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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WARREN HAVENS et al.,

Plaintiffs and Appellants,

v.

MOBEX NETWORK SERVICES, LLC et al.,

Defendants and Respondents.

A122489

(San Mateo County
Super. Ct. No. CIV-463985)

Warren Havens, Telesaurus VPC, LLC, AMTS Consortium, LLC, Intelligent Transportation & Monitoring Wireless, LLC, and Telesaurus Holdings GB, LLC, (collectively plaintiffs) appeal from a judgment dismissing their second amended complaint against Mobex Network Services, LLC (Mobex), Maritime Communications Land Mobile, LLC (Maritime) and Paging Systems, Inc. (PSI) (collectively defendants).

The complaint alleged causes of action for violations of the Cartwright Act (Bus. & Prof. Code, § 16720, et seq.) and Business and Professions Code section 17200, and common law causes of action for fraud, negligent misrepresentation, conversion and interference with prospective economic advantage, and interference with contract. All causes of action were based upon allegations that defendants had hoarded or warehoused licenses, falsely represented to the Federal Communications Commission (FCC) that they had constructed stations and provided required coverage, or failed to notify the FCC that they had not, and retained or renewed licenses that should have been automatically terminated under FCC rules.

After allowing plaintiffs an opportunity to amend, the court ultimately sustained defendants' demurrers to all causes of action alleged in the second amended complaint, without leave to amend, on the ground that they are preempted by the Federal Communications Act (FCA), specifically title 47 United States Code section 332(c)(3)(A).[1] Plaintiffs appeal from the judgment dismissing their second amended complaint.

We hold that the causes of action alleged in the second amended complaint are preempted by section 332(c)(3)(A) and affirm the judgment.

I. FACTS

Since we are reviewing an order sustaining a demurrer to the second amended complaint, this summary of facts is based on facts alleged in the second amended complaint and documents judicially noticed by the trial court.

The Parties

Plaintiffs are individuals and limited liability companies engaged in the business of obtaining licenses issued by the FCC in the Automated Marine Telecommunications Service (AMTS) frequency spectrum, and Location and Monitoring Service (LMS) spectrum. They also develop businesses to provide new wireless communication services authorized by these licenses. Plaintiffs have cooperated to obtain and use their licenses principally for providing new, advanced wireless services essential for Intelligent Transportation Systems (ITS) as defined by the United States Department of Transportation, the FCC, and other federal and state agencies.

Defendants are also limited liability companies, and a corporation. Defendants are plaintiffs' competitors in the business of acquiring AMTS licenses and operating wireless stations and systems.

Background Allegations Regarding Site-Based and Geographic Licenses

"[Y]ears ago" the FCC granted defendants site-based AMTS licenses for a large portion of the United States. Defendants eventually acquired site-based licenses "in a

[1] All further section references are to title 47 of the United States Code unless otherwise indicated.

large percentage of the major urban markets and high-use waterways throughout the United States, including virtually the entire length of the west coast of the States of California, Oregon and Washington."

The FCC issued site-based licenses "on a first-come first-serve basis at no cost for the spectrum." A site-based license "authorize[s] construction and operation of systems only at" a specific location. FCC rules require the holder of a site-based license to construct a station, meaning that a "system is installed and its operations commenced with certain FCC-approved equipment and certain minimum performance" (construction and coverage requirements) within two years of the grant of the license (the construction period). The FCC may grant an extension of the construction period upon a showing of good cause.

Plaintiffs alleged that, under FCC regulations, if a licensee fails to meet the construction and coverage requirements within the construction period the license terminates automatically. The license holder is also required to notify the FCC of the termination so the FCC can delete or cancel the license from its public license database known as the Universal Licensing Service or ULS. The ULS is the official primary source relied upon by parties "considering bidding for [g]eographic [l]icenses in upcoming spectrum auctions."

Plaintiffs alleged that if a site-based licensed station "is terminated for any reason, then the AMTS spectrum and service territory" automatically reverts to the geographic license covering that region. The reason for the rules is to prevent license holders from "hoarding" or "[w]arehousing" spectrum that they do not actually develop and use, and preventing competitors from acquiring licenses to the spectrum.

In two FCC auctions in 2004 and 2005, plaintiffs were the high bidders for certain AMTS geographic licenses that in the aggregate covered all of the United States except for an area around the Great Lakes. Geographic licenses are issued in public auctions and authorize the licensee to construct and operate stations within a defined area.

Defendants' Alleged Wrongful Acts

The FCC conducted an audit of defendants' licenses in 2004. As a result of this audit, the FCC identified some licenses held by defendants that it deemed cancelled because of defendants' failure to comply with FCC construction and coverage requirements. Plaintiffs designated these licenses as "cancelled licenses." They attached a list of the cancelled licenses as Exhibit A to the complaint.

Plaintiffs alleged that, in addition to the cancelled licenses, defendants continued to hold many other licenses that are subject "to ongoing administrative proceedings before the FCC." Plaintiffs alleged these licenses should be revoked or automatically terminated for the same reasons as the cancelled licenses. They designated these licenses as "challenged licenses." They attached a much longer list of the challenged licenses as Exhibit B to the complaint.

Plaintiffs alleged that defendants obtained all of their site-based licenses "pursuant to a scheme of bandwidth hoarding and 'Warehousing' whereby [d]efendants' purpose was not to construct and operate systems to service the public, but to lock-up AMTS spectrum in major markets, and thereby lockout competition . . . by making the large surrounding geographical licenses for the same frequencies . . . less economically viable to competitors, thus discouraging competition in the auction," and enabling defendants to obtain AMTS geographic licenses at a substantial discount.

As part of this scheme, defendants allegedly failed to construct "a major percentage" of stations within the construction period set by the FCC, and "deliberately hid [such] failures from the FCC" by falsely claiming that the required construction would be or had been completed in false station activation notices to the FCC. Defendants also allegedly falsely represented in license application filings, and in statements to their competitors and the general public that they "satisfied the *sine qua non* technical 'coverage' requirement of site-based AMTS licenses" by the license deadlines. Plaintiffs further alleged that defendants had submitted applications to the FCC for renewal of licenses that actually should have been deemed automatically terminated for failure to comply with FCC rules for construction and coverage.

Plaintiffs alleged the foregoing conduct prevented plaintiffs and other competitors from obtaining licenses they otherwise could have obtained in auctions of geographic licenses. Specifically they alleged the FCC database upon which bidders rely did not reflect that certain of defendants' licenses were cancelled or automatically terminated. The inaccuracy of the database restricted plaintiffs' ability to raise funds to participate in auctions because defendants made it appear they held valid site-based licenses that reduced the value of the geographic licenses upon which plaintiffs intended to bid. According to plaintiffs, defendants' misconduct "directly resulted in [p]laintiffs' loss of winning bids in these auctions."

Plaintiffs also generally alleged that in certain states where defendants "purport[] to own and operate AMTS CMRS [commercial mobile radio service] Stations" defendants failed to register as entities doing business within the states, and failed to collect surcharges and other taxes from alleged customers and failed to obtain and maintain "required legal access" to physical antenna structures and other infrastructure necessary for "actual construction . . . of its alleged still-valid AMTS stations."

Plaintiffs further alleged defendant Maritime obtained a bidding credit to which Maritime was not entitled in competition against plaintiffs in one of the auctions before the FCC. The FCC had already ruled Maritime was not entitled to the credit. Defendants also allegedly made false statements about title to certain licenses in an attempt to interfere with a contract between Kurian and plaintiff ACL. Plaintiffs further alleged that, principally through PSI and Maritime, defendants made false claims to plaintiffs' client Northeast Utility Service Company (NUSCO) and other entities that licenses ACL had agreed to assign to NUSCO under a contract were encumbered by PSI's AMTS licensed spectrum.[2]

Plaintiffs alleged "[s]pectrum hoarding and Warehousing is against the public-interest purpose of wireless licensing and license applications in the FCA, FCC Rules and also breaches the State of California and [f]ederal laws protecting against anti-

[2] We shall sometimes refer to all of the foregoing allegations collectively as "the license warehousing scheme."

competitive conspiracies and actions." The primary damaging effect of defendants' license warehousing scheme was that it "blocked [p]laintiffs and other competitors . . . from obtaining . . . AMTS licenses they otherwise would have obtained, and suppresses competition."

Summary of Causes of Action

Based upon the foregoing general factual allegations the second amended complaint alleged statutory violations of the Cartwright Act and Business and Professions Code section 17200, and common law tort causes of action for fraud, negligent misrepresentation, conversion and interference with prospective economic advantage, and interference with contract.[3]

The license warehousing allegations we have summarized above underlay each cause of action. For example, with respect to their cause of action for a violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.), plaintiffs alleged defendants "combined and conspired" with each other for the purpose of restraining trade or preventing competition or maintaining monopolies in the relevant markets in violation of California Business and Professions Code section 16720 et seq. by: (1) hoarding or warehousing licenses; (2) making numerous false representations to the FCC and "the industry" that stations had been or would be timely constructed, and that defendants complied with requirements to provide overlapping or continuous coverage, provided required service to maritime users, and used system equipment that complied with all FCC requirements for AMTS; (3) failing, "for years after licensed [s]tations had automatically terminated" to report their failure to construct to the FCC; (4) renewing licenses that plaintiffs claim should have been deemed terminated; (5) operating stations without an FCC license because the license had, according to plaintiffs, automatically terminated; and (6) failing to pay fees taxes and other costs imposed by state law where

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[3] The second amended complaint actually alleged *two* causes of action each for interference with prospective economic advantage, fraud, unfair competition, and conversion. The primary difference between these duplicate causes of action was that one applied to the cancelled licenses, and the other to the challenged licenses.

defendants purport to own and operate CMRS licenses thereby gaining a competitive advantage by lowering their cost of doing business.

Similarly, the cause of action for interference with prospective advantage alleged plaintiffs "had an economically beneficial relationship with the FCC as the subject licensing authority (required for any FCC license-based wireless business)" and with "equipment providers, financiers, partners for building and operating wireless systems, and end users of FCC licenses and licensed wireless services." Defendants allegedly knew of the these relationships and intentionally interfered with them by engaging in essentially all the same wrongful acts alleged as part of the license warehousing scheme.

The fraud and negligent misrepresentation causes of action repeated a variation of the license warehousing scheme by alleging that defendants intentionally or negligently stated in renewal applications that they had complied with construction requirements, had submitted station activation notices to the FCC for stations that were not constructed, and in response to the 2004 FCC audit had falsely stated they had timely constructed stations. Plaintiffs further alleged that, in fact, a major percentage of defendants' licenses had been terminated by operation of law, and should have been surrendered to the FCC for cancellation in its public licensing database. Plaintiffs alleged they reasonably relied upon defendants' explicit and implicit misrepresentations. Consequently they refrained from or were otherwise blocked from seeking and obtaining from the FCC spectrum licensed to defendants and licenses to spectrum elsewhere in the nation.

The unfair competition causes of action incorporated all the preceding allegations of wrongful acts and alleged that all defendants' "acts and omissions" regarding "licenses cancelled as a result of the FCC's 2004 audit" and with respect to the challenged licenses, constituted unlawful, unfair or fraudulent business practices in violation of Business and Professions Code section 17200.

The interference with contract cause of action also was predicated upon allegations that defendants made specific false representations about title to certain licenses and about the degree to which their site-based licenses encumbered plaintiffs' licenses.

Finally, the cause of action for conversion alleged that defendants, by failing to comply with the FCC construction and coverage requirements, and failing to timely report their failure to comply, had exercised control over spectrum that belonged to plaintiffs. They alleged the spectrum over which defendants wrongfully retained control should have reverted to plaintiffs to the extent they held geographic licenses encumbered by defendants' site-based licenses.

Plaintiffs further alleged they were damaged by defendants' license warehousing scheme because it prevented them from applying for, or obtaining, licenses for spectrum covered by defendants' site-based licenses that defendants should have surrendered. Absent the license warehousing scheme, plaintiffs alleged the spectrum defendants hoarded would have been available for plaintiffs to bid on. Defendants' conduct therefore interfered with plaintiffs' ability to successfully bid on licenses "in the first and second AMTS auction[s]" of geographic licenses, and "blocked" plaintiffs from "seeking and obtaining from the FCC the spectrum in the [d]efendants' [l]icenses and elsewhere in the United States."

Procedural History and Grounds for the Demurrers

Prior to the filing of the above described second amended complaint, defendants successfully demurred to all the causes of action alleged in the first amended complaint. The court sustained the demurrers on the ground that "the claims . . . come within the express preemption clause of the [FCA] at . . . section 332(c)(3)(A). Adjudication of the state claims pled in the [first amended complaint] would require the [c]ourt to determine whether or not [d]efendants' site-based licenses remained valid or were terminated and thus necessarily implicate the regulation of 'entry' into the mobile service market. (See *TPS Utilicom Services, Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 Fed.Supp.2d 1089, 1108 (*TPS Utilicom*).)" The court, citing a footnote in *TPS Utilicom,* gave leave to amend "to allege facts sufficient to show that the [FCC] has finally determined" the defendants "wrongfully retained canceled licenses."

In an attempt to cure the defects identified in that order, plaintiffs created the two categories of licenses "cancelled licenses" and "challenged licenses," and bifurcated their

tort causes of action into two separate causes of action distinguished only by the category of licenses to which the cause of action allegedly applied.

The only other difference between the first and second amended complaints was the addition of the allegation that, in certain states where defendants "purport[] to own and operate AMTS CMRS Stations," defendants had also failed to register as entities doing business within the states, and failed to collect surcharges and other taxes from alleged customers and failed to obtain and maintain "required legal access" to physical antenna structures, and other infrastructure necessary for "actual construction . . . of its alleged still-valid AMTS stations."

Defendant PSI again filed a demurrer to the second amended complaint contending the second amended complaint failed to state a cause of action because the state claims were preempted by section 332(c)(3)(A) of the FCA. It also filed a request for judicial notice of several FCC orders and pleadings addressing many of the same issues plaintiffs raised in the complaint. PSI argued that these records demonstrated that some of plaintiffs' claims with respect to what plaintiffs characterized as "cancelled licenses" were still the subject of ongoing proceedings before the FCC.

Defendants Mobex and Maritime (collectively the Mobex defendants) also demurred on the ground that the causes of action were preempted by section 332(c)(3)(A) of the FCA. In addition, the Mobex defendants advanced numerous reasons why, even if the claims were not preempted, plaintiffs failed to state any viable cause of action under state law. The Mobex defendants also filed a request for judicial notice of records of proceedings before the FCC in which plaintiffs had raised many of the same charges of license warehousing, defective station activation, coverage failures, improper bidding and other allegedly improper conduct.

Plaintiffs responded with their own request for judicial notice of FCC orders and records of proceedings before the FCC that they argued would demonstrate defendants did not timely disclose that some of their licenses had automatically terminated.

Order Sustaining the Demurrers Without Leave to Amend

At the hearing on the demurrers, the court stated the allegations regarding failure to pay state taxes and fees "appeared . . . to just be allegations thrown in to try to get around the defect that I pointed out at the last hearing." Even with these allegations, the court stated that, read as a whole, "the thrust and the gist of this action is alleged state law claims based upon licenses that automatically terminated and were wrongfully retained so as to warehouse licenses and hoard spectrum."[4] The court explained the changes in the second amended complaint did not cure the essential problem, i.e., "that we still have a case that is founded upon licenses which allegedly automatically terminated and allegedly were wrongfully retained by . . . defendants." The court concluded the state claims were preempted because: "[t]hey regard maintenance of licenses, [and] entry into the market."

The court granted the requests for judicial notice, and sustained defendants' demurrers to each cause of action alleged in the second amended complaint on the ground that "the claims set forth in the [second amended complaint] come within the express preemption clause of the [FCA] at . . . [section] 332(c)(3)(A)" because "[a]djudication of the state claims . . . would necessarily implicate the regulation of 'entry' into the mobile service market."

The court entered a judgment of dismissal in defendants' favor, and plaintiffs filed a timely notice of appeal.

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[4] The court also noted that the only cause of action that related the failure to pay taxes to any specific elements was the Cartwright Act claim, and questioned whether, even if not preempted, the failure to pay taxes is a violation of antitrust law. Plaintiffs' counsel was unable to provide the court with a case to support the proposition but responded: "[I]n this case when there was a pattern of operating sham entities, and that as a result of them being sham entities they were violating state law . . . it constitutes anticompetitive conduct."

II. ANALYSIS

1. Standard of Review

Our review of the trial court's ruling on the demurrer is governed by well-settled principles. "A general demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 534-535 (*Ball*).) We therefore deem all material facts properly pleaded to be admitted, but need not accept contentions, deductions or conclusions of fact or law. We may also consider matters that are judicially noticed. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) In determining whether the complaint states a cause of action we must give it a reasonable construction, reading all the allegations in context, and affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

Our review of the legal sufficiency of the complaint is de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

2. The Enactment of Section 332(c)(3)(A) and Summary of Cases Defining the Scope of Preemption

The right to obtain and use radio frequencies is regulated in the United States by the FCC acting pursuant to its authority created by the FCA. (§ 151 et seq.) The overall intent of the FCA is "to maintain the control of the Untied States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by [f]ederal authority." (§ 301.) To this end, the FCC regulates the airwaves by acting as the exclusive authority for the award of licenses, and regulating a comprehensive scheme for competitive bidding. (§§ 307, 309(j)(3).)

Section 332(c)(3)(A) is an *express* preemption provision declaring: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by

any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." (§ 332(c)(3)(A).) The general purpose of this preemption clause is "to achieve nationwide uniformity in telecommunications regulation." (*Bastien v. AT&T Wireless Services, Inc.* (7th Cir. 2000) 205 F.3d 983, 988-989 (*Bastien*).) "For purposes of [section] 332(c)(3)(A), state regulation of entry includes lawsuits and state judicial actions." (*TPS Utilicom, supra,* (2002) 223 F.Supp.2d at p. 1108.)

"Section 332(c)(3)(A) is part of the 1993 amendments to the Communications Act of 1934 (§ 151 et seq.) (Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, § 6002(b)(2)(A) (Aug. 10, 1993), 107 Stat. 312, 393." (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1372.) Congress enacted section 332(c)(3)(A) in the face of new regulatory challenges posed by the technology of wireless commercial mobile radio services as opposed to traditional landline technology. "As Congress became more aware of the barriers to entry and obstacles to growth presented by state regulation, it moved toward providing unequivocal federal authority to the FCC to foster development of this unique wireless medium" (Kennedy & Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong"* (1998) 50 Fed.Comm. L.J. 547, 559). In response to this changing technological landscape, "[i]n 1993, Congress amended the Communications Act to create a new regulatory class called 'commercial mobile radio service.' . . . The amendment granted the federal government exclusive authority to regulate the 'rates charged' and 'entry' of wireless carriers." (*National Ass'n of State Util. Cons. Adv. v. F.C.C.* (11th Cir. 2006) 457 F.3d 1238, 1242.)

Section 332(c)(3)(A), by its express terms precludes state or local government regulation of "rates" or "the entry of" mobile service providers into the market. At the same time, it expressly *limits* the scope of federal preemption to those two areas, and reserves the right of the states to regulate "other terms and conditions" of the provision of mobile services. (See, e.g., *Moriconi v. AT&T Wireless PCS, LLC* (E.D. Ark. 2003) 280 F.Supp.2d 867, 873-874.)

Therefore, in determining whether the causes of action alleged in the second amended complaint are preempted, the primary question we must resolve is whether the causes of action in the second amended complaint intrude upon the area reserved to the federal government and the FCC, .i.e., regulation of "rates" and market "entry," or whether, as plaintiffs contend, the causes of action impact only "other terms and conditions," that Congress expressly left to the states to regulate.

The touchstone of any inquiry into the scope of the statute's preemptive effect is congressional intent. (*Altria Group, Inc.* v. *Good* (2008) __U.S.__ [129 S.Ct. 538, 543].) "Congressional intent regarding the appropriate division of the regulatory authority of federal and state governments under the FCA is reflected by the following House of Representatives' report: 'Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." ' (H.R.Rep. No. 103-111, § 5205 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News pp. 378, 588.)" (*Moriconi v. AT&T Wireless PCS, LLC, supra,* 280 F.Supp.2d at pp. 873 -874.)

Most cases applying section 332(c)(3)(A) to determine whether state law causes of action are preempted have focused on the question whether specific state law causes of action regulate "rates," not whether state claims regulate market "entry." Although the parties agree the issue in this case is whether the causes of action in the second amended complaint seek to regulate market entry, not rates, we briefly summarize these cases

because they help define the standard for assessing whether a state claim intrudes upon a preempted area under section 332(c)(3)(A), or instead concerns "other terms and conditions," which Congress intended to allow the states to regulate.

As a general rule, these cases hold state law claims challenging the *setting* or *reasonableness* of rates are preempted, but claims alleging the nondisclosure or false representation of rates, or challenging billing practices not directly related to rates concern "other terms and conditions," that Congress intended to allow the states to regulate, and are not preempted. For example, in *Ball, supra,* 81 Cal.App.4th 529 the plaintiffs alleged causes of action for violation of Business and Professions Code section 17200 against every major provider of cellular phone services based upon charges for time when the customer was not actually talking, including for time rounded up to the next full minute and for ringing time. The plaintiffs sought restitution of all amounts overpaid and an injunction against these practices. The trial court sustained demurrers without leave to amend on the ground that the plaintiffs' causes of action were preempted by section 332(c)(3)(A). (*Ball,* at p. 533.)

The Court of Appeal upheld the order sustaining the demurrer with respect to the plaintiffs' claims challenging charges for noncommunication time. It reasoned that regulation of "rates" includes not only the rate *level* but also the method of measuring the length of a call. Since the plaintiffs' claims challenged the reasonableness of the latter rate component and sought restitution of amounts they contended were overpaid, the court concluded their claims were, to that extent, preempted as intruding upon the federally reserved area of rate regulation. (*Ball, supra*, 81 Cal.App.4th at pp. 535-540.)

The court, however, also held section 332(c)(3)(A) did not preempt plaintiffs' state law claims based upon an alleged *failure to disclose* to the consumer a particular rate or rate practice, because if successful, these claims would only require full and accurate *disclosure*, and therefore would not intrude upon the setting or assessment of the reasonableness of rates. The court reasoned that claims seeking only full disclosure concerned an issue of consumer protection falling in the category of "other terms and conditions" that Congress intended to allow states to regulate. The court held the

plaintiffs should have been granted leave to amend their unfair competition claims to seek injunctive relief based only upon inadequate *disclosure* of the challenged charges. It therefore reversed the judgment with directions to allow such an amendment. (*Ball, supra*, 81 Cal.App.4th at pp. 543-544.)

The courts have also clarified that a state claim is not preempted simply because the plaintiff seeks damages that may incidentally or indirectly have an effect on rates charged. For example, in *Spielholz v. Superior Court, supra*, 86 Cal.App.4th 1366, the court issued a writ directing the trial court to vacate its order striking a demand for monetary relief including damages and restitution. The substance of the plaintiffs' state law claims challenged the defendants' false advertising to consumers of a seamless calling area, and failure to disclose dead zones. (*Id.* at pp. 1369-1370, 1381-1382.) The Court of Appeal accepted the distinction the FCC drew between " 'an outright determination of whether a price charged . . . was unreasonable,' which would be preempted, and the determination of 'whether . . . there was *a difference between promise and performance*' in the context of false advertising or breach of contract, which would not be preempted." (*Id.* at p. 1370, quoting *In re Wireless Consumers Alliance, Inc.* (2000) 15 F.C.C.R. 17,021 ¶¶ 25-26.) The court held that "[i]f the principal purpose and direct effect of a remedy are to prevent false advertising and compensate an aggrieved customer, any prospective or retrospective effect on rates is *merely incidental* . . . even if the court determines the value of services provided in awarding damages or restitution." (*Spielholz v. Superior Court*, at pp. 1375-1376, italics added.) The court concluded that since the principal purpose and direct effect of the plaintiffs' damages claim was not to challenge rates but to remedy false advertising, it was a matter normally falling under "other terms and conditions" left to the states, and was not preempted. (*Id.* at pp. 1375-1376.)

The foregoing cases illustrate that, in determining whether state claims are preempted, the critical question is not the "form of the state claim or remedy," but rather the substance of the claims. (*In re Wireless Consumers Alliance, Inc., supra*, 15 F.C.C.R. 17,021 ¶ 28.) In other words, section 332(c)(3)(A) preempts a state claim only if it

"necessarily treads upon the federally-reserved area" of rates and market entry. (*Fedor v. Cingular Wireless Corp.* (7th Cir. 2004) 355 F.3d 1069, 1072 (*Fedor*).)

The courts have applied a similar approach when assessing whether state law claims are preempted as state regulation of "market entry." In *Bastien, supra*, 205 F.3d 983, AT&T Wireless, "a subsidiary of AT&T, entered the market in the late 1990s, after receiving approval of its rates and infrastructure arrangements from the [FCC], as required by federal law. (See 47 C.F.R. § 24.1 et seq.) To encourage new market entrants, the FCC allows service providers to begin operations in an area before it has fully built out its network. For this reason, the service provided by AT&T Wireless in 1998 was far from flawless." (*Id.* at p. 984.) A customer sued AT&T wireless for breach of contract and violation of a state consumer fraud law based upon AT&T signing up customers without first building adequate cellular towers and other infrastructure.

The Seventh Circuit acknowledged these claims were cast in terms of state contract and consumer protection law. Nonetheless, it held the state claims were preempted because, if successful, they would have compelled the defendants to build infrastructure the FCC did not require as a condition of market entry, or to pay damages for failing to do so. It held: "These claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market. The statute [section 332(c)(3)(A)] makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure, as well as the rates and conditions that can be offered for the new service. Should the state court vindicate Bastien's claim, the relief granted would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates. The statute specifically insulates these FCC decisions from state court review." (*Bastien, supra*, 205 F.3d at p. 989.)

In a subsequent decision, *Fedor, supra,* 355 F.3d 1069, the Seventh Circuit emphasized that examination of the substance of the plaintiff's claims must be based upon a reasonable construction of the complaint, and that section 332(c)(3)(A) does not preempt a state claim simply because it "touches on" the federally-reserved areas of

market entry or rate regulation "in any manner." (*Fedor,* at p. 1072.) Fedor had purchased a plan entitling him to a certain monthly allotment of airtime minutes for a flat rate, and additional charges for excess minutes. He brought causes of action for breach of contract, breach of the covenant of good faith and fair dealing, consumer fraud and unjust enrichment based upon the defendant's practice of billing for some minutes in a month other than the month in which the minutes were incurred. (*Id.* at pp. 1070-1071.) The defendant characterized these claims as treading upon the area of market entry. They argued that, by analogy to *Bastien,* the plaintiff's claims, if successful, would "necessarily require" Cingular to build towers in areas where it did not already have them because delays in billing for "roaming" minutes occurred when Cingular had to wait for operators of towers outside the service area to provide Cingular with the billing information. Cingular asserted it would have to build its own towers to avoid these delays. It concluded the plaintiff's state claims therefore trod upon the federally-reserved area market entry regulation and were preempted. (*Fedor,* at pp. 1072, 1074-1075.)

The Seventh Circuit rejected Cingular's argument because it stretched "the allegations of the complaint beyond recognition." (*Fedor, supra,* 355 F.3d at p. 1074.) It pointed out that the plaintiff's claims did not challenge *delays* in billing, but rather the month to which those minutes were allocated once they were billed. Therefore the complaint actually raised "an accounting problem, not an infrastructure problem." (*Ibid.*) It concluded the plaintiff's claims were not preempted because if plaintiff was successful Cingular would only have to conform its billing practices to the promises it made to consumers by contract.

Further delineation of the type of state claims that intrude upon federal regulation of market entry is provided by the decision in *TPS Utilicom, supra,* 223 F.Supp.2d 1089. The plaintiff alleged that AT&T had used a shell company to enter an auction in which AT&T would not otherwise have been eligible to participate. The plaintiff further alleged that AT&T's participation raised the amounts bid for licenses thereby making it more difficult for smaller companies like the plaintiff to bid successfully. Based upon

these allegations, the plaintiff alleged state law claims for unfair competition and interference with prospective advantage. (*Id.* at pp. 1093-1094, 1096.)

The court held these causes of action, at their core, intruded upon the federally-reserved area of regulation of market entry because "[e]ntry into the wireless communication market requires access to the FCC license [and] [t]he manner by which a party may acquire such a license is determined by the FCC." (*TPS Utilicom, supra*, 223 F.Supp.2d at p. 1108.)

The court explained: "TPS's claims are an attempt to regulate entry into the market for wireless communication by challenging the FCC eligibility criteria for competitive bidding on wireless licenses. The claims fall within the express preemption at [section] 332(c)(3)(A). The criteria for participation in the auctions for 'commercial mobile service' are established by the FCC pursuant to its authority under title 47 and as set forth by FCC regulation at [title 47 Code of Federal Regulation] sections 1.2101-1.2113. Whether or not TPS seeks to 'invalidate' the licenses acquired by the [d]efendants in this auction is irrelevant." (*TPS Utilicom, supra*, 223 F.Supp.2d at p. 1108.)

"Entry to the wireless communication market requires access to the FCC license. The manner by which a party may acquire such a license is determined by the FCC. The express preemption at [section] 332(c)(3)(A) prevents second guessing of the FCC auction participation criteria by challenge under state law. The structure of the act confirms this analysis. (See, e.g., . . . §§ 307(a)-(c) [authority to issue licenses]; 308(a)-(b) [requirements for licenses]; 309(j)(3) [specifying comprehensive scheme of competitive bidding for licenses].) The act further provides the FCC with a disciplinary mechanism for resolving disputes over eligibility and license awards. (See, e.g., . . . §§ 208(a) [investigation of complaints]; 209 [award of damages]; 303(m)(1) [license suspension]; 309(a) [specifying review process for parties who disagree with FCC licensing determinations]; 309(d) [party that objects to an FCC eligibility determination can file a petition with the FCC to deny the license]; 312 [license revocation].) The two claims in this action are an attempt to challenge the FCC eligibility determinations under

state law. Those challenges are expressly preempted." (*TPS Utilicom, supra*, 223 F.Supp.2d at pp. 1108-1109.)

In sum, state claims that, in substance, directly "tread upon" the federally-reserved areas of rates and market entry regulation, including setting and reasonableness of rates, the auction bidding process, licensing determinations, and infrastructure requirements are preempted. By contrast, state claims challenging only inadequate disclosure to consumers of rates or billing practices, or a disparity between a promise of service and performance, or false advertising, concern "other terms and conditions" that Congress intended to allow states to regulate. The latter type of state law claims are not preempted despite the possibility that success of such claims in the form of a damage award or other monetary relief may *incidentally* affect rates by increasing costs.

3. Application of Section 332(c)(3)(A) to the Second Amended Complaint

Applying the foregoing principles, we have no difficulty concluding that, to the extent that the causes of action alleged in the second amended complaint were based upon allegations that defendant Maritime obtained a bidding credit to which it was not entitled, they are clearly preempted. A state claim by one bidder against another challenging the eligibility of a competitor to participate in an auction or to benefit from auction credits is "purely a question of federal law as administered by the FCC." (*TPS Utilicom, supra,* 223 F.Supp. 2d at p.1108.) Therefore to the extent each of the state causes of action was based upon these allegations, it directly treads upon an issue of market entry and is preempted.[5] (*Ibid.*)

The next, and dispositive, question is whether the remainder of license warehousing scheme allegations upon which the causes of action are based intrude upon federal regulation of "entry" to the market. (§ 332(c)(3)(A).) Plaintiffs assert their state causes of action based upon these allegations do not tread upon federal regulation of

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[5] We also note that plaintiffs had specifically challenged the use of this credit in a proceeding before the FCC. Although the FCC adjusted the credit it also ruled that plaintiffs were not harmed in the bidding process. Irrespective of the outcome, the prior proceeding addressing the issue before the FCC illustrates that this type of claim falls directly in the area of market entry regulation.

market "entry" because plaintiffs do not challenge the *initial grant* of licenses to defendants. Instead, they challenge only defendants' wrongful retention or renewal of licenses that plaintiffs contend automatically terminated as a result of failure to comply with FCC rules regarding construction within a specified period. Plaintiffs do not, however, cite any authority for the proposition that federal regulation of "entry" to the market begins and ends with the initial grant of a license.

The distinction plaintiffs attempt to draw between initial licensing and renewal, revocation, or termination of licenses is illogical and inconsistent with the purpose of section 332(c)(3)(A) to ensure uniformity in the law applicable to mobile service providers with respect to market entry. A license is a *prerequisite* to market entry. (*TPS Utilicom, supra,* 223 F.Supp.3d at p. 1108.) As is the case with an initial grant of a license, a subsequent renewal, revocation or termination of a license determines access of the holder, and of other bidders or potential bidders to a license and the spectrum covered by it and therefore necessarily is also an issue of market entry. Uniformity in the regulation of market entry could not be achieved by limiting preemption of state regulation to the procedure, terms, and conditions for an initial grant of a license, yet allowing state regulation of the procedure and terms or condition with respect to the renewal, termination or revocation of licenses.

That the intended scope of federal control over market entry is not limited to the initial licensing decision is also illustrated by the comprehensive statutory scheme created by the FCA giving the FCC authority to resolve disputes over eligibility and license awards. (See, e.g., §§ 208(a) [investigation of complaints]; 209 [award of damages]; 303(m)(1) [license suspension]; 309(a) [review process for parties who disagree with FCC licensing determinations]; 309(d) [party that objects to an FCC eligibility determination can file a petition with the FCC to deny the license]; and 312 [license revocation].) The scope of this authority strongly suggests that control over disputes and decisions beyond the initial grant of a license are essential to the federal regulation of market "entry." In fact, the FCC orders and other pleadings that the trial court judicially

noticed reflect that plaintiffs availed themselves of many of the above described procedures to raise many of the same issues they now attempt to cast as state law claims.

Moreover, the FCA itself specifically identifies the warehousing of licenses as a potential barrier to market entry and development and use of spectrum in the public interest by requiring the FCC to adopt rules "to prevent stockpiling or warehousing of spectrum by licensees." (§ 309(j)(4)(B).) The important role of these rules in the regulation of market entry is illustrated by plaintiffs' own allegations throughout their second amended complaint that the primary effect of defendants' license warehousing scheme was to deny them and other potential market entrants access to the hoarded spectrum.

We also reject plaintiffs' contention that the distinction they attempted to draw between "cancelled licenses" and "challenged license," avoids preemption. After the court sustained demurrers to the first amended complaint, plaintiffs created these categories, and separate causes of action based upon them in an attempt to avoid dismissal based upon preemption. They did so in reliance upon a footnote in *TPS Utilicom, supra,* 223 F.Supp.2d 1089 suggesting that the preempted state claims in that case, "might escape FCA preemption" if they were brought "*after* a determination that a party had wrongfully participated in an FCC license auction." (*Id.* at p. 1109, fn. 19.) Plaintiffs argue that at least to the extent their license warehousing scheme allegations were incorporated in the causes of action relating only to "cancelled licenses," their claims should not be preempted because the FCC had already determined that those licenses should be cancelled or terminated.[6]

We find the contention unpersuasive for two reasons: First, the footnote in *TPS Utilicom* described a hypothetical not before the court. It therefore is dictum. Second,

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[6] The trial court also was apparently relying upon this footnote in *TPS Utilicom, supra,* when it sustained the demurrer to the first amended complaint, but granted leave to amend "to allege facts sufficient to show that the [FCC] has finally determined that . . . [d]efendants wrongfully retained canceled licenses." As we shall explain that footnote is premised upon a confusion of the principles of federal preemption with the doctrine of primary jurisdiction.

and more fundamentally, the footnote confuses the doctrine of comity between courts and agencies known as "primary jurisdiction," with preemption. Primary jurisdiction " '*applies where a claim is originally cognizable in the courts*, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' [Citations.]" (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390.) But where, as here, and in *TPS Utilicom*, the state claims are expressly *preempted* the state law claims are simply *not cognizable in state court at all*, not because of deference to the special expertise of an agency, but because Congress has expressed its intent through enactment of section 332(c)(3)(A), under the Supremacy Clause (U.S. Const., art VI, § 2) to preclude any state regulation in this particular area. Therefore, for purposes of analyzing the issue of *preemption,* it is irrelevant whether the FCC has rendered a final decision because, *regardless of any pending or final action by* the FCC, the state is simply precluded from regulating in the area.[7]

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[7] After the court sustained the demurrer to the first amended complaint, plaintiffs filed a request to stay the proceedings based upon the doctrine of primary jurisdiction, and attached an approximately 440-page table of ongoing proceedings before the FCC in which plaintiffs were challenging defendants' licenses. If the plaintiffs' claims were not preempted, this might have been an appropriate case in which to stay the proceedings until the FCC could render final decision on many of the issues within the agency's special expertise, such as: (1) whether and with respect to which licenses did defendants fail to satisfy construction and coverage requirements; (2) whether this failure did result in *automatic* termination or whether the FCC had discretion to, and would grant a waiver, or extend the period; and (3) whether defendants' retention of licenses that plaintiffs contended should have been surrendered or cancelled actually harmed plaintiffs in the bidding process of any of the auctions in which plaintiffs participated. Resolution of these issues involves technical or policy considerations within the agency's field of expertise. Moreover, as the complaint itself recognized many of the challenged licenses were already the subject of ongoing administrative challenges, creating "a substantial danger of inconsistent rulings." (*Ellis v. Tribune TV Co* (2d Cir. 2006) 443 F.3d 71, 82-83.)

The irrelevance of an FCC final decision to the preemption analysis is illustrated by the recent decision in *Telesaurus VPC, LLC v. Randy Power* (D.Ariz. 2009) WL 273295.[8] In that case, Telesaurus, also one of the plaintiffs in this case, filed state tort causes of action including conversion and interference with prospective advantage based upon allegations the defendant improperly obtained a license to spectrum frequencies the FCC had previously awarded to the plaintiff. The FCC had already issued an order resolving the conflict by deleting the disputed frequencies from defendants license. The court nonetheless held the state claims were preempted because they intruded upon federal regulation of market entry, and granted the motion to dismiss them.

In any event, as the trial court in the present case noted at the hearing and in its order sustaining the demurrer, the only final FCC determination alleged was with respect to the category of "cancelled licenses." The second amended complaint alleged that "cancelled licenses" had automatically terminated, and had been "identified by the FCC as cancelled." Yet, the license warehousing scheme alleged in the complaint did not end with the assertion that many of defendants' licenses had automatically terminated. Plaintiffs alleged defendants had acquired both "cancelled" and "challenged" licenses with the intent to warehouse them, had retained them knowing that they failed to comply with FCC construction and coverage requirements, had intentionally misrepresented to the FCC and to potential competitors and bidders the status of their compliance with the construction and coverage requirements and other terms of their licenses, and had concealed their violations of the FCC anti-warehousing rules. According to plaintiffs, all of the foregoing conduct had the effect of interfering with the exercise of their own licensing rights, and either deterred them from making, or interfered with their ability to

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If, however, the causes of action are *preempted*, there is no point in staying the matter until the FCC renders a final decision on these issues because the state claims are simply not cognizable in court at all. The complaint would have to be dismissed on preemption grounds even if the FCC had rendered final decisions on theses issues. The court, therefore, properly never reached the request for a stay, and instead denied it as moot, because the causes of action were preempted.

[8] Although the *Telesaurus* case is pending before the Ninth Circuit Court of Appeals, it remains federal authority and is available for our consideration.

make, successful bids in two FCC auctions of geographic licenses. The allegation that the FCC made a determination in the 2004 audit that some licenses had automatically terminated and should have been canceled falls far short of reaching these broader allegations of wrongful conduct with respect to both the "cancelled" and the "challenged licenses."[9] Thus, even if the existence of a final decision by the FCC with respect to plaintiffs' allegations of wrongful conduct could have avoided the preemption defense, the second amended complaint failed to allege that the FCC had rendered such a decision.

Nor did the addition of allegations in the second amended complaint concerning defendants' failure to pay state taxes and fees succeed in defeating the preemption defense as a ground for sustaining defendants' demurrers. If considered in the abstract, an allegation of violations of state tax laws would not appear to tread upon an issue of federal regulation of entry into the wireless communication services market. Nonetheless, an examination of these allegations, in context of the whole complaint, demonstrates that the alleged failure to pay state taxes and fees was premised upon, and simply another variation of the licensing warehousing scheme allegations. Plaintiffs alleged each defendant failed to pay state taxes and fees in states where that defendant "*purports* to own and operate AMTS CMRS Stations not previously canceled by the FCC." (Italics added.) They further alleged defendants had failed to register as out of state entities doing business in the states; failed to collect state surcharges and other taxes from "*alleged* customers"; and failed to obtain and maintain "required legal access" to physical antenna structures, and other infrastructure necessary for "actual construction of its alleged still-valid AMTS stations." Thus the allegations of failure to comply with state tax laws were based upon the assertion that defendants were operating as "sham entities" in these states where they held licenses and purported to be operating CMRS stations, but according to plaintiffs actually were not. The underlying premise of these

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[9] With respect to the "challenged licenses" which represented the majority of the licenses at issue, there was no allegation that the FCC had rendered a final decision on *any* issue. To the contrary, the second amended complaint alleged these licenses were "subject to ongoing administrative proceedings before the FCC."

claims therefore, was also that defendants were wrongfully retaining licenses despite having failed to comply with FCC construction and coverage requirements, and they were operating these sham entities to conceal that failure.

We conclude that neither the attempted distinction between cancelled and challenged licenses, nor the addition of general allegations of violations of state tax laws based upon the alleged failure to comply with FCC rules applicable to licenses avoids the conclusion that the state law causes of action alleged in the second amended complaint are preempted by section 332(c)(3)(A). All of the state law causes of action tread upon federal regulation of market entry, because they were based upon allegations challenging defendants' retention or renewal of licenses that plaintiffs contended should have been automatically terminated based upon defendants alleged noncompliance with FCC rules concerning construction and coverage, or violations of other rules against warehousing and stockpiling of licenses, and allegations that the effect of this conduct was to undermine the fairness and outcome of bidding in two FCC auctions.

4. Savings Clauses

Section 414 of the FCA provides: "Nothing in this Chapter 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." (§ 414.)

Plaintiffs argue the court erred in finding their claims preempted because this "savings clause" specifically preserves their state law claims based upon the license warehousing allegations. They are wrong. In *Ball, supra*, 81 Cal.App.4th at page 539 the court rejected the identical contention. The plaintiff in that case argued state claims the court found were expressly preempted by section 332(c)(3)(A) were nonetheless preserved by this savings clause. The court held that a " '[a] general "remedies" savings clause cannot be allowed to supersede [a] specific substantive preemption provision'—this would render the preemption provision meaningless." (*Ball,* at p. 540.) We agree with *Ball* that this savings clause preserves only state law claims or remedies that *are not otherwise expressly preempted by section 332(c)(3)(A).*

None of the cases plaintiffs rely upon compel a different conclusion because they do not address the question whether state law claims that are expressly preempted pursuant to section 332(c)(3)(A) could nonetheless be preserved by section 414. (See *Cooperative Communications Inc. v. AT&T Corp.* (D. Utah 1994) 867 F.Supp. 1511, 1515 [court *without any reference to express preemption based upon section 332(c)(3)(A)* addressed the question whether state claims were *impliedly* preempted by the FCA because the comprehensive statutory scheme evinced intent to "occupy the entire field"].) The other two decisions plaintiffs cite, *Bruss Co. v. AllNet Communication Services, Inc.* (N.D. Ill. 1985) 606 F.Supp. 401 and *Financial Planning Inst., Inc. v. American Tel.&Tel. Co* (D.Mass. 1992) 788 F.Supp. 75 also involved only issues of implied preemption. Moreover, these two decisions were decided in 1985 and 1992 before Congress enacted section 332(c)(3)(A). "Absent an express congressional statement, state law may be preempted in two situations: first, if the state law actually conflicts with federal law, [citations]; or second, if federal law so thoroughly occupies a legislative field ' "as to make reasonable the inference that Congress left no room for the States to supplement it." ' [Citations.]" (*Cooperative Communications, Inc. v. AT&T Corp., supra*, 867 F.Supp. at p. 1515.) Since Congress *expressly* stated its intent to preempt state law when it added section 332(c)(3)(A) in 1993, the forgoing cases upon which plaintiffs rely analyzing whether congressional intent to preempt may be implied are inapplicable to the issue before us, i.e., whether the savings clause set forth in section 414 was intended to permit state law clams that are expressly preempted by section 332(c)(3)(A).

In the absence of citation to any persuasive contrary authority on point, we choose to follow the explicit holding in *Ball, supra,* that Congress did not intend this savings clause to supersede the express preemption it declared in section 332(c)(3)(A).

Plaintiffs' reliance upon another savings clause included in the Telecommunications Act of 1996 as support for the proposition that at least their cause of action for violation of the Cartwright Act is not preempted is also misplaced. "Section 601(b) of the 1996 Act is an antitrust-specific saving clause providing that 'nothing in

this Act or the amendments made by this Act shall be construed to modify, impair or supersede the applicability of the antitrust laws.' (110 Stat.143, 47 U.S.C, § 152 . . . .)" (*Verizon Communications, Inc. v. Law Offices of Curtis Trinko* (2004) 540 U.S. 398, 406 (*Trinko*).)[10]

Setting aside the question whether the reference in section 601(b) to "antitrust laws" includes state laws such as the Cartwright Act, plaintiffs misstate the holding in *Trinko.* They assert *Trinko* interpreted section 601(b) to mean that "antitrust claims are not preempted generally under the FCA." To the contrary, *Trinko* did not involve a question of preemption of state law, and the court did not even discuss whether section 601(b) amended, limited or modified the scope of preemption previously expressly declared in section 332(c)(3)(A). Instead, the court addressed the very different question whether an alleged breach of certain duties created by the Telecommunications Act of 1996 could be enforced by a *federal* antitrust claim. The court interpreted section 601(b) to bar application of the doctrine of implied immunity which shields regulated entities from liability upon a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. (*Trinko, supra,* 540 U.S. at pp 406-407; see also *United States v. National Ass'n of Securities Dealers, Inc.* (1975) 422 U.S. 694, 719-720 [defining implied immunity].) In the absence of citation to any authority that supports plaintiffs' novel interpretation, we conclude that section 601(b) did not amend, limit or modify the scope of preemption Congress previously expressly declared in section 332(c)(3)(A).

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[10] The focus of the Telecommunications Act of 1996 was "the entrenched local monopolies held by incumbent local exchange carriers." (Kennedy & Purcell 150 Fed.Comm. L.J. 547, 570.) Again, those commentators opine that "nothing in the 1996 Act undercuts the 'hog tight, horse high , and bull strong' federal regulatory framework predicated upon . . . section 332(c)(3) . . . in fact section 601(c)(1) of the 1996 Act states that Congress did not intend to amend existing law, such as the 1993 Act. Congress provided: 'This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided in such Act or amendments.' " (*Ibid.*, fn. omitted.)

III. DISPOSITION

For the foregoing reasons we conclude the court did not err in sustaining defendants' demurrers without leave to amend as to all causes of action alleged in the second amended complaint on the ground that they are preempted by section 332(c)(3)(A). We therefore affirm the judgment.

Graham, J.*

We concur:

Marchiano, P. J.

Margulies, J.

A122489, *Havens et al., v. Mobex Network Services et al.*

* Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.