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Christy Cornell Kunin

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UNILATERAL TARIFF EXCULPATION IN THE ERA OF COMPETITIVE TELECOMMUNICATIONS

The Communications Act of 1934 (Communications Act or Act)\(^1\) governs the regulation of communications in the United States and allocates jurisdiction over common carriers between federal and state regulators.\(^2\) In the last decade, the communications industry has undergone a technological, competitive, and regulatory revolution,\(^3\) with new and emerging technologies challenging the bounds of the Act.\(^4\) Only liberal interpretation of the Act...
will sustain its goals in the vastly different communications environment of the 1990s.\textsuperscript{5} Indeed, numerous advocates for revamping the Act exist.\textsuperscript{6}

Since 1980, the Federal Communications Commission (FCC or Commission) has systematically realigned the telecommunications industry toward competition\textsuperscript{7} by providing carriers with greater flexibility to meet the demands of their subscribers.\textsuperscript{8} The FCC increasingly relies on the market to regulate activities of nondominant carriers in competitive markets.\textsuperscript{9} Carriers subject to this relaxed regulation flourish in this competitive era.\textsuperscript{10} While

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5. The FCC, in considering deregulation of the industry in 1981, examined the congressional purpose behind the Act and noted that "continued rigid uniform application of Title II requirements to all market participants threatens to undermine [industry] dynamism and in turn betray the overriding goals of the Act." \textit{Further Notice, supra} note 2, at para. 33(a).

Furthermore, in examining legal precedent in the enabling Communications Act for its regulatory forbearance policy, the FCC stated "[t]here can be no doubt, however, of our broad discretion and flexibility to adjust to the dynamic and rapidly changing nature of the communications industry. Congress foresaw that circumstances and conditions might change and, accordingly, gave this agency broad powers to respond appropriately to such events." \textit{Id.} at para. 71.


7. The FCC sought to gradually deregulate the telecommunications industry and allow competitive markets to emerge. \textit{See Further Notice, supra} note 2, at paras. 3-8.


9. Those carriers lacking market power are nondominant, while those carriers with market power are dominant. \textit{Id.} para. 56. Competitive entry into a regulated market "has the effect of not only making more and newer service options available to customers; it also has the effect of forcing the firms that are already in the business to be more responsive and to adapt." \textit{Competition in the Common Carrier Communications Field: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce, 94 Cong., 2d Sess. 1096-97 (1976)} [hereinafter \textit{Hearings}] (statement of Donald I. Baker, Assistant Attorney General, Antitrust Div., U.S. Dept. of Justice). Market regulation, therefore, assumes that inefficiencies will be reflected in the demand for the service. \textit{See, e.g.}, Mark S. Fowler et al., \textit{"Back to the Future:" A Model for Telecommunications}, 38 FED. COMM. L.J. 145 (1986).

Under perfectly competitive conditions, the market functions as "a system in which individuals or other entities may freely buy or sell inputs or outputs, guided by their own goals and tastes and by relative prices which, in turn, are free to change in response to the market decisions of the various players." \textit{Bolter, supra} note 3, at 63. Negligence can be viewed as an inefficiency that is corrected through the award of damages. \textit{Cf. id.} at 64 ("[M]arket imperfections distort the operation of a free market because of deviations from one or more of the conditions requisite for 'perfect competition.' ").

10. For example, "the percentage of interstate switched traffic carried by AT&T's competitors increased from 20 percent in 1984 to about 30 percent in 1988." \textit{Bolter, supra} note 3, at 259.
these carriers embrace minimal regulatory oversight, they cling to certain incidents of regulation, such as the exculpation doctrine.\textsuperscript{11}

Historically, common carriers were required to file tariffs with the FCC. These tariffs contained provisions that limit carrier liability in the event of mistakes or errors in transmission.\textsuperscript{12} Tariff provisions, once approved by the reviewing authority, bind both carriers and their customers, regardless of notice to subscribers.\textsuperscript{13} Thus, the carrier, in drafting tariff provisions, unilaterally provides for its own liability exculpation. Given the recent fundamental changes that have occurred in regulation of telecommunications companies and the emergence of a new breed of non-rate-regulated, competitive companies, extension of the doctrine of unilateral liability exculpation, without some corresponding contractual bargained-for consent, may ignore the public interest touchstone of the Communications Act.\textsuperscript{14} This issue requires a critical evaluation of who has the power to decide whether liability limits are appropriate today. Several legal and regulatory doctrines interact in this analysis, including the primary jurisdiction of administrative agencies, federal preemption of state laws, and the nature of FCC common carrier regulation or forbearance from regulation.

This Comment explores the 1920s doctrine of exculpation of liability as it applies to nondominant carriers filing tariffs with the FCC. It begins by reviewing the history of tariff exculpation clauses and the various policy rationales behind their application at the federal and state levels.\textsuperscript{15} Next, this Comment delineates the role of the courts and the FCC in reviewing the applicability of the doctrine. This Comment then evaluates these issues in the context of a recent Third Circuit case, Richman Bros. Records v. U.S.\textsuperscript{11}

\textsuperscript{11} The doctrine of unilateral exculpation of liability or, as it has been called, the money back guarantee, was formulated by Justice Brandeis in the 1920s—predating the Communications Act itself. See Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566 (1921) (allowing tariff provisions to limit carriers' liability for telegraph mistransmissions to a refund of the charge for the message). As the FCC continues to reconsider regulation of competitive providers, the doctrine and its extension to nondominant carriers in the competitive era must also be reexamined. See, e.g., Further Notice, supra note 2, at paras. 4-8 (articulating the need to reexamine Commission policies in light of emerging competition). Indeed, it may be time to rethink the application of the rule to all competitive carriers, dominant and nondominant alike.

\textsuperscript{12} See, e.g., infra note 154, for an example of an exculpatory provision.

\textsuperscript{13} See infra note 156 and accompanying text.


\textsuperscript{15} Analogies from treatment at the state and federal levels provide insight into the appropriate application in the modern regulatory system. See, e.g., Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976).
Sprint Communications Co. Richman challenges the limited recovery provided by an exculpatory tariff clause. Finally, this Comment examines the need for change in the modern telecommunications environment and concludes that competition will not tolerate the continuation of unilateral tariff exculpations.

I. REGULATORY OVERSIGHT AND TARIFF LIMITATIONS

The Communications Act, largely adopting sections from the Interstate Commerce Act, was enacted in 1934 with little congressional consideration of the impact of these provisions on the emerging communications industry. Similarly, the case law involving exculpatory clauses that developed in the pre-Communications Act era was applied without change in the new regulatory environment. Thus, it is necessary to examine the rationales behind the exculpation tariffs as they emerged, as well as the evolution of regulatory oversight of carriers and tariffs.

A. Unilateral Tariff Liability Exculpation Clauses

1. Early Cases

Early in the century, courts validated tariff exculpatory clauses filed with the Interstate Commerce Commission (ICC). The United States Supreme Court first addressed the issue of liability exculpation clauses in the 1920s with cases involving Western Union Telegraph Company. In 1921, Justice Brandeis examined whether Western Union could limit potential liability through the use of a bifurcated tariff rate structure in Western Union Telegraph Co. v. Esteve Bros. Although mistransmission of an unrepeated

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17. Id. at 3-4.
19. Title II of the Act borrows heavily from the regulatory provisions of the Interstate Commerce Act in effect in 1934. Title II incorporates not only the portions of the latter that had explicitly governed telephone and telegraph companies, but also parts that had applied only to regulation of transportation common carriers.
20. Western Union Tel. Co. v. Priester, 276 U.S. 252 (1928); Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566 (1921).
21. 256 U.S. 566 (1921). Western Union's tariff provided two rates: a higher rate for repeated telegraphs and a "basic" rate for unrepeated telegraphs. Id. at 569. The basic rate for telegraphs applied for messages relayed at the sender's risk, with liability limited to the ninety cents toll collected. Id. at 568-69. The rate was higher for repeated messages, because
message resulted in substantial damage to Esteve, the Court nonetheless upheld the liability limitation. In its reasoning, the Court noted that prior to enactment of the June 18, 1910 amendment to the Act to Regulate Commerce, companies could only exculpate themselves from common law liability if permitted by the policy of the governing jurisdiction. However, by virtue of the 1910 amendment, such companies were subject to the established rule of national rate uniformity. Hence, the Court found that the liability limit, filed with the ICC in 1916, was not only lawful, but an inherent part of the rate structure under the uniformity requirement.

A similar issue came before the Court seven years later in Western Union Telegraph Co. v. Priester. Seeking recovery for damages occasioned by a mistransmission of an unrepeated message, Priester relied on the public policy distinction between liability limitations for ordinary and gross negligence. The Court refused to impose liability under the theory of gross negligence in Western Union's erroneous transmission substituting "fifteen cents" for "fifty cents" in an unrepeated message. The tariff limited liability to $50. This rate "represents the whole duty and the whole liability of the company." Nevertheless, some state court decisions explicitly refuse to uphold limits on recovery for gross negligence.
negligence when regulatory approval had not made that distinction.30 With these two cases, the Court established the validity of exculpatory clauses in communications tariffs. These decisions remained untouched throughout implementation of the Communications Act in 1934 and continue to persist in today's competitive environment.

2. Current Application

Judge-made law regarding unilateral tariff liability exculpation clauses, interpreted and applied by the courts for the last seventy years, balances the effect of regulatory obligations, such as the mandate of uniform common carrier rates,31 with the courts' traditional application of the common law, including the public policy concerns attendant to limited liability.32 Unilateral tariff liability limitations have been upheld on three distinct bases.

First, in upholding limited liability, some courts consider the strength of regulatory power and oversight. State and federal courts have held that the right to limit liability of regulated common carriers is an inherent part of regulatory power.33 Under this view, regulatory oversight by the FCC guards against unreasonable tariff provisions that contravene public policy.34

Second, liability limits persist because courts fear the impact of liability judgments on rates paid by captive ratepayers.35 Courts argue that extensive liability awards would be passed on to the general body of ratepayers through the fair return doctrine inherent in rate-of-return or price caps regulations.36

30. Priester, 276 U.S. at 260.
31. Uniform common carrier rates are not explicitly mandated by the Communications Act. Under § 201(b) of the Act, common carriers must establish just and reasonable rates. 47 U.S.C. § 201(b). Similarly, § 202(a) requires no unjust or unreasonable discrimination for like communications services. 47 U.S.C. § 202(a). In Esteve, the Court interpreted the ban against undue preferential treatment of § 3 of the Act to Regulate Commerce to require national uniformity. Esteve, 256 U.S. at 571.
32. Limited liability for negligence raises public policy concerns because carriers are not held responsible for their negligent behavior to the full extent of the damage caused. See, e.g., Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411, 418 (1959).
ulation.36 This rationale assumes that, as a matter of public policy, the "public interest" standard contemplates reasonable rates.37 Because the costs of these judgments would be passed on to ratepayers with no alternative service source, liability limitations that apply to monopoly providers serve the public interest and are, therefore, not unconscionable.38

Third, courts have upheld limited liability provisions in order to preserve national uniformity39 and prevent disparate treatment by preempting state authority to regulate on this issue. Although the Esteve Court did not address the issue as one of preemption,40 the national uniformity rationale articulated in Esteve and Priester is a preemption argument.41 National

36. Under rate-of-return regulation, carriers are authorized to receive a specified "fair" return on capital as set by the regulatory authority. Levitz, supra note 18, at 1496. If legal fees and awards are included in the rate base for the utility, then these costs are in turn passed on to ratepayers through the authorized rate of return. Under price caps regulation, the maximum allowable rate for service is set by the regulating agency, and companies are permitted to keep any profits generated through provision of service, as long as rates do not exceed the capped levels. Id. at 1500. Thus, ratepayers could bear the cost of judgments against the telephone company either through rates increased to the maximum level or alternatively through reductions in the quality of service or other cost-cutting measures.

37. See, e.g., Professional Answering Serv., 565 A.2d at 64.


40. The Court was concerned with maintaining national uniformity. Esteve, 256 U.S. at 571.

41. It is likely that this preemption issue was not addressed by Justice Brandeis in Esteve for two reasons. First, in 1921, there was no Communications Act and therefore no clause preserving state common law remedies. The Communications Act was enacted in 1934. 47 U.S.C. §§ 151-163 (1988). While Title II of the Act incorporated substantial portions of the ICA relating to the regulation of communications, it went far beyond the ICA in other respects. Levitz, supra note 18, at 1496. The broad mandate provided to the Commission in § 1 of the Communications Act was entirely unpredicated in the ICA. G. Hamilton Loeb, The Communications Act Policy Toward Competition: A Failure to Communicate, 1978 DUKE L.J. 1, 21. Second, these 1920s decisions were handed down before Justice Brandeis authored the opinion in the Court's famous 1938 decision of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which abolished the use of federal common law in diversity cases. Id. at 78. In the 1920s, diversity cases were decided under the "brooding omnipresence" of federal common law. Charles E. Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 YALE L.J. 267, 274-75 (1946). Prior to Erie, federal common law applied to diversity cases and controversies in federal court under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Under Swift, the word "laws," as used in the Judiciary Act of 1789, did not include state common law, and the federal courts were therefore free to apply federal law to state questions in diversity cases. Id. at 18-19. After Erie, federal courts were compelled to apply state common law principles in diversity cases unless the Constitution or an Act of Congress provided otherwise. Erie, 304 U.S. at 78. Thus, there was no need for the Esteve Court to address whether there was a state claim with a corresponding federal defense. Thus, in Ivy Broadcasting v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968), the United States Court of Appeals for the Second Circuit relied on the cases from the 1920s to conclude that all questions regarding duties, charges, and liabilities of telegraph or telephone carriers should be governed solely by
uniformity requires rates to be applied in the same manner throughout the country.\(^{42}\) If some users were allowed to recover damages occasioned under basic unrepeated service, then these customers would in effect get preferential treatment in contravention of the uniformity requirement.\(^{43}\)

Thus, the doctrine continues to be applied today. However, the underlying judicial rationales rest on a presumption of active regulatory involvement. Such active regulation continues in large measure at the state level.

Even with active state regulation, decisions considering liability limitations in state tariffs reach conflicting results. Many state law decisions uphold the validity of exculpatory clauses.\(^{44}\) On the other hand, numerous federal common law, \textit{id.} at 490-91, and therefore states were precluded from acting in this area. \textit{id.} at 491.

Additionally, the preemption doctrine has evolved significantly in the last 20 years. See John R. Haring & Kathleen B. Levitz, \textit{The Law and Economics of Federalism in Telecommunications}, 41 FED. COMM. L.J. 261 (1989) (tracing the evolution of the preemption doctrine in the last 20 years as it relates to communications). Today, it is very difficult to find preemption of state common law without express congressional fiat. See, e.g., Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991) (requiring express congressional intent to override state laws and upset the constitutional balance between federal and state governments); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) (invalidating FCC regulation of intrastate depreciation rates where no clear Congressional mandate can be discerned). Thus, Justice Brandeis's reasoning relies on rationales that probably would not survive the more stringent test for preemption that the Supreme Court currently demands. See, e.g., Haring & Levitz, \textit{supra}, at 330 ("The \textit{Louisiana} decision appears to undermine, but not unequivocally preclude, effective efforts to internalize extrajurisdictional effects of state actions.").

\(^{42}\) Id., 256 U.S. at 571.

\(^{43}\) Id. at 573. This argument fails to account for differences in service (e.g., one customer's message was transmitted properly and one customer's message was garbled) and focuses solely on the price-risk relationship. \textit{id.}

\(^{44}\) A broad range of cases uphold tariff liability clauses as binding. See, e.g., Olson v. Mountain States Tel. & Tel. Co., 580 P.2d 782 (Ariz. Ct. App. 1978) (holding absent proof of willful or wanton misconduct, plaintiff can only recover amount of charge in accordance with limited liability under tariff); Sommer v. Mountain States Tel. & Tel. Co., 519 P.2d 874 (Ariz. Ct. App. 1974) (holding tariff limiting liability became part of contract when telephone company filed with regulator and is binding unless misconduct is willful and wanton); Waters v. Pacific Tel. Co., 523 P.2d 1161 (Cal. 1974) (holding court award of damages would interfere with regulatory approval of tariff liability clause); University Hills Beauty Academy, Inc. v. Mountain States Tel. & Tel. Co., 554 P.2d 723 (Colo. Ct. App. 1976) (holding liability limits are valid when fairly made and may preclude recovery, otherwise court makes telephone company an insurer contrary to settled law); Shoemaker v. Mountain States Tel. & Tel. Co., 559 P.2d 721 (Colo. Ct. App. 1976) (holding any common law remedy inconsistent with tariff was extinguished when tariff created through properly delegated legislated authority); Woloshin v. Diamond State Tel. Co., 380 A.2d 982 (Del. Ch. 1977) (holding telephone company agreement limiting liability was not unconscionable or violative of public policy when applied to two attorneys); Southern Bell Tel. & Tel. Co. v. C & S Realty, 233 S.E.2d 9 (Ga. Ct. App. 1977) (holding company not liable when tariffs and contracts limit liability unless showing of gross negligence); Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974) (holding reasonable liability limits on damages may be part of telephone ratemaking process subject to jurisdiction of regulators unless it limits recovery for willful misconduct); Burdick v. Southwestern Bell Tel. Co., 675 P.2d 922 (Kan. Ct. App. 1984) (holding exculpa-
decisions dealing with state regulation of tariff liability clauses have invalidated the clauses.\textsuperscript{45}
Frequently, state law decisions distinguish between causes of action sounding in tort and contract when deciding whether to uphold liability limits. This distinction is critical; parties entering into a contract must have notice and typically have an opportunity to bargain. None of the indicia of healthy contractual relations attends a tariffed limitation. Therefore, in *Travelers Insurance Co. v. SCM Corp.*, the United States District Court for the District of Columbia upheld a contractual limit on liability as enforceable in light of clear and unambiguous contractual language and the parties' sophistication and bargaining power. In *Helms v. Southwestern Bell Telephone Co.*, the United States Court of Appeals for the Fifth Circuit struggled with the issue of whether liability limitations properly apply to negligence claims, as opposed to breach of contract claims, and concluded that this distinction was tenuous but supported by Texas law. Thus, the court upheld the negligence claim, even in the face of previous cases refusing to allow breach of contract claims.

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46. Some courts have refused to extend liability limits applicable to contractual relations to situations involving torts. See, e.g., *Thomas v. General Tel. Directory Co.*, 339 N.W.2d 257 (Mich. Ct. App. 1983) (holding liability limits only pertain to contract obligations between parties and thus recovery in tort is not limited; once tortious conduct is properly alleged, plaintiff may proceed and recover in court of general jurisdiction).

47. *Inc. v. Wisconsin Tel. Co.*, 345 N.W.2d 417 (Wis. 1984) (holding contract limiting damages to money back was an unconscionable and unenforceable exculpatory contract contrary to public policy).

48. The court specifically noted that the Public Utility Commission had chosen to limit liability for public policy reasons as a function of the rate-setting process. *Id.* at 495-96. In particular, the court commented that a tariff is not a private contract between the parties but a public regulation. *Id.* at 496. Cf. *Stand Buys, Ltd. v. Michigan Bell Tel. Co.*, 646 F. Supp. 36 (E.D. Mich. 1986). *Stand Buys* involved a local telephone company tariff that limited liability when there was no showing of willful or wanton misconduct. *Id.* at 38. The United States District Court for the Eastern District of Michigan held that the tariff was the law with respect to any claims for damages. *Id.* at 37. In *Pilot Indus. v. Southern Bell Tel. & Tel. Co.*, 495 F. Supp. 356, 362 (D.S.C. 1979), the court found liability limits reasonable when liability for gross negligence was not limited. This distinction was offered in *Priester*, but the Supreme Court refused to recognize differing degrees of negligence. Western Union Tel. Co. v. Priester, 276 U.S. 252, 260 (1928).

49. *794 F.2d 188* (5th Cir. 1986).

50. *Id.* at 194.

51. *Id.* The court noted that "under Texas law actions for breach of contract and negligence are not necessarily mutually exclusive." *Id.* at 194; see also *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947) (holding that a duty of care is implicit in every contract).

While these state decisions are instructive, they are not dispositive. Most state decisions do not consider the issue of competition because state regulators deal primarily with regulated monopolies and not deregulated competitive companies. Therefore, although state decisions are not dispositive, they indicate the persistence of the exculpation doctrine. The critical question thus becomes whether these limits remain appropriate in the modern regulatory environment.

B. Deregulation and the Role of FCC Regulation of Nondominant Carriers

Throughout much of the twentieth century, long-distance telephone service was a monopoly market controlled by American Telephone & Telegraph (AT&T). Since 1980, however, a revolution in policy and regulation occurred in the industry. The FCC has substantially altered regulation of the communications industry in the last decade through its Competitive Carriers' Writ Refused, No Reversible Error. A decision to . . . refuse a writ 'n.r.e.' is a statement on the merits of the appeal . . . . ' (citation omitted)).


Nonetheless, in recent years state regulators have gained some experience with competitive offerings of telephone directory services. However, although many states allow competing telephone directories, the providers are regulated and the directory services represent a substantial and essential contribution to local revenues. See American Tel., 552 F. Supp. at 231 (establishing that directory services will be provided by local telephone companies upon divestiture). The AT&T MFJ segregated the nation into 164 "local access and transport areas" (LATAs) roughly corresponding to standard metropolitan statistical areas. Western Elec., 569 F. Supp. at 994 nn.8-9; see Levitz, supra note 18, at 1504 n.58. Within these LATAs, the local telephone companies provide all service, and outside of these LATAs, the local telephone companies are prohibited from providing service. See Levitz, supra note 18, at 1504 n.58. Local telephone companies' revenues are derived from a provision of intraLATA services. Directory services were designated local services to bolster revenues for local telephone companies and to help maintain lower local rates. See American Tel., 552 F. Supp. at 228 (including "directory services" within the definition of exchange services to be provided by the local telephone companies).

54. Heavy regulation was historically appropriate for monopoly service providers; regulation of AT&T's monopoly was achieved through entry and exit controls. Further Notice, supra note 2, at 452 (describing traditional public utility rate regulation). In fact, "scarcely a single business act [was] free from continuous regulation or at least administrative governmental review." Carter v. American Tel. & Tel. Co., 365 F.2d 486, 495 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

55. There has been a "revolution in telecommunications occasioned by the federal policy of increasing competition in the industry." Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 358 (1986).
rier decisions, in which streamlined forbearance regulation applies to nondominant carriers. The FCC has effectively deregulated competitive telecommunications providers.

The FCC's gradual approach to deregulation of the long-distance telephone industry began in 1979 when the Commission sought comment on a broad range of options concerning regulation of nondominant carriers. After reviewing these comments, the FCC issued the First Report delineating between dominant and nondominant carriers on the basis of their market power. The FCC announced that streamlined regulations would pertain to nondominant carriers, allowing tariffs to become effective on fourteen days notice and establishing a presumption that tariffed rates were lawful.

In 1981, the FCC sought additional comment on whether to undertake "deferential" or "forbearance" deregulation in one of two ways. First, the Commission could classify certain nondominant carriers of communications services as noncommon carriers, such that Title II of the Communications


57. Under forbearance regulation a carrier is exempted from certain Title II regulatory requirements. See Further Notice, supra note 2, at para. 3.

58. The landmark Competitive Carrier docket divided telecommunications providers into dominant and nondominant carriers based on their relative market power. First Report, supra note 8, at para. 56. Those carriers lacking market power are nondominant, while those carriers with market power are considered dominant. Id.

59. One court noted that the Competitive Carrier rulemaking has undertaken the "gradual deregulation of the nondominant common carrier interstate telephone industry." MCI Telecom., Inc. v. FCC, 765 F.2d 1186, 1188 (D.C. Cir. 1985).

60. In re Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations, Notice of Inquiry & Proposed Rulemaking, 77 F.C.C.2d 308 (1979) [hereinafter Notice]. This proceeding was commenced to respond to "changes . . . in the domestic telecommunications industry." Id. at para. 2.

61. The FCC determines market power on the basis of a carrier's power to control prices. First Report, supra note 8, at paras. 15, 25, 56.

62. Id. para. 16. These streamlined provisions were deemed appropriate because "firms lacking market power simply cannot rationally price their services [in contravention of the Act]." Id. para. 88. The presumption of lawfulness is particularly pertinent because it demonstrates that tariffs become effective without regulatory review or approval. The FCC will only scrutinize tariffs when challenged under § 208 of the Act. Id.
Act would not apply to them.63 Alternatively, the FCC could abstain from application of certain Title II procedural requirements to nondominant common carriers, while maintaining the basic substantive requirements of just and reasonable rates and nondiscrimination.64 The FCC tentatively concluded that competition warranted removal of Title II regulation for competitive or nearly competitive carriers lacking market power.65 In its Second Report,66 the FCC adopted permissive forbearance67 for resellers of domestic terrestrial services and permitted them to cancel tariffs with the FCC and provide service on a private contract basis.68 The FCC's Fourth Report69 and Fifth Report70 expanded the application of forbearance policies.

In 1985, the FCC boldly directed all “forborne carriers” to remove tariffs filed with the FCC and conduct business with their customers solely on a contract basis.71 This changed the FCC's forbearance regulation from permissive to mandatory.72 At this juncture, the FCC effectively chose to forgo any preliminary regulatory oversight for nondominant carriers.73 One carrier, MCI, appealed the FCC's detariffing decision.74 The United States

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63. Title II of the Communications Act applies only to common carriers. 47 U.S.C. §§ 201-26 (1988). Noncommon carriers are therefore not subject to its provisions, which include requirements to provide just and reasonable and nondiscriminatory rates. See 47 U.S.C. §§ 201-05.

64. See MCI Telecom. Corp. v. FCC, 765 F.2d 1186, 1188 (D.C. Cir. 1985); First Report, supra note 8, at para. 16. Both the definitional and forbearance approaches to deregulation use the touchstone of market power to determine whether application of the Title II requirements is appropriate. Second Report, supra note 56, at para. 3. Under the definitional approach, a carrier is considered a common carrier on the basis of its market power, while under the forbearance approach, the absence of market power triggers relaxed Title II regulation. Id.

65. Further Notice, supra note 2, at para. 200. The FCC reasoned that the costs of certain Title II regulations far exceeded the benefits and, thus, the public interest and the purpose of the Act would be better served by forbearance. Id. at para. 198.


67. Rather than mandating or prescribing particular requirements for nondominant carriers, the FCC's permissive forbearance policy permitted such carriers to forbear from certain procedural requirements of Title II regarding entry, exit, licensing and tariffs. Id. para. 30.

68. Id. The FCC extended this policy to United States offshore resellers in its Third Report. See Fourth Report, supra note 56, para. 3.

69. Fourth Report, supra note 56 (extending forbearance regulation to nondominant domestic satellite resellers and specialized common carriers, including MCI and Sprint).

70. Fifth Report, supra note 56 (applying forbearance to interexchange affiliates of telephone companies having no joint ownership of transmission facilities and all domestic satellite service providers of interexchange digital electronic message services, except AT&T and the local exchange carriers).

71. Sixth Report, supra note 56, at para. 2.


73. Sixth Report, supra note 56, at para. 11 (asserting that FCC regulatory oversight will be effectuated through the complaint process).

74. MCI, 765 F.2d at 1186. Opponents of mandatory detariffing complain that, inter alia, customer information would be compromised and conversion to contracts would impose an undue burden on carriers. Id. at 1189.
Court of Appeals for the District of Columbia Circuit reversed the mandatory tariff cancellation by the FCC, vacated the Sixth Report, and remanded the issue to the FCC. Yet, the FCC continues to insist that tariffs are optional.

Presently, under its forbearance policy, the FCC refrains from regulating nondominant carriers and relies totally on the market. Nondominant carriers are not required to file tariffs, and the FCC does not substantively review their rates or tariffs prior to their taking effect. The FCC only examines competitive carrier practices in the context of its adjudication of

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75. Id. at 1195-96. The court found that the FCC lacked statutory authority to abolish tariffs entirely in the face of § 203 of the Act, which required filing of rate schedules. Id. at 1195. While filing tariffs is permitted, however, it is purely voluntary and connotes no sanction or review by the FCC of the rates or terms contained within the tariff. See, e.g., Sixth Report, supra note 56, para. 20.

76. See AT&T Communications v. MCI Telecom. Corp., Memorandum Opinion & Order, E-89-297, FCC 92-36 (Jan. 28, 1992) 6, para 13. The D.C. Circuit in MCI specifically declined to rule on whether the FCC's actions, short of a complete ban, were reviewable. MCI, 765 F.2d at 1190-91 n.4.

In a subsequent ICC case, the Supreme Court held that the ICC could not eliminate its tariffs where they were mandated by statute. See Maislin Indus. Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2770 (1990). (holding that the ICC had no “authority to alter the well-established statutory filed rate requirements”). Maislin narrowly held that courts cannot attribute to Congress the intent to do that which it did not do. The Court found that the ICC's action directly conflicted with its statutory mandate. Id. at 2770. The Maislin decision may not be controlling with respect to the FCC, given the difference in statutory mandates of the FCC and ICC. See In re Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, CC Docket No., 92-13, FCC 92-35 (Jan. 28, 1992). FCC forbearance policy rests on the discretionary power provided in § 203(b)(2) of the Communications Act, which provides “[t]he Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances.” 47 U.S.C. § 203(b)(2) (1988). In MCI, the D.C. Circuit limited the Commission's discretion under this provision, reasoning that the power to modify was not tantamount to the power to eliminate requirements of the Act. MCI, 765 F.2d at 1188. In contrast, the ICC forbearance policy rested not on explicit discretion within the enabling statute, but on a provision of the Act which allowed the ICC to authorize rate levels. Interstate Commerce Act, 49 U.S.C. § 10701 (1988). Maislin involved deviation from rates contained in the tariff, not ancillary limits on liability unrelated to rates. Maislin, 110 S. Ct. at 2763. In any event, consideration of the propriety of tariff exculpation clauses takes regulatory structure as a given. Therefore, the issue raised by Maislin is a distinct question for consideration in another case. This Comment focuses on the continued propriety of tariff liability limitations in the current competitive environment where tariffs, whether required or not, are not subject to Commission scrutiny and reflect the competitive posture of the carrier.


79. Id. The FCC reiterated that regulatory forbearance of nondominant carriers “remov[es] affirmative requirements which require prior Commission approval, namely the filing of tariffs and Section 214 applications” for a certificate to construct new facilities. Id.
specific consumer-initiated complaints. Thus, under the new regulatory regime, the FCC does not regulate rates, tariffs, practices, costs, investments, entry, exit or services. Therefore, all of the aspects of the comprehensive scheme of regulation that applied traditionally to telephone utilities do not apply to nondominant carriers.

II. JURISDICTIONAL ISSUES

Two jurisdictional issues interact in an appropriate reevaluation of the tariff exculpation clauses. The threshold question is whether the FCC has statutory authority to preempt state common law remedies. A closely related question is whether the decision to continue the exculpation policy properly rests with the courts or with the FCC.

A. Federal Preemption and the Savings Clause

Congress has not preempted state common law remedies of general applicability. Federal preemption occurs in three situations. First, Congress can express the extent of federal preemption on the face of the federal statute. Second, preemption may be implied, without any express language, where Congress intends to occupy an entire field and preclude supplemental application of state law. Finally, state law may be preempted where it actually conflicts with federal regulations. Federal preemption of state

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80. Sixth Report, supra note 56, at para. 1 (noting that the FCC considers tariff issues through the § 208 complaint process outlined in the Communications Act).

81. Id.; see also West v. Northwest Airlines, Inc., 923 F.2d 657, 660 (9th Cir. 1990), petition for cert. filed, 60 U.S.L.W. 3322 (U.S. Sept. 27, 1991) (No. 91-505).

82. Id.; see also Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-96 (1983) (stating Court may ascertain Congressional intent from either explicit language of statute or implicit structure and purpose of statute).


84. Michigan Canners, 467 U.S. at 469 (“absent[ ] express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government”).

law, because it impacts the balance of powers in our system of government, must be carefully justified.9

Administrative agencies may not preempt state laws unless such power is expressly given by Congress in the enabling statutes.90 Administrative decisions within an agency's delegated authority, however, have the same preemptive effect as federal statutes.91 Accordingly, in *West v. Northwest Airlines, Inc.* ,92 the United States Court of Appeals for the Ninth Circuit held that state causes of action are not preempted solely because they impose liability over and above that available under federal regulations.93

Similarly, in *Nader v. Allegheny Airlines Inc.*,94 a passenger brought a common law tort action based on fraud after he was bumped from an overbooked flight.95 The overbooking policy was regulated by the Civil Aeronautics Board (CAB).96 CAB regulations required that liquidated damages be awarded to bumped passengers.97 Although CAB permitted overbooking, such overbooking was not required.98 CAB's enabling statute contained a savings clause that retained common law state remedies.99 Faced with an express savings clause, the United States Supreme Court declined to hold that state claims were preempted by the federal regulations.100

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89. Preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded... unless that was the clear and manifest purpose of Congress," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).


91. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704-05 (1984) (holding FCC regulations regarding cable carriage of distant signals preempted state ban on beer advertisements); *Florida Lime*, 373 U.S. at 142-43 (holding federal preemption inevitable "where compliance with both federal and state regulations is a physical impossibility"). But the Court cautions that "[i]nfer pre-emption [sic] whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. [This is] inconsistent with the federal-state balance embodied in [the] Supremacy Clause Jurisprudence." *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 717 (1985) (citing *Jones*, 430 U.S. at 525). Therefore, courts must look for special features of federal regulation that warrant preemption. *Id.* at 719.

92. 923 F.2d 657 (9th Cir. 1990), *petition for cert. filed*, 60 U.S.L.W. 3322 (U.S. Sept. 27, 1991) (No. 91-505).

93. *Id.* at 661; *see also Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976) (holding that a federal injunctive remedy supplements common law compensatory remedies).


95. *Id.* at 293-95.

96. *Id.* at 294.

97. *Id.*

98. *Id.* at 300.

99. *Id.* at 296 n.7.

100. *Id.* at 302-03.
Federal preemption relates to both unilateral liability exculpation and primary jurisdiction. Specifically, the savings clause in the Communications Act provides that federal regulation cannot alter or abridge state law remedies. In addition, if the FCC lacks jurisdiction to override state law causes of action and remedies, then the FCC cannot entertain primary jurisdiction to answer the legal question.

B. Primary Jurisdiction

Primary jurisdiction allocates the adjudication of issues between the courts and administrative agencies. Courts are guided by two principles in applying primary jurisdiction: The importance of uniformity of regulation and the need for specialized knowledge. Courts defer to an agency under primary jurisdiction when some special expertise of the agency pertains to an issue not traditionally within the competence of the judiciary.


102. 47 U.S.C. § 414 (1988). The Communications Act contains the following savings clause: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Id.

103. In Louisiana Pub. Serv. Comm'n, the Court made it clear that the FCC must demonstrate that preemption of state law is within the scope of its congressionally delegated authority. 476 U.S. at 374.

104. United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956) (explaining that "[t]he doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties"). In Professor Jaffe's landmark article on primary jurisdiction, he states:

Primary jurisdiction situations arise when the original jurisdiction of a court is being invoked to decide the merits of a controversy: the facts, the law, the relief; and it is held that the jurisdiction of the court either to decide one of the relevant issues or to entertain the action at all has been superseded by agency jurisdiction.


105. Transway Corp. v. Hawaiian Express Serv., 679 F.2d 1328, 1332 (9th Cir. 1982). The court's decision to exercise jurisdiction should balance varying interests: the need for comprehensive review by the agency in regulating an industry to maintain statutorily mandated uniformity, Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-04 (1976), the need for agency input as an expert on technical questions, id. at 304, and expeditious resolution of the case. Early cases stress the need for uniformity; later cases tend to rely on the benefit of specialized agency knowledge. Western Pacific, 352 U.S. at 64. By allowing the administrative agency to pass initially on a question within its purview, the early courts reinforced desirable policies respecting uniform national treatment by not rendering conflicting judgments. Id.

106. The Court further articulated the standard as it applied to a dispute with the Federal Maritime Board: "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574 (1952). The precise function of primary jurisdiction is "to guide a court in determining whether and when it should refrain from or postpone the exercise
Thus, primary jurisdiction concerns the proper relationship between the courts and administrative agencies\(^{107}\) and should only be used when the expertise of the agency would be advantageous, not merely as a means to dispose of cases.\(^{108}\) A court need not defer to an agency on a purely legal question.\(^{109}\) Consequently, courts have declined to assert primary jurisdiction where application of the facts before the court to the general rule asserted in the case was mechanical.\(^{110}\)

When the reasonableness of a tariff is at issue, the question is squarely within the agency's primary jurisdiction.\(^{111}\) Complex cost allocation and of its own jurisdiction so that an [administrative] agency may first answer some question presented.\(^{107}\) KNENETH C. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 22.1, at 81 (2d ed. 1983); see also Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (annunciating the doctrine of primary jurisdiction and holding primary jurisdiction appropriately in the ICC when court's common law authority was in direct conflict with ICC ratemaking power). Primary jurisdiction applies to claims that, although originally cognizable in the courts, require the special competence of a regulatory body envisioned by the regulatory scheme. Western Pacific, 352 U.S. at 64. Primary jurisdiction chiefly applies to regulated industries. Jaffe, supra note 104, at 1040. "It is not merely the presence of expertness, but the wide-reaching and systematic character of agency regulation which tends to choke out the normal jurisdiction of the courts." Id. at 1040-41. Absent pervasive regulation, the courts more liberally exercise jurisdiction. Id. at 1041.

107. Western Pacific, 352 U.S. at 63. The doctrine does not imply a belief that the agency is more competent than the court, but rather recognizes that when confronted with an issue within the particular expertise of the agency, the court may benefit from agency insight. See id. at 63-64. In Clark Oil Co. v. Texaco, Inc., 609 F. Supp. 1373, 1381-82 (D. Del. 1985), the United States District Court of Delaware reiterated that primary jurisdiction should only be utilized if an agency's expertise would be helpful in making a final decision. Id.

108. Clark Oil, 609 F. Supp. at 1381-82. No fixed formula determines when primary jurisdiction is appropriate; rather courts must discern, in each case, whether the rationales supporting the doctrine will be served by agency referral. Western Pacific, 352 U.S. at 64. Because the decision to exercise primary jurisdiction depends on the specific issues and facts in question, see Jaffe, supra note 104, at 1037, courts must evaluate the prudence of referral using a flexible case-by-case approach. See Western Pacific, 352 U.S. at 64. Thus, although no fixed factors exist to determine when primary jurisdiction is appropriate, four factors are often considered when courts decide whether to resort to primary jurisdiction: (1) whether the issue is within the conventional wisdom of judges, (2) whether a question lies at the heart of an agency's discretion or requires agency expertise, (3) whether the possibility of inconsistent rulings exist, and (4) whether prior application was made to the agency. Clark Oil, 609 F. Supp. at 1382.


110. Transway Corp. v. Hawaiian Express Serv., 679 F.2d 1328, 1332 (9th Cir. 1982). The rationale for judicial decision, without prior agency referral, is self-evident when application of the issue is mechanical, because no special expertise is required. Id.

111. Western Pacific, 352 U.S. at 69; Puerto Rico Maritime Shipping Auth. v. Valley Freight Sys., 856 F.2d 546, 550 (3d Cir. 1988). In Western Pacific, the Court determined that a question of whether napalm gel constituted an incendiary bomb subject to higher tariffs was properly within the exclusive primary jurisdiction of the ICC. The Court reasoned that tariff construction that requires special knowledge is within the agency's primary jurisdiction. 352 U.S. at 63. The Court stated that:

Where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that
accounting problems must be solved in the initial calculation of tariff rates.\textsuperscript{112} Thus, the reasonableness of rates should first be adjudicated by the agency.\textsuperscript{113} Although not all tariff construction matters are properly referred to the regulating agency,\textsuperscript{114} where tariff construction and questions of tariff reasonableness are inextricably intertwined, primary jurisdiction is proper.\textsuperscript{115}

In \textit{Southwestern Sugar \& Molasses Co. v. River Terminals Corp.},\textsuperscript{116} the Supreme Court examined whether primary jurisdiction was appropriate for consideration of the public policy behind a tariff exculpation clause.\textsuperscript{117} The Supreme Court found that, although the ultimate determination was one for the courts, it remained appropriate to seek advice from the agency\textsuperscript{118} when the regulation was pervasive.\textsuperscript{119} In \textit{Nader v. Allegheny Airlines, Inc.}\textsuperscript{120} the Court declined to refer the question to the governing agency under primary jurisdiction or to dismiss the state tort actions.\textsuperscript{121}

A number of lower courts have applied the Supreme Court's reasoning. In \textit{MCI Communications Corp. v. American Telephone \& Telegraph Co.},\textsuperscript{122} the United States Court of Appeals for the Third Circuit found that technical issues were properly referred to the FCC under primary jurisdiction.\textsuperscript{123}

\textsuperscript{112} Cost allocation is the process of determining which rates should recover which costs of the network. For example, since both local and long distance calls are completed over the wire which extends to the customer’s phone, the cost allocation process determines what portion of the cost of that wire is recoverable in the rates for those services.

\textsuperscript{113} \textit{Western Pacific}, 352 U.S. at 69. However, “Congress has granted and confirmed the original jurisdiction of the courts to enforce carrier rules and tariffs partly in order to make available . . . convenient federal and state judicial forums. The function of interpreting specific tariffs is not central to carrier regulation.” Jaffe, \textit{supra} note 104, at 1044.

\textsuperscript{114} When prior agency opinion “has already construed the particular tariff at issue or has clarified the factors underlying it,” the court may construe the tariff without reference to the agency. \textit{Western Pacific}, 352 U.S. at 69. In many cases, construing the tariff does not involve complicated questions of cost allocation. \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} 360 U.S. 411 (1959).

\textsuperscript{117} \textit{Id.} at 426.

\textsuperscript{118} Specifically, agency advice with respect to the “relevant economic and other facts which the administrative agency . . . is peculiarly well equipped . . . to evaluate” could assist courts in their decisionmaking. \textit{Id.} at 420.

\textsuperscript{119} \textit{Id.} at 418. The Court reasoned that a common carrier, at all times subject to regulatory control, could not abuse the tariff provisions. \textit{Id.}

\textsuperscript{120} 426 U.S. 290 (1976).

\textsuperscript{121} \textit{Id.} at 304-06. The court reasoned that the action did not turn on tariff reasonableness and therefore did not require agency expertise, \textit{id.} at 305, and that the tariffs provided for a resort to common law remedies. \textit{Id.} at 306.

\textsuperscript{122} 496 F.2d 214 (3d Cir. 1974).

\textsuperscript{123} \textit{Id.} at 223.
The court found it unclear whether previous FCC orders addressed the technical issues before the court.\footnote{124} The court also sought to avoid conflict with the FCC in resolution of the issues.\footnote{125} In contrast, in In re Long Distance Telecommunications Litigation,\footnote{126} the United States Court of Appeals for the Sixth Circuit refused to refer state law claims to the FCC because they were within the conventional expertise of judges.\footnote{127} Similarly, primary jurisdiction is not invoked when the issue involves the jurisdiction of the FCC over a service.\footnote{128}

The issue of tariff liability is usually decided in state cases without prior agency referral.\footnote{129} Cases are only rarely referred to state regulatory agencies.\footnote{130} State court reluctance to refer decisions on tariff liability to state regulators supports the conclusion that decisions on tariff liability limitations are within the purview of the courts.\footnote{131}

Thus, while the doctrine of primary jurisdiction is a matter of judicial discretion, referral is primarily based on the expertise of the administrative agency with respect to an issue before the court.\footnote{132} Moreover, judges tend to exercise primary jurisdiction discretion in regulated industries, where the court is reluctant to interfere with an agency's regulation of an industry.\footnote{133} Finally, purely legal questions or questions of policy within the conventional experience of judges are not referred to the agency for decision.\footnote{134}

\footnote{124. Id. at 220-21 (referring case to FCC for decision on a technical interconnection issue).}
\footnote{125. Id. at 221. The court noted that the case was appropriately referred to the FCC because it would have required the court to make a "judicial determination of the scope of permissible competition between the specialized carriers." Id. at 222. If the question framed by the court goes to the heart of agency regulation, the court may refer to the agency because the question involves technical or policy considerations beyond the court's ordinary competence and within the agency's field of expertise. Id. at 220.}
\footnote{126. 831 F.2d 627 (6th Cir. 1987).}
\footnote{127. Id. at 633. The court, however, referred claims based on the Communications Act to the Commission. Id. at 631.}
\footnote{128. Puerto Rico Maritime Shipping Auth. v. Valley Freight Sys., 856 F.2d 546, 549-50 (3d Cir. 1988). In RCA Global Communications, Inc. v. Western Union Tel. Co., 521 F. Supp. 998 (S.D.N.Y. 1981), the United States District Court for the Southern District of New York declined to apply primary jurisdiction because the essential factual and legal issues upon which the plaintiff's claims rested had been definitively resolved by the reviewing court. Id.}
\footnote{129. See, e.g., supra notes 44-45, and accompanying text.}
\footnote{130. See infra note 244.}
\footnote{131. State courts have repeatedly found liability issues within the purview of the courts. See supra notes 44-45.}
\footnote{133. Jaffe, supra note 104, at 1040-41.}
III.  *RICHMAN BROS. RECORDS v. U.S. SPRINT COMMUNICATIONS CO.*

The 1920s doctrine of liability exculpation is directly challenged in *Richman Bros. Records v. U.S. Sprint Communications Co.* 135 In this case, Richman seeks reevaluation of the long-standing and outdated liability limits pertaining to customers of nondominant carriers and applied through voluntary tariffs. 136 Such voluntary tariffs impose unilateral provisions on customers in a competitive market without providing them with notice or an opportunity to reject the limitations.

Richman filed suit against Sprint137 for negligence, tortious interference with business, failing to properly install new phone lines, and interrupting its phone order business through the year-end holiday season. 138 On reconsideration, the United States District Court for the District of New Jersey vacated its prior Summary Judgment decision, 139 and transferred the case to the FCC for adjudication. 140 The district court reasoned that because Sprint files tariffs with the FCC, the issue should be referred to the agency under the doctrine of primary jurisdiction. 141

Richman appealed the primary jurisdiction ruling to the Third Circuit142 on the grounds that liability limitations, voluntarily filed with the FCC in Sprint's tariffs, do not give the FCC jurisdiction to decide Richman's common law tort claims. 143 The Third Circuit dismissed for lack of appellate jurisdiction on the grounds that the district court action was a not a final action subject to appellate review. 144 Similarly, the U.S. Supreme Court de-
nied Richman's petition for certorari. The district court transferred the case to the FCC for adjudication under the doctrine of primary jurisdiction stands. Thus, this issue will proceed before the FCC under the District Court's transfer action.

Richman is significant because it challenges the assumptions of the 1920s doctrine of unilateral liability exculpation in the modern era of deregulation. Both parties have an enormous stake in the outcome: Sprint would be subject to far greater liability under an adverse ruling and Richman would recover damages for the considerable financial harm sustained by loss of business in its busiest selling season.

Richman asks whether policy decisions made pursuant to the Communications Act can legitimately preempt state negligence and fraud claims. Richman believes the Communications act specifically preserves these actions in state court. More importantly, Richman questions the appropriateness of continued routine application of the exculpation doctrine in the competitive service environment.

In contrast, Sprint maintains that as a tariff-filing common carrier, and under the “tariff as law” doctrine, any claims arising from its tariffed serv-

Richman's petition for reconsideration en banc, on the grounds that the transfer under primary jurisdiction was an appealable action, was denied.

146. Richman Bros., 90-5607, 90-5657, slip. op. at 5 (3d Cir. Dec. 31, 1991). Richman unsuccessfully argued that, in light of the Communications Act savings clause, this issue should be decided by the courts at the same time as the common law tort and contract issues. See Jaffe, supra note 104, at 1038 (noting that jurisdiction lies with the court for common law contract or tort issues).
147. Interestingly, a typical referral under primary jurisdiction applies only to those issues suited to Commission expertise. The case is then concluded in the court that originally stipulated the issues to the Commission. However, in this case, the district court appears to have transferred the entire case to the Commission. Thus, if the tariff liability issue is decided for Richman, the Commission, not the court, would be faced with deciding the legal issues of state contract and tort claims. Such decision-making power is completely outside the Commission's jurisdiction.
148. See, e.g., Western Union Tel. Co. v. Priester, 276 U.S. 252 (1928); Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566 (1921).
149. If Sprint's liability is not limited, it faces consequential, treble, and punitive damages under New Jersey state law. Richman Bros., Nos. 90-5607, 90-5657, slip op. at 6 (3d Cir. Dec. 31, 1991).
ices are governed by the provisions of its lawfully filed tariff.\(^{153}\) Sprint contends, therefore, that its liability is limited by the tariff provisions.\(^{154}\) Moreover, Sprint argues that there is no preemption issue because the plaintiffs are entitled to bring the cause of action in a state court.\(^{155}\) However, Sprint claims the right to use its tariff as a defense to limit its damages.\(^{156}\)

IV. THE NEED FOR CHANGE IN THE MODERN COMPETITIVE ENVIRONMENT

Analysis of the arguments in Richman must focus on three issues. First, a threshold consideration is whether the Communications Act preempts state common law tort and contract claims.\(^{157}\) Second, an important policy question is whether tariffs filed by nondominant, deregulated competitive carriers should appropriately exclude liability for negligence and serve as a defense to

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153. Richman Bros., Nos. 90-5607, 90-5657, slip op. at 6 (3d Cir. Dec. 31, 1991). Sprint also asserts that the issues involve “far reaching policy concerns” that should be decided by the FCC. See, e.g., Richman Bros., No. 88-4908, slip op. at 18 (D.N.J. June 22, 1990).

154. Sprint’s tariff provides:

> It shall be the obligation of the subscriber to notify the Carrier of any interruption in service. Before giving such notice, the subscriber shall ascertain that the trouble is not being caused by any action or omission of the subscriber, not within his control, or not in wiring or equipment connected to the terminal of the Carrier.

U.S. Sprint Tariff F.C.C. No. 2, § 3.14 (effective Aug. 1, 1986). Thereafter, the tariff limits liability as follows:

> The liability of the Carrier for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in the transmission occurring in the course of furnishing service, channels or other facilities and not caused by the negligence of the subscriber, commences upon activation of service and in no event exceeds an amount equivalent to the charges the Carrier would make to subscriber for the period of service during which such . . . occur.

U.S. Sprint Tariff F.C.C. No. 2, § 3.4.1 (effective June 1, 1987).


156. Id. at 23. Sprint argues that the rights of carriers cannot be enlarged by contract or tort. See Keogh v. Chicago Nw. Ry., 260 U.S. 156, 163 (1922) (“The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.”). Statutorily required tariffs set legal rates which cannot be varied by carriers, see Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Ry., 284 U.S. 370, 384 (1932), and such tariffs bind both carriers and shippers with the force of law. See Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411, 414 n.4 (1959). Sprint further maintains that, although filed tariffs give sufficient notice, Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 306 n.14 (1976), a tariff required to be filed by law is not simply a contract, but operates as law. Carter v. American Tel. & Tel. Co., 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967). Therefore, according to Sprint, this case does not involve federal preemption of state law because tariffs are the law governing the relationship between carriers and subscribers to their services. Brief for Appellee/Cross Appellant, Richman Bros., Nos. 90-5607, 90-5657, at 22 (3d Cir. filed Oct. 31, 1990).

damages actions brought under state law. Third, a final concern is the appropriate forum for the decision, either the courts or the administrative agency, under the doctrine of primary jurisdiction.

A. Preemption

The initial inquiry is whether Congress expressly preempted state causes of action in the Communications Act of 1934. The Communications Act does not expressly override state law. No provision of the Communications Act preempts application of state tort law. In fact, the Act specifically preserves state law remedies. The savings clause of the Communications Act demonstrates that Congress explicitly intended to exempt state remedies from federal preemption.

Preemption can be implied by Congress when a field has been fully occupied by the federal legislation, when the state law is fundamentally inconsistent with Congressional purposes, or where it is impossible to comply with both the state and federal laws. In order to find implicit preemption,

158. See infra text accompanying notes 190-94.
159. See infra text accompanying notes 234-48.
161. See 47 U.S.C. § 152(b) (indicating that the Communications Act reserves for the states a considerable sphere of regulatory autonomy that may not be impaired by the federal government); see also Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 371 (1986) (contemplating the argument that the legislative history to the Communications Act reveals Congressional intent to preserve state regulation powers).
162. The Court's decision in Nader v. Allegheny Airlines, Inc., under an identical savings clause in the Federal Aviation Act, makes it clear that Congress did not express preempt state law claims. 426 U.S. 290, 306 (1976). However, a footnote in Nader commented that if the exculpatory clauses were detailed in a tariff, the court could apply "settled principles of tort law [to] determine [if] the tariff provided sufficient notice." Id. at 306 n.14.
163. See 47 U.S.C. § 414 (1988). In an analogous case, the United States Court of Appeals for the Ninth Circuit recently ruled that under a provision in the Federal Aviation Act, Congress has not preempted state common law remedies of general applicability when applied to interstate airline carriers. West v. Northwest Airlines, Inc., 923 F.2d 657, 661 (9th Cir. 1990), petition for cert. filed, 60 U.S.L.W. 3322 (U.S. Sept. 27, 1991) (No. 91-505). The pertinent provision in the Federal Aviation Act reads: "Nothing contained in this [Act] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this [Act] are in addition to such remedies." Federal Aviation Act, 49 U.S.C. § 1506 (1988).
166. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see also supra note 88.
the court must conclude that the legislature intended that the federal law occupy the specific field covered by state law and that the federal scheme of regulation "left no room" for state laws. The Communications Act left significant power to the states in regulating telecommunications, indicating conclusively that Congress did not intend to occupy the entire regulatory field. Moreover, at issue in Richman are state common law tort, fraud, and contract claims. The Communications Act does not purport to occupy these traditionally common law fields. Congressional legislation in an area traditionally occupied by states faces a strong presumption against federal preemption.

The comprehensiveness of federal regulation is not in itself enough to support preemption. Merely because additional liability attends a state cause of action does not make it automatically susceptible to federal preemption. A dominant federal interest alone is insufficient to overcome the presumption against preemption, particularly where state law does not seek to regulate the entities affected and has only a tangential, indirect effect on services subject to federal regulation. Moreover, federal preemption is not assumed simply because the telephone provider is subject to state laws of general applicability. The savings clause also forestalls the conclusion that the Communications Act implicitly preempted state law.

171. This conclusion is self-evident in light of the Supreme Court's decision in Louisiana Pub. Serv. Comm'n, since regulation of telephone companies has been split between federal and state regulators and since the Communications Act regulates only interstate communications. See 476 U.S. at 374.
177. Hillsborough, 471 U.S. at 715.
179. Cf. West, 923 F.2d at 660 ("The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption.").
Finally, state law is preempted where it actually conflicts with federal regulation by impossibility or purpose.\textsuperscript{181} For the FCC to preempt state remedies, it must demonstrate that state imposed liability would create a direct conflict with carriers' federal regulatory obligations or would hinder the implementation of federal policies.\textsuperscript{182} In the instant case, state common law liability would not render compliance with both state and federal law impossible.\textsuperscript{183} Therefore, because liability awards would not inhibit carriers from compliance with federal regulations,\textsuperscript{184} congressional purpose would not be defeated by application of tort claims.\textsuperscript{185} Imposing common law negligence and tort liability on nondominant, competitive carriers is consistent with the FCC's deregulatory goals because it allows the marketplace, not regulation, to ensure reasonable rates and practices for non-monopoly telephone companies.\textsuperscript{186}

The Communications Act expressly prohibits the preemption of state claims.\textsuperscript{187} Neither Congress, under the Communications Act, nor the FCC, which is not so empowered, has preempted state common law remedies.\textsuperscript{188} Indeed, in the face of an express savings clause, tariffs filed pursuant to the Act by any carrier may not "abridge or alter" state common law remedies.\textsuperscript{189} Given this conclusion, there is no reason to extend the benefit of limited liability, applicable in the past to pervasively regulated monopoly carriers, to the significantly differing circumstances of deregulated competitive carriers.

\textbf{B. Tariff Regulation and Nondominant Carriers}

Given the facts in \textit{Richman}, the issue of unilateral tariff exculpation for nondominant carriers is thrown into sharp relief against the policies behind

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\item \textsuperscript{181} See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 57 (1941); see also supra note 91 (discussing conflicts of impossibility or purpose).
\item \textsuperscript{182} See Florida Lime, 373 U.S. at 142-43.
\item \textsuperscript{183} See California v. ARC Am. Corp., 490 U.S. 93, 105 (1989) (stating that state laws that simply impose additional liability do not render compliance with federal laws impossible).
\item \textsuperscript{185} See Communications Act of 1934, 47 U.S.C. § 151 (1988) (setting forth the purpose of the Communications Act).
\item \textsuperscript{186} See Hearings, supra note 9, at 1083 ("It is one thing . . . to say that we do not want a rate base regulated utility taking undue risks with the public's money. It is quite another thing to say that we should prohibit independent entrepreneurs from risking their money by law or regulation.").
\item \textsuperscript{187} See 47 U.S.C. § 414.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id.
\end{itemize}
liability limits.\textsuperscript{190} Cases upholding limited liability tariffs on the basis of inherent regulatory power are inapposite here.\textsuperscript{191} First, the FCC has indicated its reluctance to regulate nondominant carriers such as Sprint.\textsuperscript{192} Accordingly, the market, not regulation, sets prices.\textsuperscript{193} Second, the FCC has refrained from expressly or implicitly approving the tariff and from indicating that limited liability is an inherent part of the rate.\textsuperscript{194}

\section*{I. Deregulation and the Myth of Inherent Regulatory Oversight}

Since the mid-1980s, Sprint has been a nondominant competitive carrier which the FCC expressly forbears from regulating.\textsuperscript{195} Under the \textit{Competitive Carrier} regime, the marketplace, not rate and service regulation, maintains reasonable, nondiscriminatory rates and practices for nondominant carriers that lack market power.\textsuperscript{196} Accordingly, no court decision has ever second-guessed the market by exempting deregulated telephone companies from common law liability.\textsuperscript{197} The reasoning underlying the 1920s doctrine does not apply to nondominant carriers whose rates, tariffs, and services are not subject to regulatory scrutiny or control.\textsuperscript{198}

This change in regulatory approach by the FCC, exemplified by the \textit{Competitive Carrier} decisions, demonstrates that Sprint, as a nondominant carrier, enjoys FCC forbearance from regulation of rates, services, profits and

\begin{itemize}
\item \textsuperscript{190} See supra notes 135-56 and accompanying text.
\item \textsuperscript{191} Cases relying on inherent regulatory power assume active oversight and policy consideration by the overseeing regulatory body. See, e.g., Travelers Ins. Co. v. SCM Corp., 600 F. Supp. 493, 496 (D.D.C. 1984) (holding that decisions to limit liability are entrusted to the Public Service Commission); Pilot Indus. v. Southern Bell Tel. & Tel. Co., 495 F. Supp. 356, 361 (D.S.C. 1979) (recognizing that liability limitations are a function of ratesetting which is "totally regulated").
\item \textsuperscript{192} See, e.g., Sixth Report, supra note 56. Sprint, while held to the requirements of Title II, is not pervasively regulated. Second Report, supra note 56, at para. 21.
\item \textsuperscript{193} Second Report, supra note 56, at para. 17.
\item \textsuperscript{194} Voluntary tariffs, written and filed by competitive carriers, automatically go into effect without FCC approval. See, e.g., Sixth Report, supra note 56, at para. 1.
\item \textsuperscript{195} Sprint is often referred to in the context of competition as a nondominant interexchange competitor. Answer of U.S. Sprint at 7, U.S. Sprint Communications Co. v. AT&T Communications, F.C.C. File No. E-90-113 (filed Apr. 18, 1990).
\item \textsuperscript{196} Second Report, supra note 56, at paras. 3-5.
\item \textsuperscript{197} In the context of the instant case, Sprint strenuously denies its deregulated status, but the FCC considers such carriers deregulated, see Further Notice, supra note 2, at para. 3, as do the courts. See, e.g., MCI Telecom. Corp. v. FCC, 765 F.2d 1186, 1188 (6th Cir. 1985). Moreover, in a letter from U.S. Sprint to its customers, Sprint referred to itself as deregulated. Reply Brief for Appellant at 19-20, Richman Bros. Records v. U.S. Sprint Communications Co., Nos. 90-5607, 90-5657 (3d Cir. filed Dec. 3, 1990).
\item \textsuperscript{198} The FCC's own inclination is to let the market regulate the relations between carriers and customers. Second Report, supra note 56, at paras. 12, 17.
\end{itemize}
costs and is thus not a pervasively regulated monopoly. In fact, Sprint’s rates and tariffs are simply not regulated. Rather, Sprint is an essentially deregulated common carrier permitted to enter and exit markets of its choice, set prices without regulators looking over its shoulder, and avoid most of the constraints of traditional public utility regulation. 

Sprint is not required to file tariffs, and those that are voluntarily filed are not subject to regulatory scrutiny before they become effective. Similarly, Sprint’s rates are not “approved” by the Commission, and consequently it is unnecessary for Sprint to cost-justify its rates or submit supporting economic studies or analysis for its proposed rate changes. Finally, Sprint’s profits are a function of the marketplace and are not established in administrative rate cases or subject to price caps, nor do its costs and investments require regulatory approval. In contrast, because of their market power, dominant carriers remain subject to these requirements in order to protect captive customers who have no competitive alternative.

2. Cost of Judgments and Marketplace Regulation

The cost of judgments rationale for limited liability is similarly inapplicable in the instant case. The rationale—to protect ratepayers from the cost of judgments imposed by litigation—does not apply when there are competitive alternatives for service. If the customer chooses not to pay inflated

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199. The Commission distinguishes between the role of regulation for dominant and nondominant carriers:

[Public utility regulation . . . sees far beyond fixing prices, and includes control over market entry and exit, as well as investment decisions, determination of allowable rates of return, and review of all rates and practices. Generally, such regulation is administered by an autonomous government agency with extensive investigating powers. This is, of course, the same form of regulation which this Commission exercises under Title II of the Act.

Further Notice, supra note 2, at para. 19; see also id. at para. 20 (describing traditional public utility rate regulation).

200. The FCC does not purport to regulate nondominant carriers’ tariffs. Sixth Report, supra note 56, at para. 1. It is significant that Sprint is comfortable asserting that its tariffs are nonbinding and argues that it is free to set rates through individual contractual bargains that are outside its tariffs. Answer of U.S. Sprint at 7, U.S. Sprint Communications Co. v. AT&T Communications, F.C.C. File No. E-90-113 (filed Apr. 18, 1990).

201. Second Report, supra note 56, at para. 3.


205. Fourth Report, supra note 56.


207. Id.

208. See supra notes 35-38 and accompanying text.

209. See supra notes 35-38 and accompanying text.
rates, which reflect judgments against the company, then they can seek service from other competitive providers.\textsuperscript{210} This is not so with monopoly carriers.\textsuperscript{211} In the days when all service was obtained from a single carrier, the possibility that the carrier could pass on the cost of judgments through standard rates-of-return meant that all ratepayers would bear the burden of increased costs imposed by one customer's lawsuit.\textsuperscript{212}

Sprint may set its rates for service as it sees fit and within the constraints placed on it by the market.\textsuperscript{213} Indeed, the regulatory purpose for promoting reasonable rates has been left to the market.\textsuperscript{214} Voluntary tariffs are inconsistent with the "tariff as law" rule of old.\textsuperscript{215} There is no automatic pass-through on judgments to captive ratepayers in a competitive environment.\textsuperscript{216} Rather, the marketplace determines the prices of competitive carriers.\textsuperscript{217} The market price should reflect the cost of service; service that is of a particular quality will attract customers at specified prices.\textsuperscript{218} By removing the judgment factor from the pricing decision, courts would distort the market for services.\textsuperscript{219}

Sprint argues that dominant carriers would not be subject to the same liability and therefore would be able to undercut price. Ultimately, these dominant carriers would drive competitors out of the business, directly contravening the Commission's objective of market competition.\textsuperscript{220} This argument is flawed because it ignores the fact that dominant carriers are still regulated as to price and service quality.\textsuperscript{221} Regulatory oversight should adjust requirements on dominant carriers to assure a level playing field. Carriers will either be subjected to liability in competitive markets or be required to meet strict regulatory standards on quality of service in order to minimize

\textsuperscript{210} See Second Report, supra note 56, at para. 21.
\textsuperscript{211} See supra note 36.
\textsuperscript{213} Fourth Report, supra note 56.
\textsuperscript{214} Second Report, supra note 56, at para. 21.
\textsuperscript{215} See Stand Buys, Ltd. v. Michigan Bell Tel. Co., 646 F. Supp. 36, 37 (E.D. Mich. 1986). The inconsistency arises because this rule would allow carriers to voluntarily bind customers with the force of law. \textit{Id.}
\textsuperscript{216} In a competitive market, customers are not captives to any particular provider because they can always change to a competitor. See \textit{e.g.}, Fowler, supra note 9, at 146.
\textsuperscript{217} Second Report, supra note 56, at para. 21.
\textsuperscript{218} See Hearings, supra note 9, at 1080 (discussing the relationship between price and customer satisfaction).
\textsuperscript{219} Fowler, supra note 9, at 150 n.6. "In a free market economy, where individual consumers express their preferences among competing goods through free choice in their purchases, price becomes the principle arbiter of relative values." \textit{Id.} at 149.
\textsuperscript{220} \textit{Id.} at 157-58.
\textsuperscript{221} Further Notice, supra note 2, at para. 19.
the number of judgments imposed on them. This regulatory oversight of dominant carriers is a substitute for the market which operates to regulate nondominant carriers.

3. Competitive Alternatives and National Uniformity

Finally, with respect to national uniformity, the Communications Act savings clause specifically allows common law recovery. This fundamentally undermines the uniformity rationale applied in the 1920s. Deregulation of competitive carriers conflicts with cases requiring uniform rates. Under the rationales of the early cases, either the FCC or another agency regulated public utilities, and these agencies actually reviewed and approved the tariffs and rates. Esteve and Priester involved a regulated telegraph utility and not competitive telecommunications carriers. The rationale of cases permitting unilateral tariff liability limitations is inapplicable outside the framework of regulated, monopoly public utilities, where judicial deference to pervasive regulatory oversight of carrier rates and practices can be justified.

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222. See, e.g., id., at para. 159 (indicating that the “full panoply of... regulations” will continue to apply to AT&T as the dominant carrier).
223. Fowler, supra note 9, at 150-51.
225. See supra notes 41-43 and accompanying text; see, e.g., Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566, 572 (1921).
226. See supra notes 31-43 and accompanying text. A competitive marketplace assumes price differentials. See supra note 219. Moreover, decisions at the state level clearly evidence disparate treatment of consumer claims. See supra notes 44-45 and accompanying text. Given the changes in industry structure, see supra note 53, the simplest approach to equitable treatment is to place the decision in the hands of consumers through contractual bargains. See infra pt. IV(D).
227. Although Sprint points out that Western Union had competition from ITT, the Court makes clear that Western Union’s rates were authorized and approved by the ICC. Esteve, 256 U.S. at 571.
228. Id.; Western Union Tel. Co. v. Priester, 276 U.S. 252 (1928). Additionally, in reviewing the legislative history of the Communications Act, the FCC noted that Western Union held over 75 percent market share, and together with ITT, they controlled 99.9 percent of all telegraph and cable revenues. Further Notice, supra note 2, at paras. 44-46.
229. This reasoning was used in state cases dealing with yellow page directory services. See, e.g., Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107 (Ala. 1985) (holding exculpatory clause in directory agreement invalid as against public policy where relationship is primarily contractual); Tannock v. New Jersey Bell Tel. Co., 515 A.2d 814 (N.J. Super. Ct. Law Div. 1986) (holding yellow pages contract was a contract of adhesion), aff’d in part, rev’d in part, 537 A.2d 1307 (N.J. Super. Ct. App. Div. 1988); Discount Fabric House of Racine, Inc. v. Wisconsin Tel. Co., 345 N.W.2d 417 (Wis. 1984) (holding the threat of rate increases as a result of being held negligently responsible is an invalid reason to limit liability applicable to telephone company yellow pages listing). But see University Hills Beauty Academy v. Mountain States Tel. & Tel. Co., 554 P.2d 723 (Colo. Ct. App. 1976) (holding liability limits in contracts are subject to strictest scrutiny, but since directory services are wholly matter of private concern, there is no duty to public); Morris v. Mountain States Tel. & Tel. Co., 658
One further characteristic illustrates that national uniformity no longer
controls the rate environment. Unlike the initial application of the doctrine
to rates that specifically incorporated varying levels of customer liability,230
Sprint customers do not choose between different levels of liability when se-
lecting service options.231 Rather the exculpation clause applies across the
board to all tariffed services.232 Arguably, in Priester, customers were "on
notice" because they chose between repeated and unrepeated service with
the attendant assumption of risk.233

C. Primary Jurisdiction

The final issue raised by Richman is whether the courts or the FCC
should decide whether to extend the doctrine of limited liability to nondomi-
nant carriers.234 Courts should not resort to the doctrine of primary juris-
diction purely out of administrative convenience.235 Although the FCC has
never ruled on the applicability of tariff liability clauses to nondominant car-
rriers,236 the Communications Act precludes the agency from overriding state
law remedies,237 and the FCC deregulatory scheme lets the market regulate
competitive carriers.238

A threshold consideration is whether the FCC has statutory authority to
"approve" tariffs which preempt state common law remedies.239 A question
of an agency's statutory authority to regulate in a particular area is appropri-
ately decided by the courts.240 Questions relating solely to tariff reasona-
ness, however, properly belong before the FCC. The issues to be decided are those within the expertise and competence of the judiciary: common law fraud, negligence, and contract claims. Similarly, these liability issues do not require the special technical analysis or cost-allocation expertise of the Commission. The doctrine of limited liability, created by the judiciary, can be interpreted, applied, and extended by it as well.

Finally, given the nature of the savings clause, the FCC may not be able to make the determination. The FCC may not preempt state law without express empowerment from Congress. The savings clause reserves those rights to the states. Thus, the FCC's statutory authorization to limit claims may not exist.

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241. See In re Long Distance Telecom. Litig., 831 F.2d 627, 631 (6th Cir. 1987) (holding that the reasonableness of carrier practices was squarely within the FCC’s expertise).
243. See, e.g., Clark Oil Co. v. Texaco, Inc., 609 F. Supp. 1373, 1381-82 (D.C. Del. 1985) (“primary jurisdiction should only be utilized if an agency’s special technical or policy expertise would be advantageous”).
244. See Western Union Tel. Co. v. Priester, 276 U.S. 252 (1928); Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566 (1921). Indeed, in the numerous state cases considering this question, the court has only rarely referred the issue to the state commission. See, e.g., Jeffries v. Glacier State Tel. Co., 604 P.2d 4 (Alaska 1979) (holding that when a disgruntled customer complains of problem common to public, the issue is properly referred to Public Utility Commission under primary jurisdiction, but when complainant suffers from an action that does not effect the general public, the issue should be handled as traditional common law action by judiciary); General Tel. Co. v. Auto-Owners Ins. Co., 409 N.W.2d 133 (Wis. Ct. App. 1987) (finding court would invoke primary jurisdiction to the agency on issue of tariff interpretation because the question of tariff applicability was suited to agency expertise). But see Southern Bell Tel. Co. v. Mobile Am. Corp., 291 So. 2d 199 (Fla. 1974) (holding that a court is not required to refer issue to regulators when claim arises out of a tort); Kellerman v. MCI Telecom. Corp., 493 N.E.2d 1045 (Ill. 1986) (holding that state law claims of fraud and deception are not preempted by the Communications Act and do not require reference to the FCC under primary jurisdiction), cert. denied, 479 U.S. 949 (1986); Moore v. Pacific Nw. Bell, 662 P.2d 398 (Wash. Ct. App. 1983) (holding primary jurisdiction inappropriate when claim was telephone company negligence).
246. The FCC indicated in its Competitive Carrier decisions its doubt as to its ability to preempt state common law rights: “There is no explicit denial of common law contractual rights contained in the statute, and in the absence of such express directive, we are not free to infer an implied denial of those rights.” Further Notice, supra note 2, at para. 96.
248. See 47 U.S.C. § 414. This is consistent with rulings in Nader, 426 U.S. at 308, and In re Long Distance Telecom. Litig., 831 F.2d 627, 634 (6th Cir. 1987).
D. The Time Has Come to Change the Rules

The FCC has embarked on the path to deregulated competition. As the first step, the FCC adopted the use of a policy of permissive forbearance to nondominant carriers on the theory these carriers will act as a bellwether for industry-wide full and fair competition. In applying market theory as a substitute for strict regulatory scrutiny, the FCC must be vigilant in allowing the market to operate. Thus, the fostering of a market driven competitive telecommunications industry requires that the deregulated firms not be granted the same opportunity to evade common law liability as other public utilities.

Competitive nondominant telephone companies respond to market signals in the same way other competitive firms do. Because nondominant carriers conduct business in the same manner as other companies, they should be treated as all other competitive firms are treated. Competitive telecommunications carriers should not be permitted to escape liability for negligence or misconduct based on unilateral tariff provisions that their customers have not specifically agreed to or that afford the vast majority of customers no notice or opportunity to read or understand. Such unilateral limitations are not tolerated in other competitive industries, such as automobiles and airlines. Competitive carriers cannot avoid tariff and rate regulation and then seek the benefits that accompany pervasive regulation of public utilities. Because the special "rules" granted to the regulated dominant firms, such as tariff liability limitations or favored financial status, are an integral part of the quid pro quo for regulation, deregulated nondominant carriers should not be entitled to these benefits.

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249. Further Notice, supra note 2, at para. 2.
250. Id. at para. 7.
251. Id. at para. 30.
252. See id. at para. 22 (indicating that application of traditional regulation on nondominant firms would impose costs that outweigh the benefits to regulation).
253. See Hearings, supra note 9, at 1082 (indicating that competition has stimulated most innovative communications developments).
254. See, e.g., Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (invalidating warranty provisions that limited liability for breach as an unconscionable adhesion contract). Even in the pharmaceutical industry, which is pervasively regulated by the Food and Drug Administration, there is no similar limitation on damages. See, e.g., Sindell v. Abbott Lab., 607 P.3d 924 (Cal. 1980) (holding all manufacturers of DES liable for injuries resulting from uses of the drug in proportion to their market share); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (adopting proportional liability for DES manufacturers based on national market share).
256. Id.
257. "[S]ince the [local telephone] utility is strictly regulated in its rights and privileges, it should likewise be regulated to some extent in its liabilities . . . ." Warner v. Southwestern Bell
There would be no adverse consequences of refusing to extend the outdated Esteve doctrine beyond pervasively regulated utilities into the new era of deregulated competitive carriers. First, any impact on rates would be merely incidental. Second, carriers could and undoubtedly would protect their shareholders and customers by obtaining tort liability insurance. Third, nondominant carriers would still be permitted to price services using tariffs, because imposing state common law liability would not affect carriers' ability to comply with federal regulatory obligations. Fourth, and most importantly, nondominant carriers could still exculpate themselves from liability for negligence under state law simply by obtaining contractual or other bargained-for consent from their customers. Thus, the only certain effect of a decision restricting the Esteve doctrine to regulated firms would be that customers of competitive carriers would be placed on notice and would have a prior opportunity to agree with, or reject, a carrier's liability limitations.

V. Conclusion

The policies behind the imposition of unilateral tariff exculpation no longer apply to the competitive telecommunications environment of the 1990s and beyond. As originally conceived, unilateral liability exculpation preserved uniform rates for common carrier services. In the competitive environment of modern telecommunications, however, such a policy is antithetical to the very nature of competition, where providers compete on the basis of service and price for marketshare. Nondominant carriers are not

Tel. Co., 428 S.W.2d 596, 601 (Mo. 1968). This reasoning clearly does not apply to nondominant carriers which are not strictly regulated.

258. Id.


260. It is pertinent that tort liability insurance was not widely available at the time that the court decided the Esteve case. Tort liability insurance became more widely available after World War I in response to growing public dissatisfaction with indemnity insurance. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS, at 883-84 (1990).

261. Title II requirements applicable to carriers' rates would still apply and would not be compromised by removing non-bargained for exculpatory provisions. See Second Report, supra note 56, at para. 12; Further Notice, supra note 2, at para. 96. The various benefits outlined in MCI attendant to tariff filings would thus be undisturbed.

262. These contracts would be subject to traditional common law construction and review applicable to adhesion contracts by the courts to determine innate fairness, thereby protecting customers. See, e.g., University Hills Beauty Academy v. Mountain States Tel. & Tel. Co., 554 P.2d 723 (Colo. Ct. App. 1976) (suggesting that contracts which limit a carrier's liability should be subject to the strict scrutiny applied to adhesion contracts generally).

263. This is consistent with Sprint's position in an unrelated case. Answer of U.S. Sprint at 7, U.S. Sprint Communications Co. v. AT&T Communications, F.C.C. File No. E-90-113 (filed Apr. 18, 1990).
pervasively regulated, but operate in a competitive environment, where innovation is encouraged and price wars are the hallmark of competition. The public no longer deserves the disservice of unilateral liability limitations. Such a concession by a customer more properly accompanies a commensurate price reduction accomplished through the process of contractual bargaining.

*Christy Cornell Kunin*