

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

JUDGE'S COPY

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

STATE OF IOWA,

Plaintiff,

v.

UNITED STATES CELLULAR
CORPORATION,

Defendant.

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ORDER ON MOTION TO REMAND,
DISMISS, TRANSFER, OR STAY

This matter comes before the Court on a Motion to Dismiss, Transfer, or Stay filed by Defendant, United States Cellular Corporation ("US Cellular"), on May 2, 2000. On May 18, Plaintiff, State of Iowa ("the State"), filed a brief in Resistance to Defendant's Motion to Dismiss, Transfer, or Stay. US Cellular filed a Reply to the State's Resistance on June 1. Concurrent with briefs relating to the US Cellular motion, the State filed a Motion to Remand on May 8. US Cellular filed a Resistance to the Motion to Remand on May 22. On June 9, the State filed a Reply to Defendant's Resistance to the Motion to Remand. Oral arguments were heard on both motions on June 6. This matter is fully submitted.

I. BACKGROUND

US Cellular provides customers with cellular telephone service in several states, including Iowa. Customers are typically required to sign contracts that obligate them to service for at least one year. As an inducement to enter into these contracts, US Cellular advertises to customers such incentives as free cellular telephones, free minutes, and free statewide roaming.

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To cancel these contracts, US Cellular charges substantial penalties. If the cancellation fee is not paid, the company reports the customer to credit agencies and collectors.

The State alleges that US Cellular's policies violate Iowa consumer protection laws on numerous grounds. First, the State alleges that US Cellular's policy of requiring customers to pay a monetary penalty for the cancellation of a contract for future service violates Iowa Code section 537.3310. The section states that "if performance by a creditor is by delivery of . . . services . . . in four or more installments . . . the consumer may cancel the obligation with respect to that part which has not been performed on the date of cancellation." Iowa Code § 537.3310(1). Furthermore, "the creditor is entitled to recover only that part of the cash price and charges attributable to the part of the creditor's obligation which has been performed." Iowa Code § 537.3310(2). The State asserts that since US Cellular's service contracts include at least twelve monthly installments, customers may cancel service without penalty under Iowa law. The State wants to stop US Cellular from reporting to credit agencies those customers who do not pay the cancellation penalties.

Second, the State alleges that US Cellular has refused to stop service and associated charges to those customers who have completed their contracts until any outstanding balance is paid in violation of Iowa Code section 714.16.

Third, the State contends that the company has misrepresented its service by advertising "free" minutes, "free" phones, "free" weekend minutes, and "free" statewide roaming. The State alleges that, while customers are not charged for the air time, characterizing the services as "free" is a misrepresentation because other call costs are assessed against customers.¹ The State

¹These costs include such things as land line fees. The land line costs are the charges for sending the call from the cellular tower to the phone of receiver, or vice versa, using conventional land-based telephone lines.

also alleges that US Cellular wrongfully modified the terms of the agreement after the execution of service contracts by reducing the number of "free" weekend hours to which customers were entitled. "Free" phones are a misnomer, the State contends, because customers are charged for the phones if they cancel their service agreements. The State asserts that US Cellular unlawfully advertised "free" in-state calls, but charged customers for some in-state calls that were placed near Iowa's borders.

Fourth, the State asserts that US Cellular unlawfully pursued customers in court and yet restrained its customers from access to the courts. The State bases this assertion on a mandatory arbitration clause contained in the company's service contracts. The State argues that the company routinely ignores the clause itself, yet enforces it against customers who take their complaints against the company to court.

The State originally brought these claims in the Iowa District Court for Polk County on April 11, 2000. The claims are based upon numerous alleged violations of Iowa Code under sections 537.3310 (limitations on executory contracts), 714.16 (consumer fraud, deceptive and unfair practices, misrepresentation of the right to cancel, refusal to cancel consumer contracts), 537.2507 (collection of attorneys fees, default penalties, and other unauthorized charges), 537.7102 (debt collection practices), 537.5108 (unconscionability), and 555A.1 (door-to-door sales). Requested relief includes injunctions, cancellation of current contracts, compensation for past wrong acts, court costs, attorneys' fees, and civil penalties. US Cellular removed the case to the United States District Court for the Southern District of Iowa on April 17, 2000.

US Cellular asserts that, under the amended Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* ("the Communications Act"), the State has no authority to enforce its claims. US Cellular specifically references § 332 of the Communications Act which states that

"no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." US Cellular argues that the claims brought by the State are completely preempted by the section. Moreover, the company believes that the action by the State is impermissibly discriminatory, violating 47 U.S.C. § 253,² because the State did not bring similar suits against other cellular companies operating in Iowa.

US Cellular further asserts that a suit being heard by the United States District Court for the Northern District of Iowa³ should control the instant case because of the "first-to-file" rule. The rule demands that in the interest of judicial efficiency, courts of concurrent jurisdiction defer to the court receiving the first filed case when identical claims are filed.⁴ See *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985). The Northern District case is a declaratory judgment action brought by two US Cellular subsidiaries and two other unrelated cellular providers against the State of Iowa alleging misapplication of Iowa law, violation of the Communications Act, interference with interstate commerce, and violation of the companies' due process rights.

²The section is titled "Removal to barriers to entry" and states, in relevant part:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure continued quality of telecommunications services, and safeguard the rights of consumers.

³*Cedar Rapids Cellular Tel. v. Miller*, Civ. No. C-00-58-MJM.

⁴The first-to-file rule demands that "when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action." *Upchurch v. Piper Aircraft Corp.*, 736 F.2d 439, 440 (8th Cir. 1984) (quoting *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982)). The purpose of the rule is to promote judicial efficiency. See *Orthmann*, 765 F.2d 119 at 121.

II. ANALYSIS

US Cellular's Motion to Dismiss, Transfer, or Stay is premised on this Court having jurisdiction over the matter. US Cellular contends that this Court has jurisdiction because section 332 of the Communications Act preempts the State's action. The State argues that this Court has no federal question jurisdiction because its claims are matters of state law that are not preempted by the Communications Act. It is well established that the burden of establishing federal jurisdiction falls upon the party seeking removal of the action from state court to federal court, in this case US Cellular. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A state law case may be removed to federal court only if federal jurisdiction is evident on the face of the plaintiff's well-pleaded complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Hull v. Fallon*, 188 F.3d 939, 942 (8th Cir. 1999) ("Generally, an action arises under federal law only if issues of federal law are raised in the plaintiffs [*sic*] well-pleaded complaint."). "Federal pre-emption 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." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Gore v. TWA*, 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 complete preemption doctrine.⁵ *See Gore*, 210 F.3d at 949 (citing *Caterpillar*, 482 U.S. at 393). "On occasion, the Court has

⁵"The Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with or are contrary to,' federal law." *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 357 (8th Cir. 1993) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985)). In addition, a plaintiff may not defeat removal through "artful pleading"—by omitting to plead necessary federal questions. *See Gore*, 210 F.3d at 950 (citing *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)).

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), cited in *Gore*, 210 F.3d at 949. When an area of state law has been so completely pre-empted, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 24 (1983)).

Whether a state-law cause of action is preempted by federal law is a question of congressional intent. See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994).

"Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."⁶ *Metropolitan Life*, 481 U.S. at 63-64.

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.⁷ "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute."⁸ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

⁶Examples of federal laws that completely preempt state law claims are the Employment Retirement and Income Security Act ("ERISA"), see *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 54-55 (1987); the Labor Management and Relations Act ("LMRA"), see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); and the Railway Labor Act ("RLA"), see *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 263 (1994).

⁷The preemption analysis for purposes of determining removal jurisdiction seems to vary from the standard preemption analysis which examines three or four forms of preemption. See, e.g., *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1248 (8th Cir. 1996) (three forms); *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1548 (8th Cir. 1995) (preemption may be express, implied, field, or actual); *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 358 n.3 (8th Cir. 1993) (stating that preemption comes in four "flavors": express preemption, implied preemption, conflict preemption, and field preemption).

⁸In determining the intent of Congress, Courts should look first to language of the statute. See *Lewis v. United States*, 445 U.S. 55, 60 (1980).

From the language of the Communications Act itself, it is apparent that Congress did not intend to completely preempt all state regulation of cellular service. First, the Communications Act does not contain a jurisdictional provision parallel to section 301 of the LMRA or section 502(f) of ERISA. *See Metropolitan Life*, 481 U.S. at 65 (indicating that without such a jurisdictional provision the Court “would be reluctant to find that extraordinary preemptive power . . . that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule”). Second, there is an exception clause in the Communications Act that expressly reserves power for the states. Section 332 pronounces that “no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that *this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*” 47 U.S.C. § 332(c)(3)(A) (emphasis added). Finally, the Act contains a savings clause that provides, “[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 47 U.S.C. § 414. The legislative history similarly fails to indicate Congressional intent to create “extraordinary preemptive power” in the Communications Act.

Congress’ stated purpose in passing section 332 was to create a “procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”⁹ *Paging, Inc. v. Board of Zoning Appeal for Montgomery County*, 957 F. Supp. 805, 807 (W.D. Va. 1997) (quoting Arnold &

⁹Section 332 is actually an amendment to the Communications Act of 1934. The amendment was made as a part of the Omnibus Budget Reconciliation Act of 1993.

Porter S. Rep. 104-230); *see also* H.R. Rep. No. 103-111 (1993) (The Act intends to “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”). Those statements show House recognition of the inherently interstate nature of cellular service and Senate intent to create a national policy framework for cellular service. But they are not sufficient to indicate an intent to completely preempt all state regulation. The House Committee Report on the amendment to the Communications Act states:

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 . . . or such other matters as fall within a state's lawful authority. [These types of issues are] 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, at 261 (1993). While this excerpt does not speak for all of Congress, it does reflect the intent of the committee that forged the section to allow state regulation of terms and conditions, specifically via state consumer protection laws.

This Court, therefore, finds that the Communications Act, specifically section 332, does not so completely preempt regulation of cellular service such that the State's complaint is necessarily federal in character for purposes of removal jurisdiction.

Even if this Court were required to engage in further discussion of the preemptive power of section 332, states are only specifically prohibited from regulating rates and market entry, while they are specifically allowed to regulate “other terms and conditions” of service. *See GTE Mobilnet v. Johnson*, 111 F.3d 469, 477 (6th Cir. 1997) (finding that section 332 does not completely preempt). US Cellular would have this Court construe the term “rate” broadly, so almost all State claims are preempted by the Communications Act. The State urges a narrow

interpretation, permitting State action on any types of action that do not directly interfere with US Cellular's rates.

Other courts have concluded that state consumer protection laws are not preempted by the Communications Act's prohibition of state regulation of "rates," and that claims such as those of the State in this case may properly be heard in state court. *See Marcus v. AT&T Corp.*, 138 F.3d 46 (2nd Cir. 1998) (holding that fraudulent billing practices are not preempted); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947 (D. Del. 1997) (holding that the practice of billing to next whole minute is not preempted); *Bauchelle v. AT&T Corp.*, 989 F. Supp. 636 (D.N.J. 1997) (holding that defendant's failure to disclose the least-expensive calling plan was not preempted); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996) (billing practices of rounding up to the next full minute are not preempted by the Communications Act); *DeCastro v. AWACS*, 935 F. Supp. 541 (D.N.J. 1996) (company's practice of billing customers for time beginning when the call is initiated, rather than when the call is connected, is not preempted by the Communications Act); *Esquivel v. S.W. Bell Mobile Sys., Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996) (holding that a liquidated damages provision for early termination of service is a "term and condition" and not preempted).

US Cellular relies heavily upon *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000). In *Bastien*, a cellular customer sued under state consumer protection laws alleging that AT&T failed to provide the infrastructure necessary to adequately serve its cellular customers. The customer complained that his calls were not able to be connected or were frequently cut off during conversations, alleging AT&T did not have sufficient towers to provide adequate service. Under the Communications Act, the FCC is responsible for determining the number, placement and operation of cellular towers and other infrastructure. *See Bastien*, 205

F.3d at 988 (citing 47 C.F.R. §§ 24.103 (geographic and population coverage requirements), 24.132 (narrowband antenna power and height requirements), 24.232 (broadband antenna power and height requirements)). Therefore, the Seventh Circuit found that Congress had reserved these areas exclusively for federal adjudication, and because the allegations of Bastien's complaint went directly to the federally preempted domain of market entry, his claims were preempted. *Bastien* is factually distinguishable from the present case. In the instant case, the claims 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.

US Cellular argues that rates “do not exist in isolation. They have meaning only when one knows the services to which they are attached.” Def.’s Mem. in Supp. of Mot. to Dismiss, Transfer, or Stay at 4 (quoting *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998)). US Cellular further asserts that the State’s claims “not only touch on, but go to the heart of rates.” *Id.* This assertion is overly broad. While there is a connection between the contracts which US Cellular may offer and the rates charged by the company, allowing a company to perpetrate frauds upon consumers was not Congress’ intent when it enacted the statute. Indeed, it appears to be just this concern that prompted Congress to include the exception clause to section 332.

US Cellular would have this Court construe “rates” so broadly as to incorporate anything that might touch upon US 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 US 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.

Each of the State's ten claims are brought to protect Iowa consumers from the alleged fraudulent practices of US Cellular. The claims do not attempt to regulate rates, they merely require US Cellular to fairly and adequately disclose its contract terms to consumers and to refrain from unjust and oppressive business practices. Therefore, the State's claims are not preempted by section 332's prohibition of state regulation of "rates" and "entry" so as to create federal jurisdiction. US Cellular's preemption arguments must be raised as a defense to the state law claims in state court.

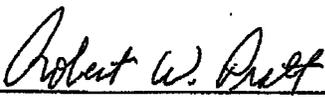
Because the State's claims are not federally preempted and this Court lacks jurisdiction over the matter, this Court is precluded from addressing US Cellular's assertions of discriminatory enforcement under 47 U.S.C. § 253. Nor can this Court properly entertain US Cellular's "first-to-file" arguments.

III. CONCLUSION

The Communications Act 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. Therefore, this Court does not have jurisdiction over this matter. US Cellular's Motion to Dismiss, Transfer, or Stay (#3) is DENIED. The State of Iowa's Motion to Remand (#5) is GRANTED. This matter is hereby remanded to Iowa District Court for Polk County.

IT IS SO ORDERED.

Dated this 7th day of August, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE