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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 DEFENDANT'S MOTION FOR RECONSIDERATION**

This matter is before the Court on Defendant's Motion for Reconsideration (Clerk's No. 17). In this motion, Defendant asks the Court to reconsider its Order on Motion to Remand filed July 29, 2004 (Clerk's No. 16). Attorney for Plaintiff is Ray Johnson; attorneys for Defendant are Stephen E. Doohan, Louis F. Bonacorsi, and Jennifer S. Kingston. The matter is fully submitted and ready for ruling.

DISCUSSION

Plaintiff, Kenneth Phillips ("Phillips"), commenced this action against Defendant, AT&T Wireless Services, Inc. ("AWS"), specifically alleging violations of several Iowa statutes. AWS then removed the action, claiming Plaintiff's state law claims were 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.

Consistent with the view of two other Iowa federal judges, this Court determined that while the FCA does completely preempt actions involving challenges to "rates" or "market entry", the early termination fee at issue in the present case is not a rate, and therefore the FCA is inapplicable. Accordingly, the Court remanded the action for lack of jurisdiction in an order filed July 29, 2004.[1] Defendant has now moved for reconsideration of that order.

AWS argues that reconsideration is appropriate to enable the Court to certify the issue for immediate appeal under 28 U.S.C. § 1292(b). AWS contends this would allow the Court of Appeals to "resolve what is quickly becoming a patchwork of inconsistent decision[s] nationwide on what this Court called a 'very close issue.'" AWS urges the Court to reconsider its prior order, deny the motion to remand, and immediately certify the issue for interlocutory appeal.

Section 1292 authorizes interlocutory appeals when the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Courts have certified cases for interlocutory appeal under section 1292(b) for orders denying motions to remand, especially in cases where the issue is preemption. See, e.g., Sonoco Prods. Co. v. Physicians Health Plan Inc., 338 F.3d 366, 368 (4th Cir. 2003)

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[1] See Phillips v. AT&T Wireless, 2004 WL 1737385 (S.D. Iowa July 29, 2004).

(hearing section 1292(b) appeal from order denying remand on basis of complete preemption under ERISA); Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 656 F.2d 1364, 1365 (9th Cir. 1981) (hearing section 1292(b) appeal from order denying remand on basis of preemption under federal banking regulations). No other course for federal appellate review is available. See Feidt v. Owens Corning Fiberglass Corp., 153 F.3d 124, 130 (3d Cir. 1998) (holding that Court of Appeal lacked jurisdiction under 28 U.S.C. § 1447(d) to hear section 1292(b) interlocutory appeal from order granting motion to remand); Transit Cas. Co. v. Certain Underwriters at Lloyds of London, 119 F.3d 619, 623 (8th Cir. 1997) (finding an order remanding a case to state court for lack of subject matter jurisdiction is not reviewable) (citations omitted).

AWS contends all the requirements for certification are met here. First, AWS asserts that the Court's order involved a controlling question of law in that the preemptive scope and force of a federal statute is necessarily a legal question. See Netland v. Hess & Clark, Inc., 284 F.3d 895, 898 (8th Cir. 2002). Second, AWS argues that there is a substantial ground for difference of opinion as evidenced by the Court's discussion of the current case law on the issue and the conclusion that it was a "very close issue."[2] Phillips, 2004 WL 1737385, at *11 n.23. Finally, AWS contends that the

[2] Ultimately, Defendant is arguing that the Court incorrectly determined that its early termination fee is not a rate and therefore the action is not completely preempted under the FCA. In making this argument, Defendant points out the perceived deficiencies in the cases discussed by this Court that reached a similar result. Defendant fails to acknowledge that this Court emphasized that it was not bound by those

appeal here would materially advance the ultimate termination of the litigation by preemption of all of Plaintiff's state law claims, and would further be in the interests of justice because a holding of preemption would foreclose a variety of similarly preempted state law claims across the region.

Phillips resists Defendant's motion for reconsideration by stating there is no reason for the Court to modify its July 29, 2004, order by substituting an opinion that does not accurately state or apply the law. Both parties thoroughly briefed the issues on the motion to remand and participated in oral argument. Phillips argues that AWS should not be granted an additional opportunity to argue the issues already analyzed and decided by this Court. Phillips also asserts that reconsideration would be unlikely to accomplish AWS' objectives and that AWS' argument that a section 1292(b) would promote the interests of justice is irrelevant.

While this Court is aware of some inconsistent rulings on the matter and recognizes there may be more, and while the Court further appreciates the candor of the Motion for Reconsideration, the Court finds that reconsideration is not warranted in the present case. The parties fully briefed the relevant issues on the motion to remand. The Court then had the added benefit of the oral arguments presented by the parties. The Court fully understood the issues and the arguments made by the parties. The Court

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decisions and that the final determination was made only after a very thorough and detailed analysis.

then conducted its own research on the relevant issues before reaching the conclusions contained in the July 29, 2004. Defendant's arguments do not convince the Court that any of its findings were made in error. Thus, Defendant has provided the Court with no reason to revisit its prior determinations.

In addition, there is no guarantee that Defendant's suggested course of action will resolve the issues presented. In fact, the Court of Appeals may not accept certification of the interlocutory appeal, leaving the case pending in this Court on suspect jurisdiction; and if the appellate court does issue an order, that decision will only be binding on the courts of this circuit. Accordingly, the Court finds it inappropriate to reconsider its prior order, deny the motion to remand, and certify the issue for interlocutory appeal.

CONCLUSION

Without revisiting the issues decided by the Court in its July 29, 2004, order, the Court finds reconsideration is not warranted. Therefore, the Court hereby **denies** Defendant's Motion for Reconsideration (Clerk's No. 17).

IT IS SO ORDERED.

Dated this 30th day of August, 2004.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT