IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

KENNETH PHILLIPS, Plaintiff, vs. AT&T WIRELESS, Defendant.	**No. 4:04-cv-40240** **ORDER ON MOTION TO REMAND**

This matter is before the Court on Plaintiff's Motion to Remand (Clerk's No. 3). This motion seeks remand of the complaint originally filed in state court by Plaintiff. Attorney for Plaintiff is Ray Johnson; attorneys for Defendant are Stephen E. Doohan, Louis F. Bonacorsi, and Jennifer S. Kingston. An oral hearing on the motion was held July 23, 2004. The motion is now fully submitted and ready for ruling.

PROCEDURAL HISTORY AND BACKGROUND FACTS

Plaintiff, Kenneth Phillips ("Phillips"), commenced this action against Defendant, AT&T Wireless ("AT&T"), in the Iowa District Court for Polk County on March 25, 2004. Defendant removed the matter to this court on April 28, 2004. Phillips' complaint asserts two counts against Defendant. At issue in the present motion is whether jurisdiction is proper pursuant to 28 U.S.C. § 1331, the federal question statute, and 28 U.S.C. § 1367(a), the supplemental jurisdiction statute.

The lawsuit arises out of claims by Phillips, a former subscriber of cellular telephone services from AT&T, that AT&T has illegally charged early termination fees/ default charges in its cellular service contracts and engaged in unfair debt collection in violation of state law. Defendant removed the action pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, claiming Plaintiff's state law claims are completely preempted by the Federal Communications Act ("FCA"), 47 U.S.C. § 151 et seq., and that Plaintiff's claims depend on resolution of a substantial question of federal law. In response, Phillips filed the pending Motion to Remand pursuant to 28 U.S.C. § 1447(c).[1]

ANALYSIS

Phillips filed suit against AT&T specifically alleging violations of the Iowa Consumer Credit Code and the Iowa Unfair Debt Collection statute. AT&T then removed the action within the statutory time period on two separate but related bases under 28 U.S.C. § 1441(b): (1) the doctrine of "complete preemption"; and (2) the "substantial federal question" doctrine. Plaintiff has moved to remand, claiming the following: (1) he is not challenging rates and thus his claims are not completely preempted; and (2) he does not need to prove any violation of the FCA to prevail on his claims. The burden of establishing federal jurisdiction falls upon the party seeking removal of the

[1] Any additional background facts relevant to the parties' respective arguments will be discussed infra, in the analysis section.

action from state court to federal court. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

A. Nature of the Plaintiff's Action

Phillips' complaint alleges claims that AT&T has charged illegal early termination fees and illegal default charges in its cellular service contracts in violation of Iowa Code §§ 537.3310 and 537.3402. The complaint further alleges that AT&T engaged in unfair debt collection in violation of Iowa Code § 557.7103. These claims stem from the imposition of an early termination fee in Phillips' cellular service contract after Phillips attempted to cancel the contract because he was dissatisfied with the service AT&T was providing. Phillips asserts these claims are based solely in state law; meanwhile, AT&T contends federal law, namely, the FCA, is implicated.[2]

B. Removal Based on Complete Preemption

A civil action filed in state court may be removed to federal court if founded on a claim "arising under" federal law. 28 U.S.C. § 1441(b). Generally, an action arises under federal law only if issues of federal law are raised in the well-pleaded complaint.[3] Hull v. Fallon, 188 F.3d 939, 942 (8th Cir. 1999); see also Caterpillar Inc. v. Williams,

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[2] Even though federal law may be implicated, the defendant must still show federal jurisdiction exists. See Kokkonen, 511 U.S. at 377.

[3] However, a plaintiff may not defeat removal through "artful pleading," that is, by omitting to plead necessary federal questions. Gore v. Trans World Airlines, 210 F.3d 944, 950 (8th Cir. 2000) (citing Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998)).

482 U.S. 386, 392 (1987). Thus, courts examine the well-pleaded allegations of the complaint and ignore potential defenses. Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); see also Gore v. Trans World Airlines, 210 F.3d 944, 948 (8th Cir. 2000) ("'Congress has long since decided that federal defenses do not provide a basis for removal.'") (quoting Caterpillar, 482 U.S. at 399)).

A corollary to the well-pleaded complaint rule is the doctrine of complete pre-emption.[4] Gore, 210 F.3d at 949 (citing Caterpillar, 482 U.S. at 393). While "[f]ederal preemption is ordinarily a federal defense to the plaintiff's suit . . . , and, therefore, does not authorize removal to federal court," Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987), "[o]n occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" Caterpillar, 482 U.S. at 393 (quoting Metropolitan Life, 481 U.S. at 65); see also Gore, 210 F.3d at 949. In short, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."[5] Metropolitan Life, 481 U.S. at 63-64. "When the federal statute completely

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[4] "'The Supremacy Clause, U.S. Const., Art VI, cl. 2, invalidates state laws that 'interfere or are contrary to,' federal law.'" Kinley Corp. v. Iowa Utils. Bd., 999 F.2d 354, 357 (8th Cir. 1993) (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985) (citations omitted)).

[5] Examples of federal laws that completely preempt state law claims are the Employment Retirement and Income Security Act ("ERISA"), see Pilot Life Ins. Co.

pre-empts the state law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law" and "is then removable under 28 U.S.C. § 1441(b)." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003); see also Caterpillar, 482 U.S. at 393 (citing Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 24 (1983)). However, when construing federal statutes, courts will not find preemption of state law unless it is the clear and manifest purpose of Congress. See Nordgren v. Burlington Northern R. Co., 101 F.3d 1246, 1248 (8th Cir. 1996) (finding further that courts will be reluctant to find preemption in interpreting federal statutes pertaining to subjects traditionally governed by state law in order to avoid the unintended encroachment on the authority of the states).

Section 332 of the FCA provides that "no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). AT&T argues that state prohibition on default charges and

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v. Dedeaux, 481 U.S. 41 (1987), and Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); the Labor and Management Relations Act ("LMRA"), see Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557 (1968); and the Price-Anderson Act, see El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999). See also Neztosie, 526 U.S. 473, 484 n.6 (1999) (noting that the Supreme Court has found complete preemption only under the Price-Anderson Act, the LMRA, and ERISA). In addition, the Supreme Court recently held the National Bank Act ("NBA") provided the exclusive cause of action for usury claims brought against national banks. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003). Under the complete preemption doctrine, the cause of action arose under federal law and could be removed. Id. at 11.

early termination fees in cellular service contracts regulate its "rates" and that rate regulation is completely preempted by this section of the FCA. Meanwhile, Phillips argues that the FCA does not completely preempt rate regulation and even if it does, the early termination fee imposed by AT&T is not a rate and does not fall within the scope of the preemption.

1. Complete Preemption and the FCA

Both this Court[6] and the U.S. District Court for the Northern District of Iowa have previously found that similar actions were not completely preempted by the FCA. See Iowa v. United States Cellular Corp., 2000 WL 33915909 (S.D. Iowa Aug. 7, 2000) [hereinafter "U.S. Cellular"]; Cedar Rapids Cellular Tel., L.P. v. Miller, 2000 WL 34030836 (N.D. Iowa Sept. 15, 2000) [hereinafter "Cedar Rapids Cellular"]. Judge Pratt looked to the language of the FCA to determine whether Congress intended that it would preempt certain state law causes of action.[7] U.S. Cellular, 2000 WL

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[6] In a decision by the Honorable Robert W. Pratt.

[7] Congressional intent determines whether a state law cause of action is pre-empted by federal law. See Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994). "To discern Congress' intent [courts] examine the explicit statutory language and the structure and purpose of the statute." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990); see also Lewis v. United States, 445 U.S. 55, 60 (1980) (finding that courts should first look to the language of the statute in determining the intent of Congress). "This Court must therefore determine whether Congress intended to so completely preempt the Iowa causes of action at issue here that the State's complaint should be considered as arising under federal law." U.S. Cellular, 2000 WL 33915909, at *3.

33915909 at *3-4. After Judge Pratt "thoroughly parsed and reviewed the language of the federal statute at issue," Cedar Rapids Cellular, 2000 WL 34030836, at *6, he concluded, "[f]rom the language of the [FCA] itself, it is apparent that Congress did not intend to completely preempt all state regulation of cellular service." U.S. Cellular, 2000 WL 33915909, at *3.

In supporting this conclusion, Judge Pratt pointed out the following: (1) the FCA does not contain a jurisdictional provision parallel to those found in the LMRA and ERISA; (2) section 332 of the FCA contains an exception clause; and (3) the FCA contains a savings clause. Id. (citations omitted). In addition, both Judge Pratt and Judge Melloy of the Northern District[8] found the legislative history similarly unpersuasive. Id. at *3-4; Cedar Rapids Cellular, 2000 WL 34030836, at *7. Ultimately, both courts determined section 332 of the FCA did not completely preempt the claims that the cellular service providers' policy of charging an early termination fee violated Iowa consumer protection laws on various grounds. U.S. Cellular, 2000 WL 33915909, at *6 ("The [FCA] does not so completely preempt state law so as to convert the complaint in this case into one that arises under federal law for purposes of removal jurisdiction. Neither does section 332's prohibition of state regulation of 'rates' and 'entry' create federal jurisdiction through preemption of the State's claims."); Cedar Rapids Cellular, 2000 WL 34030836, at *7 ("And like the Southern

[8] The Honorable Michael Melloy now sits on the United States Court of Appeals for the Eighth Circuit.

District, this Court declines to read 'rates' in section 332 so broadly as to necessarily preclude a state's judicial challenge based on a statute to protect consumers against fraudulent or deceptive business practices.").

The Eighth Circuit, upon appeal from the decision in the Northern District of Iowa, found the district court's ruling that the preemption claims cannot support federal jurisdiction "might have had force if the appellants were only seeking a declaratory judgment," but that the court had jurisdiction to hear the claims because appellants were also seeking injunctive relief. Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874, 878 (8th Cir. 2002). For obvious reasons, Phillips relies heavily on these decisions and espouses their determination as decisive in the present case.

AT&T counters by stating that Phillips inaccurately addresses legal authority by failing to discuss, or even acknowledge, Beneficial National Bank v. Anderson, 539 U.S. 1 (2003) [hereinafter "Beneficial"]. As a result, Phillips' arguments and the cases he relies on are undermined according to AT&T. AT&T further contends that Phillips mischaracterizes the relationship between the object of his claims and the rates charged by AT&T and impermissibly elevates the form of his state law claim over its substance.

AT&T argues that Beneficial "dramatically changed the jurisprudence that had previously governed the doctrine of complete preemption."[9] See 14B Charles A.

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[9] Phillips maintains that Beneficial has not altered the jurisprudence of complete preemption, but has merely added one more statute under which the Supreme Court has found complete preemption. Phillips then reiterates that the FCA still is not one

Wright, Arthur Miller & Edward H. Cooper, Federal Practice & Procedure 3722.1 at 169 (Supp. 2004) ("With this change of focus, we may well see lower federal courts holding more claims completely preempted than we have seen up until now."). In Beneficial, the Supreme Court held that a state law claim alleging that a national bank had committed usury was completely preempted by the National Bank Act. Beneficial, 539 U.S. at 10-11. The Court found that because the National Bank Act provided the "exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank." Id. at 11.

AT&T argues Beneficial changed the previous complete preemption jurisprudence in three significant ways. First, it is no longer the case that complete preemption has been found to exist by the Supreme Court under only three statutes. Second, Beneficial makes clear "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." Id. at 9 n.5. Third, Beneficial demonstrates that complete preemption does not turn on whether a federal statute preempts all state regulation in a particular field; rather, complete preemption is a narrower concept focusing on whether Congress intended that a cause of action based on particular

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of them. Contrary to Phillips' assertions, the Court is convinced Beneficial does have some impact on the complete preemption analysis, and the statute discussed in that case is more analogous to the FCA then any of those previously found to completely preempt state actions in a certain field. Therefore, the Court will discuss the Beneficial decision and any impact it has on the present matter.

allegations be exclusively federal in nature, irrespective of whether the federal statute converts all causes of action in an area into federal claims.

AT&T contends that under the more specific Beneficial test, the FCA completely preempts, and thus permits removal of, state law claims that challenge a component of a wireless provider's rate structure. As section 332 provides, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). The Seventh Circuit has construed this clause and found "[t]here can be no doubt that Congress intended complete preemption . . . allowing removal to federal court." Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983, 986-87 (7th Cir. 2000).[10] Thus, according to Bastien, complete preemption exists if plaintiff's complaint challenges either rates or market entry. Id. at 987; see also Gilmore v. Southwestern Bell Mobile Phone Sys., Inc., 156 F. Supp. 2d 916, 922 (N.D. Ill. 2001) (following Seventh Circuit precedent in finding challenge to rates is preempted by the FCA).

AT&T proceeds to point out that other provisions of the FCA clearly establish that Congress intended to create an exclusive federal cause of action and remedy for

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[10] The proponent of complete preemption and removal relied heavily on the Bastien decision in U.S. Cellular. See U.S. Cellular, 2000 WL 33915909, at *5. Judge Pratt found Bastien factually distinguishable on facts very similar to those in the present case. Id. AT&T argues, however, that U.S. Cellular relied on outdated principles of complete preemption in distinguishing Bastien. This contention will be discussed, infra.

claims challenging the rates of wireless providers. Specifically, sections 201 and 202 provide the standard for determining the lawfulness of charges and practices of wireless services providers; section 206 provides a private cause of action for the violation of such provisions; and section 207 provides for exclusive jurisdiction over such claims in federal district courts or before the FCC. 47 U.S.C. §§ 201, 202, 206, 207. According to AT&T, these sections, coupled with the express preemption provision in section 332, demonstrate that complete preemption under Beneficial exists to any claim challenging the lawfulness of a wireless provider's rates.

AT&T asserts the cases cited by Plaintiff, in support of the argument that the FCA does not completely preempt certain state law claims, rely on outdated principles of complete preemption as they were decided before Beneficial, and therefore they are inapposite to the present case. For example, according to AT&T, under Beneficial it is no longer significant that a statute does not contain a jurisdictional provision like that found in the LMRA or ERISA, see U.S. Cellular, 2000 WL 33915909, at *3 (finding it significant that the FCA does not contain a jurisdictional provision like that found in the LMRA or ERISA); Cedar Rapids Cellular, 2000 WL 3403836, at *6 (same); Esquivel v. Southwestern Bell Mobile Sys., 920 F. Supp. 713, 715 (S.D. Tex. 1996) (refusing to find complete preemption because Congress did not make causes of action under the FCA "removable to federal court in the same manner as those filed under the LMRA or ERISA."), as the Court in Beneficial found complete preemption under the National Bank Act even though it did not contain a jurisdictional provision like that found in the

LMRA or ERISA, though it did provide that the exclusive cause of action be federal which was similar to the provisions in the LMRA and ERISA. Beneficial, 539 U.S. at 9.

In addition, AT&T contends that the existence of an "exception clause" and "savings clause" no longer negates complete preemption. Both U.S. Cellular and Cedar Rapids Cellular relied on these provisions in the FCA[11] in finding there was no congressional intent to create the extraordinary preemptive power in the Act. U.S. Cellular, 2000 WL 33915909, at *3; Cedar Rapids Cellular, 2000 WL 34030836, at *6. However, while some claims against wireless providers may be properly addressed in state court, this should have no bearing on whether claims challenging rates or market entry are exclusively federal in nature and thus completely preempted. See Bastien, 205 F.3d at 987 (finding challenges to rates and market entry are completely preempted "although the savings clause continued to allow claims that do not touch on the areas of rates or market entry"). Finally, AT&T states that these cases improperly equated complete preemption with field preemption, U.S. Cellular, 2000 WL 33915909, at *3 (finding "it is apparent that Congress did not intend to completely preempt *all state*

[11] Section 332 reserves to states the right to regulate "other terms and conditions of commercial mobile services," 47 U.S.C. § 332(c)(3)(A), while section 414 provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414.

regulation of cellular services" based on the presence of the exception and savings clauses); Cedar Rapids Cellular, 2000 WL 34030836, at *6 (same), and post-Beneficial, such broad field preemption is not required for complete preemption to exist. See Beneficial, 539 U.S. at 11 (finding complete preemption existed for claims of usury against a national bank even though other claims against national banks may be based on state law claims); see also Green v. Ameritrade, Inc., 279 F.3d 590, 596 (8th Cir. 2002) ("'The term 'complete preemption' is somewhat misleading because even when it applies, *all claims are not necessarily covered*. Only those claims that fall within the preemptive scope of the particular statute . . . are considered to make out federal questions.'") (quoting Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996)) (emphasis added).

Therefore, following the Supreme Court decision in Beneficial, Defendant makes a compelling argument that challenges to rates or market entry are completely pre-empted by the FCA. Section 332 provides that no state shall regulate these areas, similar to the provision in the National Bank Act governing usury claims, and various other FCA provisions provide the standard to determine lawfulness, a private cause of action, and jurisdiction in the federal courts or before the Federal Communications Commission ("FCC") for such claims. Other claims not challenging rates or market

entry remain state claims in nature, are not completely preempted, and may be brought in state court without being removed.

On the other hand, pre-Beneficial case law from this Court, our sister court to the north, and the Eighth Circuit indicate no complete preemption exists under the FCA. Specifically, U.S. Cellular and Cedar Rapids Cellular found that a challenge to an early termination fee was not completely preempted; rather, the claims were state law claims in the area of consumer protection, and removal was not proper. U.S. Cellular, 2000 WL 3391909, at *6; Cedar Rapids Cellular, 2000 WL 34030836, at *7.

This Court finds that section 332 of the FCA completely preempts all challenges to rates and market entry in light of the decision in Beneficial. As in Beneficial, where the Supreme Court held *usury claims* against national banks[12] are federal in nature and thus completely preempted, the entire spectrum of telecommunications regulation is not being preempted. Only those claims that would regulate "rates" or "market entry" fall within the bounds of complete preemption under the FCA. Thus, the real inquiry in this case becomes whether Phillips' claims constitute a challenge to either the rates or market entry of AT&T, the cellular service provider.

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[12] The Supreme Court does note the nature of *national banks* in reasoning complete preemption applies. See Beneficial, 539 U.S. at 10-11. On the present facts, a similar case may be made for the unique nature of national telecommunications companies like the cellular service provider in this case.

2. The Meaning of "Rates" Under the FCA

Upon determining the FCA completely preempts challenges to rates and market entry, the Court will turn its analysis to what Plaintiff's claims are actually challenging. Important to this discussion is defining the term "rates", as only claims that would regulate rates or market entry are completely preempted by section 332 of the FCA.[13] See Brown v. Washington/Baltimore Cellular, Inc., 109 F. Supp. 2d 421, 423 (D. Md. 2000) ("Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves."). The FCC has noted that the term "rates charged" in section 332 "may include both rate levels and rate structures."[14] See In re Southwestern Bell Mobile Sys., Inc., 14 F.C.C.R. 19898,

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[13] Phillips himself states that "the fighting issue here . . . is whether the early termination fee is a 'rate.'" See, e.g., Gilmore, 156 F. Supp. 2d at 922 ("As to complete preemption, the issue still remains as to whether plaintiff's claims are properly characterized as challenges to defendant's rates. If so, then such claims are federal claims and this court has removal jurisdiction."). At oral argument, AT&T conceded this case does not present a market entry issue.

[14] Phillips contends, without any support beyond the actual language of the section, that section 332 does not prohibit regulation of "rate structure" or items that "affect rates", arguing that if Congress had intended to preempt state regulation "affecting rates" it could have done so, asserting instead that the FCA actually allows such regulation. See 47 U.S.C. §§ 332(c)(3)(A), 414. However, the FCC has the responsibility to regulate telecommunications under the FCA, and in this role, the FCC defined "rates" to include "rate structure" and "rate levels". The Court accepts the FCC determination for purposes of deciding whether the early termination fee at issue here falls into the FCA definition of "rates".

1999 WL 1062835, at ¶¶ 7, 20 (FCC November 18, 1999). Therefore, a case that challenges the reasonableness of the rate charged or the legality of the rate structure would be preempted by section 332.[15] See id. at ¶ 20; see also Brown, 109 F. Supp. 2d at 423-24.

However, not all matters affecting wireless providers' rates are preempted rate regulation under the FCA. For example, the FCC has observed that state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332." See In re Southwestern Bell Mobile Sys., Inc., 14 F.C.C.R. 19898, 1999 WL 1062835, at ¶ 23 (FCC November 18, 1999). Thus, this Court agrees U.S. Cellular and Cedar Rapids Cellular were correct in rejecting the arguments that "anything that might touch upon [a wireless provider's] business" is a challenge to rates in the sense that an adverse ruling would increase "business expenses" that "would likely be passed on to customers as rate increases." U.S. Cellular, 2000 WL 33915909, at *5; Cedar Rapids Cellular, 2000 WL 34030836, at *7; see also In re Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, 2000 WL 1140570, at ¶¶ 9, 14-15 (FCC August 3, 2000) (rejecting notion that any determination of money damages against a wireless provider is

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[15] For example, in this same discussion, the FCC found that suits challenging the practice of billing in whole minute increments constituted such rate regulation. In re Southwestern Bell Mobile Sys., Inc., 14 F.C.C.R. 19898, 1999 WL 1062835, at ¶ 23 (FCC November 18, 1999).

necessarily equivalent to rate regulation). Indeed, "[i]f 'rate' included any action that indirectly induced rate increases, the exception would be swallowed by the rule." U.S. Cellular, 2000 WL 33915909, at *5; see also Brown, 109 F. Supp. 2d at 423 ("Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.").

Therefore, if rate regulation as defined above is completely preempted by the FCA, the Court must determine whether Plaintiff's action constitutes a *direct* challenge to the lawfulness of the AT&T rate structure. Bastien, 205 F.3d at 987 ("The issue is whether [the] complaint, however denominated, actually challenges [the wireless service provider's] rates . . . ."); In re Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, 2000 WL 1140570, at ¶ 28 n.91 (FCC August 3, 2000) (finding that "actions under state law could in substance and effect amount to regulation of wireless providers' rates even though not formally styled as such"). In making this determination, courts are to look at the substance of the claim; that is, the Court will "ask what the nature of the claims are and what the effect of granting the relief requested would be." Bastien, 205 F.3d at 989. Phillips avers his complaint is not attacking the rate structures of AT&T, while AT&T contends it is.

AT&T states that the nature of the claims in Plaintiff's complaint, while couched in terms of the ICCC, is to regulate the AT&T early termination fee. AT&T argues

this fee is a critical component of its rate structure. AT&T further argues that the effect of granting the relief requested would be to directly increase the rates for AT&T service. According to AT&T, this is precisely what the FCA preempts.

AT&T relies on the affidavit of Michael Attiyeh, Director of Product Marketing for AT&T, to demonstrate how the early termination fee correlates to, and is an integral part of, the rates charged by AT&T for its services under a wireless service agreement.[16] According to AT&T, it considers several factors when setting rates for its services, including the costs associated with acquiring a new customer and its ability to recover those costs if a person terminates service early. For term contract rate plans,

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[16] AT&T asserts that this Court may consider Attiyeh's affidavit in assessing the present motion. Under the "artful pleading" doctrine, a removal court may permissibly look beyond the plaintiff's complaint to other materials in order to determine "whether the real nature of the claim is federal regardless of plaintiff's characterization." In re Comcast Cellular Telecom. Litig., 949 F. Supp. 1193, 1199 (E.D. Pa. 1996) (citation omitted); see also Bastien, 205 F.3d at 990 ("On a motion to dismiss under Rule 12(b)(1), the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt.").

Phillips argues to the contrary, stating it is not proper for the Court to consider Attiyeh's affidavit as Phillips has not had the benefit of discovery and thus no reasonable opportunity to rebut or dispute the veracity of the information in the affidavit. In addition, the court in Cedar Rapids Cellular observed that "the necessity of developing a factual record on the appellants' business practices and rate structure would appear to foreclose any argument of conclusive preemption." Cedar Rapids Cellular, 280 F.3d at 880 n.2. AT&T argues that the preceding statement was based on the pre-Beneficial understanding of complete preemption and that it did not cite the artful pleading doctrine. The Court does consider the affidavit to understand the role of the early termination fee in the AT&T rate structure.

AT&T is able to charge lower effective rates than non-term plans because of the assurance that the customer will provide an income stream of sufficient duration to cover costs and provide a profit. In exchange for the lower rates, the customer agrees to an early termination fee as a means of making up the lost income if the customer cancels the contract before the agreed upon term expires. Non-term rate plans have no early termination fee, and consequently the rates are typically higher for these plans to ensure coverage of costs and a profit on a more expedited basis. Based on this explanation, AT&T maintains that the early termination fee is a critical component of the AT&T rate structure, and is in fact the quid pro quo for the lower rates on term plans, and that Plaintiff's attack on the legality of the fee is therefore an attack on rates.

AT&T further contends that granting the requested relief would necessarily and directly increase rates, again relying on the Attiyeh's affidavit. According to AT&T, it would be required to increase its rates to recover costs and make a reasonable profit on a more expedited basis if it were determined that it could not charge an early termination fee for the early termination of term service agreements. Accordingly, AT&T asserts the early termination fee directly affects the rates it charges under term service plans and is an integral part of that type of rate plan.

AT&T urges the Court to adopt the reasoning in Bastien and find Phillips' claims are completely preempted by the FCA. In Bastien, the court found complete preemption under the FCA for claims regulating rates and market entry. Bastien, 205 F.3d

at 986-87. The court then proceeded to find the plaintiff's complaint "would directly alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service" and was thus preempted. Id. at 989. Phillips argues that the reliance placed by AT&T on this case is misplaced as the cause of action in Bastien was directly related to *market entry*, and not rates, and was preempted on this basis. See U.S. Cellular, 2000 WL 33915909, at *5 (finding Bastien was factually distinguishable and that Bastien's complaint went directly to the federally preempted domain of market entry). However, in fairness it must be noted the Bastien court concluded that plaintiff's "complaint, although fashioned in terms of state law actions, *actually challenges the rates and level of service* offered by [the defendant], an area specifically reserved to federal regulation." Bastien, 205 F.3d at 990 (emphasis added).

In addition to Bastien, AT&T relies on two cases attached to its filings that found challenges to early termination fees and other charges related to rates constitute preempted attacks on both rate levels and rate structures.[17] See, e.g., Redfern v. AT&T Wireless Servs., Inc., No. 03-206-6PM (S.D. Ill. 2003) (finding that "the

[17] At oral argument, AT&T presented the Court with another case in which the court denied remand based on the conclusion that an early termination fee is directly related to rates charged for mobile services and any such challenge is preempted by federal law. See Chandler v. AT&T Wireless Servs., Inc., Civil No. 04-180-GPM (S.D. Ill. July 21, 2004). This decision, rendered by Chief Judge G. Patrick Murphy, follows closely the reasoning in Redfern, also decided by Judge Murphy, as well as the decision in Bastien. Accordingly, the Chandler decision does not present any new legal analysis impacting the Court's ultimate determinations on the questions presented.

[AT&T] early termination fee affects the rate charged for mobile service and, thus, Plaintiff's challenge to the fee is completely preempted"); Consumer Justice Found. v. Pacific Bell, BC214554 (Cal. Sup. Ct. July 29, 2002) (finding that the FCA preempted the plaintiff's attack on early termination fees). These cases so held because

> the early termination fees assessed by Defendant in the event of breach or cancellation of a contract for wireless services is inextricably linked to the rates charged by Defendant for providing those wireless services and it is designed to enable Defendant to recover the origination costs incurred at the beginning of the contractual relationship with the customer.

Consumer Justice Found. v. Pacific Bell, BC214554 (Cal. Sup. Ct. July 29, 2002); see also Gilmore, 156 F. Supp. 2d at 924 (finding the FCA completely preempted a claim that a "corporate account administrative fee" violated the parties' contract because the "contract allegations explicitly raise the issue of whether [plaintiff] received sufficient services in return for the Fee," and thus involve a rate issue).[18]

Meanwhile, Phillips argues that the early termination fee is a *penalty* billed by AT&T for what it considers breach of its contract and is not a rate for service. The fee has nothing to do with a charge for airtime or minutes used, or any other fee for

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[18] AT&T only cites to the three federal court decisions in its pleadings, where the two district court cases (Redfern and Gilmore) had to follow the precedent set by the third case decided by the Seventh Circuit (Bastien), and a state court case out of California. In addition, as Phillips points out, the plaintiff's attorney did not even show up for the hearing to argue in support of remand in Redfern, and the plaintiff apparently did not contest the preemption argument in Consumer Justice Foundation other than to rely on a stipulation between the parties that there was no federal preemption that the court refused to recognize or be bound by.

services rendered. If the customer completes the contract, no early termination fee will ever be paid. Moreover, the fee is the same no matter when the customer cancels the contract. Thus, the customer that cancels the contract with only a short period of the contracted term remaining will pay the same fee as the customer that contracts with AT&T and then almost immediately breaks that contract.

In U.S. Cellular, Judge Pratt rejected the argument that prohibition of an early termination fee regulates rates. U.S. Cellular, 2000 WL 33915909, at *5. Judge Pratt opined that

> US Cellular would have this Court construe "rates" so broadly as to incorporate anything that might touch upon U.S. Cellular's business. US Cellular's interpretation requires numerous degrees of separation in order for a state claim to escape preemption by the Communications Act. This is problematic. Inherently, any interference with U.S. Cellular's business practices will increase its business expenses. These increased business expenses would likely be passed on to customers as rate increases. If "rate" included any action that indirectly induced rate increases, the exception would be swallowed by the rule. This could not have been Congress' intent. US Cellular's interpretation would destroy the Act's savings clause, making all actions affecting the company federal in nature.

Id.; see also Cedar Rapids Cellular, 2000 WL 34030836, at *7 (agreeing with and repeating the conclusions of U.S. Cellular). Judge Pratt further found that the claims in U.S. Cellular, which are nearly identical to the claims in the present case, "are brought under consumer protection laws and go to the substance of consumer protection – e.g., fraud, misrepresentation, false advertising, billing practices – not to rates or market entry." U.S. Cellular, 2000 WL 33915909, at *5.

In addition to U.S. Cellular and Cedar Rapids Cellular (both at the district court level and on appeal), Phillips points out two cases in support of his position that his claims are not completely preempted. See Brown, 109 F. Supp. 2d at 423-24 (finding that the FCA did not completely preempt a challenge to the legality of late fees); Esquivel, 920 F. Supp. at 715-16 (finding complete preemption unavailable and determining that a liquidated damage provision was a "term and condition" of the agreement). However, like U.S. Cellular and Cedar Rapids Cellular, these cases were decided prior to Beneficial.[19]

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[19] AT&T further attempts to distinguish Esquivel by claiming the court's finding that the liquidated damage provision was a "term and condition" was dicta and was based on the superficial observation that the provision was located in a section of the agreement styled "Terms and Conditions." See Esquivel, 920 F. Supp. at 715-16. The court further held that the clause "other terms and conditions" in section 332 was meant to include "consumer protection matters." Id. Furthermore, AT&T contends that despite a similar argument to that made here, i.e., that the liquidated damage provision was needed to enforce the contract and have fixed costs spread throughout the life of the contract, id., there apparently was no evidence from the cellular service provider in Esquivel that the provision was an integral part of its rate structure. Cf. Redfern, supra (distinguishing an early termination fee case on these grounds). The only evidence AT&T actually has on this point is in the form of an affidavit from a company official. See discussion supra, footnote 15.

In addition, AT&T contends the Brown decision is also distinguishable as the court was called on to determine whether a challenge to the legality of late fees was completely preempted by section 332 of the FCA, determining it was not preempted because these fees "are a penalty for failing to submit timely payment" and are not directly related to rates, whereas the early termination fee at issue in the present case is a rate. Brown, 109 F. Supp. 2d at 423. These decisions do, however, provide the Court guidance as to what constitutes a rate, with the liquidated damages provision in Esquivel strikingly similar to the AT&T early termination fee at issue here, and thus *are* relevant to the present inquiry.

AT&T must therefore rely on this Court rejecting the analysis engaged in by Judges Pratt and Melloy to reach an alternate conclusion. AT&T maintains that because the FCA provides the exclusive cause of action for challenges to a wireless provider's rate structure, and the AT&T early termination fee is a component of its rate structure, Phillips' claims necessarily arise under federal law, this case was properly removed under 28 U.S.C. § 1441, and Plaintiff's motion to remand should be denied. Phillips, on the other hand, firmly contends that even if there is complete preemption under the FCA, the doctrine is not controlling in this case because he is challenging an early termination fee which is a matter of consumer protection and not a direct challenge to the rate structure of AT&T.

Therefore, the Court must determine whether the Beneficial analysis would have changed the result in these cases, specifically, in the U.S. Cellular and Cedar Rapids Cellular conclusions that early termination fees are not rates. Upon careful consideration of these issues, the Court finds Beneficial does not change the ultimate conclusions in U.S. Cellular and Cedar Rapids Cellular on the question of whether those claims involved rates or rate structure. Therefore, the Court is inclined to agree that early termination fees are not rates but rather are other terms and conditions, and Congress demonstrated a specific intent to exclude "other terms and conditions" from preemption under section 332.

While AT&T makes a compelling argument that its early termination fee is an integral part of its rate structure and thus any challenge to those fees is a challenge to its

rates, an area within federal law under the complete preemption doctrine, the Court finds the AT&T early termination fee is not a "rate". Both Judge Pratt and Judge Melloy have rejected this same argument, finding that such a broad interpretation of "rates" is contrary to the intent of Congress. This Court agrees that "rate" must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business that have no greater significance than as factors to be considered in determining what will ultimately be required of rates to provide a reasonable return on the business investment. Judge Pratt gave a reasoned analysis in determining an early termination fee was not a "rate" under the FCA, and Defendant has not persuaded the Court to find otherwise. Accordingly, Plaintiff's claims are not completely preempted by section 332 of the FCA because neither constitute direct challenges to "rates" as defined herein.

C. Removal Because Claim Depends on Substantial Questions of Federal Law

Under the substantial federal question doctrine, federal court jurisdiction exists when the plaintiff's state law claim requires the resolution of a substantial dispute of federal law. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997) (citations omitted). There is a substantial dispute of federal law if "a question of federal law is a necessary element of one of the well-pleaded state claims." Franchise Tax Bd., 463 U.S. at 13. AT&T asserts that is the case here.

AT&T contends that to prove the claims Phillips is asserting under the Iowa Unfair Debt Collection statute, he must establish that the AT&T early termination fee is unlawful. See Iowa Code § 537.7103 (making illegal "[t]he collection, or attempt to collect, charges or fees" that are not legally chargeable). AT&T argues that the early termination fee is an integral part of the AT&T rate structure, and thus the legality of such a fee is governed exclusively by the FCA. See 47 U.S.C. § 201 (stating that "any such charge, practice . . . that is unjust or unreasonable is hereby declared unlawful"). In other words, AT&T argues that Phillips must establish the early termination fee violates the FCA in order to establish the purported violation of the Iowa statute, thereby placing substantial questions of federal law "'in the forefront of the case'". Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 814 n.11 (1986) (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 470 (1957)).

AT&T argues the FCA itself indicates that Congress has demonstrated the nationwide importance of issues related to the rates wireless service providers can legally charge. Indeed, the existence of a federal private cause of action is a significant factor in determining whether the federal issue implicated in the state law claim is sufficiently substantial to confer jurisdiction to a federal court. Id. at 812 (stating the significance of a statute's federal private cause of action or lack thereof "cannot be overstated"); see also Rice v. Office of Servicemembers' Group Life Ins., 260 F.3d 1240, 1246-47 (10th Cir. 2001) (finding a substantial question of federal law when the

statute implicated by the plaintiff's state law cause of action governed most aspects of the dispute and provided a federal remedy).

Relevant to the present case, the FCA provides both the standard for lawfulness and a remedy for violation of rates by wireless service providers. 47 U.S.C. §§ 201, 202, 206, 207. However, the important issue in this case is whether FCA is even implicated by Phillips' state law claims. Phillips claims that it is not and that he is not required to prove anything under the FCA in order to prevail on his state law claims.[20]

Like the preceding determination, resolution of this issue is contingent upon the determination of whether the AT&T early termination fee is part of the AT&T rate structure so as to require application of the FCA. As the Court has determined it is not, the Court finds there are no substantial federal issues to be resolved under the FCA and removal was not proper on this basis.

D. Supplemental Jurisdiction

AT&T maintains that the Court has original federal question jurisdiction over Count I of Plaintiff's complaint[21] under the complete preemption doctrine, and over

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[20] Though Phillips conceded there may be an issue of preemption by the FCA that can be raised *as a defense* by AT&T, this is insufficient to give rise to federal subject matter jurisdiction. See Metropolitan Life, 481 U.S. at 63 ("Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court."); see also Gore, 210 F.3d at 948.

[21] "Illegal Early Termination Fees."

Count II of Plaintiff's complaint[22] under the complete preemption and substantial federal question doctrines. If the Court were to determine only one of the counts in the complaint is subject to original federal question jurisdiction, the Court would still have jurisdiction over the whole case pursuant to its supplemental jurisdiction. 28 U.S.C. § 1367(a); see XO Missouri Inc. v. City of Maryland Heights, 362 F.3d 1023, 1025 n.2 (8th Cir. 2004) (holding where federal question jurisdiction existed over one claim, court exercised supplemental jurisdiction over other state law claims). However, because the Court has concluded it lacks subject matter jurisdiction on either of the bases advanced by Defendant, the issue of supplemental jurisdiction is moot.

CONCLUSION

The determination of the present motion contained several close issues. The Court first concludes complete preemption does in fact exist under the FCA based on the discussion of complete preemption in Beneficial, but only as to challenges of a wireless service provider's rates or market entry. Based on this conclusion, the issue becomes whether the AT&T early termination fee is a "rate" such that any challenge is completely preempted and thus removable. While AT&T makes a compelling argument as to why the Court should find Phillips' claims affect the AT&T rate structure, at least two courts have rejected the identical argument. To distinguish these decisions, the Court must find that the Beneficial decision requires the analysis as employed in

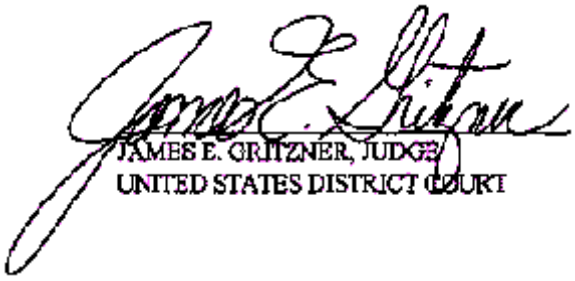
[22] "Iowa Unfair Debt Collection."

Bastien and Gilmore rather than that used in U.S. Cellular and Cedar Rapids Cellular, or conclude the prior decisions of the Iowa federal district judges were wrongly decided.[23] This determination is also decisive on the "substantial questions" of federal law issue raised by Defendant.

The Court ultimately finds the early termination fee at issue in this case is not a rate for purposes of complete preemption, and thus the action does not depend on substantial questions of federal law. As a result, removal was improper. For the foregoing reasons, the Court hereby **grants** Plaintiff's motion to remand (Clerk's No. 3). **The above-entitled action is remanded to the Iowa District Court for Polk County.**

IT IS SO ORDERED.

Dated this 29th day of July, 2004.



[23] Clearly this Court is not bound by the prior decisions of Judges Pratt and Melloy, but finds them to be thoughtful analyses that should be abandoned only if this Court is convinced otherwise. On this very close issue, this Court ultimately is not convinced otherwise.