeriSign's debts to AT&T. Alltel made no payments to AT&T Michigan on VeriSign's behalf, let alone take such action because of a duty to do so.

“Subrogation from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound.” *Washington Mut Bank, FA v Shorebank Corp*, 267 Mich App 111, 118; 703 NW2d 486 (2005) (internal quotation marks and citations omitted). Here, Alltel elected to assume a contractual obligation to reimburse VeriSign for certain expenses charged to it by AT&T Michigan. Because Alltel agreed to take on the reimbursement obligation, it must be considered a volunteer in the matter. Subrogation may be proper if the subrogee pays the debt of another to protect the subrogee's own interests. *Eller, supra* at 574. But, again, Alltel did not pay the debt of another, but rather reimbursed its own contract partner, VeriSign, for certain payments VeriSign made to AT&T Michigan. As concerns AT&T Michigan's charges to VeriSign for SS7 services, and Alltel's reimbursement of VeriSign for them, Alltel's interest was in seeing that VeriSign was paid, not that AT&T was paid. For these reasons, the doctrine of equitable subrogation is neither applicable nor instructive.

Had Alltel sued VeriSign in the first instance, or refused to pay disputed charges and caused VeriSign to initiate the litigation, then AT&T Michigan might have been joined as a necessary party, its participation then being necessary to determine the propriety of certain of its charges to VeriSign for which Alltel was contractually obligated to reimburse VeriSign. See MCR 2.205(A). However, in bypassing VeriSign and suing AT&T Michigan directly, Alltel is

simply too far removed from the matter in issue to create standing. Alltel simply lacked standing to sue, and the question of bringing in VeriSign as a necessary party did not arise.²

For these reasons, we agree with the PSC that Alltel lacked standing to litigate in connection with the course of dealing between AT&T Michigan and VeriSign.

IV. The ICA (Count II)

Alltel asserts that AT&T's practice of billing VeriSign for SS7 services violated Alltel's own amended ICA with AT&T Michigan. For this claim, Alltel again requested relief in the form of a declaration directly in favor of, and AT&T Michigan's refunding disputed monies to, VeriSign. This count was challenged, and decided, on the basis that it failed to state a claim. We agree with the PSC's determination in that regard, but alternatively conclude that Alltel again lacked standing in the matter.

Alltel characterizes the requested relief on this theory as contract damages, to apparently underscore its argument that its own ICA with AT&T Michigan constrains AT&T's prerogative to bill a third-party service provider for SS7 services. However, because Alltel demanded relief in the form of AT&T Michigan's remitting funds to VeriSign, not to Alltel, the damages Alltel sought were not its own in connection with its contract with AT&T Michigan, but rather VeriSign's in connection with VeriSign's course of dealing with AT&T Michigan. The prayer for relief itself thus reveals that, like count I, count II is, in reality, a claim stemming from a business relationship to which Alltel was neither party, nor privy, nor equitable subrogee.

In any event, Alltel points to no provision of the amended ICA that by its own terms constrains AT&T Michigan's prerogative to do business with any other party. Instead, Alltel suggests that it has acquired rights in connection with the relationship between AT&T Michigan and VeriSign as a consequence of Alltel's agreement with AT&T Michigan for certain reciprocal services and charges, along with legal authorities calling for reciprocity and capping rates for SS7 services. Alltel's insistence that it thus has the right to litigate on behalf of VeriSign seems to imply that Alltel regards VeriSign as a third-party beneficiary of Alltel's ICA with AT&T Michigan, or that Alltel enjoys some equivalent status in connection with the AT&T's course of dealing with VeriSign. However, Alltel has not set forth the exacting requirements for establishing the status of third-party beneficiary, let alone attempted to show how they would apply in this instance.³

The parties' ICA states that "SS7 signaling is the preferred method for signaling," and that "[i]f SS7 services are provided. . . , they will be provided in the applicable access tariffs."

² We note that Alltel never offered an amended complaint that added VeriSign as a party.

³ Not everyone who benefits in some way from a contract enjoys the status of third-party beneficiary. *Rieth-Riley Const Co v Dept of Transportation*, 136 Mich App 425, 430; 357 NW2d 62 (1984), citing MCL 600.1405. To create a third-party beneficiary, a contract must expressly promise to act to benefit the third party. *Dynamic Const Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995), citing MCL 600.1405.

The agreement continues, “Parties directly or, where applicable, through their Third Party provider, will cooperate on the exchange of Transactional Capability Application Part . . . messages to facilitate interoperability. . . .”

The PSC stated as follows:

Under the facts as alleged, [appellant] chose to contract with VeriSign for SS7 usage rather than using AT&T Michigan for that service. AT&T Michigan provided SS7 services to VeriSign and billed VeriSign under its access tariffs. VeriSign may have many customers for which it provides third party SS7 services, and VeriSign may obtain some of those services from AT&T Michigan for any number of those customers. AT&T Michigan bills VeriSign under the access tariff for that service. [Appellant] and VeriSign have a contract that, [appellant] indicates, allows VeriSign to take the position that these charges may be passed through to the customer. Interpretation of the [appellant]/VeriSign contract is not before the Commission.

The Commission finds that [appellant] has failed to allege facts showing that AT&T Michigan has breached the ICA by its conduct. [Appellant] did not plead an agency relationship with VeriSign, nor did it argue the existence of, or offer evidence of, an agency relationship in its opposition to AT&T Michigan’s motion to dismiss. [Appellant] states that it has never been charged more than the mandated \$0.0007 per minute required by . . . the ISP amendment to the ICA. The ICA clearly states that if SS7 services are provided by AT&T Michigan, then they will be provided under the applicable access tariffs. Contrary to [appellant’s] assertions, the ICA not only does not prohibit SS7 message charges on [appellant’s] traffic, but indeed spells out how such charges will be billed. For reasons unknown to the Commission, [appellant] chose not to buy these services directly from AT&T Michigan, but to buy them from VeriSign. The Commission finds that the facts, as alleged, do not show any breach of the ICA, and Count II fails to state a claim upon which relief can be granted. [Footnotes and record citations omitted.]

Indeed, Alltel elected to contract for certain services, on certain terms, with VeriSign. Alltel could have endeavored to include contract provisions excluding reimbursement for any of VeriSign’s payments to AT&T Michigan for SS7 services that in some way were also payable to AT&T Michigan by Alltel. But, again, VeriSign is not party to this case, and thus interpretation of the Alltel-VeriSign contract was neither subject to the adjudication below, nor at issue in this appeal. The same is true regarding the VeriSign-AT&T Michigan relationship as conducted by those entities.

For these reasons, Alltel’s attempt to modify the terms of AT&T Michigan’s and VeriSign’s course of dealing with each other, through application of Alltel’s own amended ICA with AT&T Michigan to which VeriSign was not party, did indeed fail to set forth a claim for which the law would provide a remedy.

V. Alternative Prayer for Relief (Count III)

Alltel pleaded, as an alternative theory, that, if the SS7 message charges were lawfully applied, Alltel should be entitled to assess reciprocal SS7 message charges on traffic originated by AT&T and terminated by Alltel.

Again, the PSC held that this claim failed because it presented an alternative prayer for relief predicated on a “finding that SS7 message charges were lawfully applied to Alltel’s intraMTA traffic under Counts I and II,” but that the PSC “makes no such finding,” having concluded that Alltel “lacks standing under Count I and fails to state a claim under Count II.” Simply put, the procedural failure of Counts I and II are fatal to Count III.⁴ Because we conclude that Alltel lacked standing to raise the claims presented in counts I and II of its complaint, we conclude that Alltel lacked standing to request alternative relief predicated on adverse substantive determinations of those counts.⁵

Moreover, because in count III Alltel sought reformation of its ICA with AT&T Michigan in light of the terms of the Alltel-VeriSign agreement, to which AT&T Michigan was not party, and the AT&T Michigan-VeriSign relationship, which existed independent of Alltel, we agree with the PSC that Alltel failed to plead a cause of action for which the law might provide a remedy.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

⁴ Indeed, Alltel concedes in its brief on appeal that “it may be acknowledged that there would be no basis for the alternative relief requested in Count III without an adverse adjudication of the claims raised in Counts I and II”

⁵ Alltel asserts that the PSC found a lack of standing in this regard on the basis of its failure to allege a certain fact, and presents argument to show that the fact in question was asserted. We need not reach this issue, however, in light of our determination that the lack of standing for purposes of counts I and II itself deprives Alltel of standing in count III.