CROSSED SIGNALS IN A WIRELESS WORLD: THE SEVENTH CIRCUIT'S MISAPPLICATION OF THE COMPLETE PREEMPTION DOCTRINE

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ABSTRACT

As the number of wireless telephone users continues to proliferate, so does the number of lawsuits against wireless service providers. While consumers seek to utilize various consumer-friendly state law causes of action, the wireless industry continues to push for a uniform federal regulatory regime. Ambiguous language in the Federal Communications Act of 1934 ("FCA") and disagreement among the federal circuits has led to much confusion over whether state law claims affecting wireless rates and market entry are removable to federal court by way of "complete preemption." This iBrief argues that FCA's preemption power is limited by its savings clause, failure to establish a comprehensive regulatory scheme, and provision of a significant role for state regulation. Accordingly, the Seventh Circuit erred in Bastien v. AT&T Wireless Services, Inc. when it concluded that the FCA completely preempts certain state law claims against wireless service providers and thereby requires their removal to federal court.

INTRODUCTION

¶1 In the last decade, wireless telephone usage in the United States has grown at an extraordinary rate. Between 1998 and 2003, the number of wireless subscribers exploded from 69.2 million to 158.7 million.[2] During the same time period, the usage of wireless service (also known as commercial mobile radio service, or "CMRS") quintupled from 143 to 813 average monthly minutes of use per subscriber.[3] Not surprisingly, the rapid

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[2] Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence—The Changing CMRS Roadmap*, 56 FED. COMM. L.J. 489, 561 (2004).

[3] *Id.* The Kennedy & Purcell article contains a typographical error labeling these numbers as 143 and 813 "billion" average minutes of use. However, Ms. Purcell informed the author that the numbers actually represent the average monthly minutes of use per subscriber.

growth of users has coincided with an increasing number of consumer lawsuits against wireless service providers over poor service quality and suspicious "routine billing practices."[4]

¶2 In order to alleviate the litigation burden, the wireless industry advocates limiting state court jurisdiction over claims against wireless service providers.[5] This position has been countered by plaintiffs' attorneys, who generally prefer litigating in state court, and those who argue that state laws are vital to protecting consumers from illicit business practices.[6] These diverging interests have been complicated by the Federal Communications Act of 1934[7] ("FCA"), which preempts state regulation over certain aspects of wireless service by granting the Federal Communications Commission ("FCC") the exclusive authority to regulate these areas.[8] Yet, the FCA does not clearly delineate which aspects of

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[4] *Id.* at 514. *See also Can You Legislate the Right to Decent Customer Service?*, MOBILE BUS. ADVISOR, May/June 2003, at 12 ("The number of complaints to the FCC regarding wireless services jumped 53 percent in 2002, and many of the major mobile carriers are facing class action law suits. Topping the list of subscriber complaints were billing inaccuracies, early contract termination problems, and service quality, according to the FCC."); Salina Khan, *Spotty Service Irks Cellphone Users*, USA TODAY, Nov. 6, 2000, at 1A (describing the growing number of consumer complaints and lawsuits regarding poor service quality); Elizabeth Douglass, *Dial M for Misleading? Complaints and Lawsuits Against Wireless Phone Companies are Climbing, with Users Unhappy About Everything from Billing Practices to Substandard Service.*, L.A. TIMES, Oct. 19, 2000, at V2 (discussing common consumer complaints against wireless companies).

[5] Kennedy & Purcell, *supra* note 2, at 517.

[6] *See* Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874, 880 (8th Cir. 2002) ("[S]tates have an important interest in protecting the public from deceptive business practices."); Union Ink Co., Inc. v. AT&T Corp., 801 A.2d 361, 37475 (N.J. Super. Ct. App. Div. 2002) (discussing the need to preserve state laws that "govern the relationships between parties to consumer transactions" and reasoning that "a state court should not sacrifice the public policies of the State to some ephemeral view of the federal interest"); Erik B. Walker, *Keep Your Case in State Court*, TRIAL, Sept. 2004, *available at* http://www.atla.org/Publications/trial/0409/walker.aspx ("Plaintiff attorneys' preference for state courts is undisputed and understandable."). *See also* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (showing that "[r]emoval of civil cases from state to federal court results in a precipitous drop in the plaintiffs' win rate" when compared with cases originally filed in federal court).

[7] 47 U.S.C. § 151, *et seq.* (2000) [hereinafter FCA].

[8] Kennedy & Purcell, *supra* note 2, at 499.

wireless service may be regulated by the states.[9] Ensuing litigation therefore has involved plaintiffs carefully pleading only state law claims to avoid FCC jurisdiction and wireless service providers arguing that these claims must be removed to federal court because they are preempted by the FCA.[10] As the scope of FCA preemption is unclear, judicial analysis of the preemption question has been "inconsistent, unpredictable and often fact-specific."[11]

¶3 Thus far, only two United States Circuit Courts of Appeals have addressed the issue directly. In 1998, the Second Circuit, in *Marcus v. AT&T Corp.*,[12] read the FCA's preemption provision narrowly.[13] Its narrow reading meant that even those claims that are preempted would still not be removable to federal court. However, in 2000 the Seventh Circuit, in *Bastien v. AT&T Wireless Services, Inc.*,[14] held that the FCA completely preempts any state law claim affecting service quality or rates charged to customers, therefore subjecting such claims to federal jurisdiction.[15] As will be discussed in greater detail below, while the wireless industry immediately embraced the *Bastien* court's holding, many state and federal district courts have not. The scope of FCA preemption thus remains in dispute.

¶4 Precisely which state claims are preempted is beyond the scope of this iBrief. Rather, this iBrief argues that whatever the scope of the FCA's preemption clause may be, *Bastien* misapplied the complete preemption doctrine in permitting the removal of the state claims to federal court. When compared with other statutes that have been found to completely preempt state regulations, it is clear that the FCA does not have the extraordinary preemptive force necessary to find complete preemption. After laying out the legal framework surrounding the FCA and complete preemption, this iBrief further analyzes *Bastien* through the prism of recent United States Supreme Court preemption jurisprudence. This investigation

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[9] For the purposes of the FCA, state legislative, administrative, and judicial action all constitute state CMRS regulation. *In re* Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, 17027 (2000).

[10] *See In re* Southwestern Bell Mobile Sys., Inc., 14 F.C.C.R. 19898, 19901 (1999) (noting that wireless service providers have "frequently asserted" that consumer suits are preempted by the FCA).

[11] Kennedy & Purcell, *supra* note 2, at 500 (comparing cases with nearly identical facts that reach opposite conclusions on the preemption question).

[12] 138 F.3d 46 (2d Cir. 1998).

[13] *Id.* at *54* ("The FCA not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud, it evidences Congress's intent to allow such claims to proceed under state law.").

[14] 205 F.3d 983 (7th Cir. 2000).

[15] *Id.* at 986-87.

shows that the FCA only supports a more limited form of federal preemption of state law claims against wireless service providers.

I. BASTIEN'S LEGAL CONTEXT

A. The Federal Communications Act of 1934

¶5 As part of the Omnibus Budget Reconciliation Act of 1993,[16] Congress amended the FCA to "dramatically revise the regulation of the wireless telecommunications industry, of which cellular telephone service is a part."[17] The pertinent statutory language of the FCA provides that "[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."[18]

¶6 As straightforward as this clause may seem, its preemptive effect on state law is unclear when read in conjunction with the FCA's savings clause, which provides that "[n]othing 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."[19]

¶7 As discussed below, much of the confusion over the FCA's preemptive force has involved interpreting the meaning of "entry of or the rates charged" by wireless companies, and what is covered under "other terms and conditions." To help resolve this question, many of the courts evaluating the FCA's preemptive force have relied on a report by the House of Representatives Budget Committee commenting on the proposed legislation.[20] The report states:

> 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

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[16] Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified in relevant part at 47 U.S.C. § 332 (2000)).
[17] Conn. Dept. of Pub. Util. Control v. FCC, 78 F.3d 842, 845 (2d Cir. 1996).
[18] 47 U.S.C. § 332(c)(3)(A) (2000).
[19] *Id*. § 414.
[20] *See, e.g.*, Moriconi v. AT&T Wireless PCS, LLC, 280 F. Supp. 2d 867, 873-74 (E.D. Ark. 2003); Lewis v. Nextel Comms., Inc., 281 F. Supp. 2d 1302, 1306 (N.D. Ala. 2003).

> 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."[21]

¶8 While this paragraph assists courts in weeding out cases that clearly concern "other terms and conditions," it has not been helpful in discerning which cases involve state regulation of "rates charged" by wireless service providers. Some courts have interpreted "rates charged" expansively, encompassing any regulation that might have even an indirect impact on what a customer pays for wireless service.[22] Other courts, however, have interpreted "rates charged" narrowly, including only those regulations that directly challenge the price charged by wireless service providers.[23]

B. Complete Preemption and the Well-Pleaded Complaint Rule

¶9 To keep their claims in state court, many consumer-plaintiffs rely on the well-pleaded complaint rule. The well-pleaded complaint rule governs the presence or absence of federal subject matter jurisdiction. In general, a civil action filed in state court may be removed to federal court only if the claim is one "arising under" federal law.[24] Where both state and federal law create a similar cause of action, a plaintiff, as "master of the claim," may obtain federal jurisdiction by raising the federal claim or, conversely, "may avoid federal jurisdiction by exclusive reliance on state law."[25] In light of this principle, the well-pleaded complaint rule provides that "federal jurisdiction exists only when a federal question is presented on

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[21] H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.
[22] *See, e.g.*, Bastien v. AT&T Wireless Svcs., Inc., 205 F.3d 983, 988 (7th Cir. 2000) ("In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service.").
[23] *See, e.g.*, Cellco P'ship v. Hatch, Civ.04-2981 (JRT/SRN), 2004 WL 2065807, at *4 (D. Minn. Sept. 3, 2004) (reasoning that although a state law regulating changes to service contracts "certainly implicates rates," it does not constitute "impermissible rate regulation" because "[n]othing in the law prevents wireless providers from charging any rate the market will bear."); *Moriconi*, 280 F. Supp. 2d at 876 ("[A]ny challenge to a wireless service provider's practices, if successful, is likely to impact rates . . ., but this indirect result does not convert such challenges into a direct challenge to rates and market entry contemplated by the preemptive language of the statute.").
[24] 28 U.S.C. § 1441(b) (2000).
[25] Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

the face of the plaintiff's properly pleaded complaint."[26] Thus, a defendant cannot remove a case to federal court solely based on the defense that a plaintiff's state law claim is preempted by federal law, even if the plaintiff's complaint anticipates the possibility of federal preemption.[27]

¶10 There are, however, two exceptions to this rule. The first is complete preemption, which occurs when Congress intends the preemptive force of a statute to be "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.'"[28] From then on, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[29]

¶11 Complete preemption should not be confused with the more familiar ordinary preemption. While complete preemption serves as a means of circumventing the well-pleaded complaint rule and removing a case to federal court even though no federal claim is pleaded, ordinary preemption merely "operates to dismiss state claims on the merits and may be invoked in either federal or state court."[30] For example, in *Lorillard Tobacco Co. v. Reilly*,[31] the only consequence of the Supreme Court's finding that certain state advertising laws were preempted by the Federal Cigarette Labeling and Advertising Act[32] through ordinary preemption was that the plaintiff's preempted state law claims were dismissed.[33]

¶12 The second exception to the well-pleaded complaint rule is the artful pleading doctrine, which provides that "a plaintiff may not defeat removal by omitting to plead necessary federal questions."[34] Several federal courts have used this doctrine instead of the complete preemption doctrine to remove state law claims against wireless service providers to

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[26] Lewis v. Nextel Comms., Inc., 281 F. Supp. 2d 1302, 1303 (N.D. Ala. 2003) (quoting Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908)).
[27] *Id.* at 1303-04 (quoting Rivet v. Regions Bank, 522 U.S. 470, 475 (1998)).
[28] *Caterpillar*, 482 U.S. at 393 (quoting Metro. Life. Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987)).
[29] *Id.*
[30] Smith v. GTE Corp., 236 F.3d 1292, 1313 (11th Cir. 2001) (quoting Blab TV of Mobile, Inc. v. Comcast Cable Comms., Inc., 182 F.3d 851, 855 (11th Cir. 1999)).
[31] 533 U.S. 525 (2001).
[32] 15 U.S.C. § 1334 (2000).
[33] *Lorillard Tobacco*, 533 U.S. at 553. *Cf.* Bastien v. AT&T Wireless Svcs., Inc., 205 F.3d 983, 986 (7th Cir. 2000) (permitting plaintiff's preempted claims to be removed to federal court upon finding complete preemption).
[34] Rivet v. Regions Bank, 522 U.S. 470, 475 (1998) (quoting Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 US. 1, 22 (1983)).

federal court.[35] For the purposes of this iBrief, these cases are analogous to cases analyzing federal removal jurisdiction under the complete preemption doctrine since "complete preemption is a prerequisite for application of the artful pleading doctrine."[36]

¶13 Because complete preemption is only found "[w]hen federal common or statutory law so utterly dominates a preempted field that all claims brought within that field necessarily arise under federal law," cases removing state law claims to federal court based on complete preemption are rare.[37] As of this writing, the Supreme Court has only found complete preemption in the context of certain labor statutes and a few other specialized areas of federal law.[38]

¶14 The unique policies underlying statutes that have the preemptive force necessary to circumvent the well-pleaded complaint rule are best appreciated by way of example. Congress enacted the Employee Retirement Income Security Act of 1974[39] ("ERISA") in order to "provide a

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[35] *See, e.g.*, Gatton v. T-Mobile USA, Inc., No. SACV 03-130 DOC, 2003 WL 21530185, at *9 (C.D. Cal. Apr. 18, 2003) ("Plaintiffs claims challenging the expiration of unused minutes and delayed billing practices are artfully pled federal claims that raise a federal question.").

[36] Nixon v. Nextel West Corp., 248 F. Supp. 2d 885, 893 (E.D. Mo. 2003) (citing *Rivet*, 522 U.S. at 475).

[37] Marcus v. AT&T Corp., 138 F.3d 46, 54 (2d Cir. 1998) (discussing the "limited applicability of the complete preemption doctrine"). *See also* Smith v. GTE Corp., 236 F.3d 1292, 1311 (11th Cir. 2001) (noting that complete preemption occurs under "rare circumstances").

[38] *See* Metro. Life. Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987) (holding state contract and tort claims completely preempted by the Employee Retirement Income Security Act of 1974); Avco Corp. v. Machinists, 390 U.S. 557, 558 (1968) (state law claims completely preempted by § 301 of the Labor Management Relations Act). *See also* Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 11 (2003) (holding state law usury claims against national banks completely preempted by the National Bank Act); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 484 (1999) (holding tort actions arising out of nuclear accidents completely preempted by the Price-Anderson Act); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974) (holding state claim regarding the right to possession of Indian tribal lands necessarily "arises under" several federal laws and treaties).

[39] Pub. L. No. 93-406, as amended, 29 U.S.C. § 1001, *et seq*. (2000) [hereinafter ERISA]. ERISA is representative of the policy considerations underlying complete preemption. The Supreme Court recently said that ERISA's preemptive force "mirror[s]" that of § 301 of the Labor Management Relations Act ("LMRA"), which is the statute most commonly found to circumvent the well-pleaded complaint rule through complete preemption. Aetna Health Inc. v. Davila, __ U.S. __, 124 S.Ct. 2488, 2496 (2004); Caterpillar Inc. v. Williams,

uniform regulatory regime over employee benefit plans."[40] Accordingly, Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[41] ERISA's "extraordinary pre-emptive power" is necessary because "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected" when enacting the statute.[42] Hence, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."[43] As the Supreme Court's discussion of ERISA makes clear, complete preemption is only found when permitting state remedies to infringe on a federal law's legislative domain would completely undermine Congress's purpose in enacting the statute.

II. THE SEVENTH CIRCUIT FINDS COMPLETE PREEMPTION

¶15 Steven Bastien's lawsuit against AT&T Wireless Services began just like the many other consumer lawsuits brought against wireless service providers in the late 1990's. Little could anyone have known that his case would have such a profound affect on the wireless litigation landscape. Bastien, a Chicago resident, signed up for AT&T's wireless service in 1998, but soon became dissatisfied with the service's coverage.[44] The poor coverage provided by AT&T's network caused many of Bastien's calls to be "dropped," or cut off in mid-call.[45] Upset about the number of dropped calls, and the fact that he was charged for each one, Bastien filed a complaint with the FCC.[46] The FCC told him that it could not provide any assistance because AT&T was not in violation of any FCC regulations.[47] Having no other avenue of relief, Bastien filed a complaint in Illinois state court, alleging that AT&T breached its service contract and violated various provisions of the Illinois Consumer Fraud Act.[48]

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482 U.S. 386, 392 (1987) ("the complete pre-emption corollary…is applied primarily in cases raising claims pre-empted by § 301 of the LMRA.").

[40] *Aetna*, 124 S. Ct. at 2495.

[41] 29 U.S.C. § 1144(a) (2000).

[42] *Aetna*, 124 S. Ct. at 2495.

[43] *Id.*

[44] Bastien v. AT&T Wireless Svcs., Inc., 205 F.3d 983, 985 (7th Cir. 2000).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* (citing 815 ILL. COMP. STAT. 505/2).

¶16 Arguing that Congress had expressly preempted state regulation of rates and market entry for wireless service in Section 332 of the FCA, AT&T removed the case to federal court.[49] Bastien had carefully couched his complaint only in terms of Illinois state law, and accordingly moved to remand the case back to state court due to lack of federal subject matter jurisdiction.[50] Finding complete preemption, the district court judge denied Bastien's motion to remand.[51] Bastien appealed to the Seventh Circuit, which affirmed the district court's denial of the motion to remand, but dismissed the case on other grounds.[52]

¶17 Like the other courts that have dealt with similar claims, the Seventh Circuit had to reconcile the express preemption of state laws regulating rates and market entry in Section 332, and the savings clause in Section 414. The court chose to read the savings clause narrowly, reasoning that "[t]o read the clause expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create."[53] Thus, the court concluded that

> The two clauses read together create separate spheres of responsibility, one exclusively federal and the other allowing concurrent state and federal regulation. Cases that involved "the entry of or the rates charged by any commercial mobile service or any private mobile service" are the province of federal regulators and courts . . . . The states remain free to regulate "other terms and conditions" of mobile telephone service.[54]

¶18 While this conclusion alone was not extraordinary, what was remarkable, at least compared to the holdings of other courts, was the Seventh Circuit's expansive reading of what constituted regulation of "the entry of or the rates charged" by wireless service providers. Relying on the Supreme Court's decision in *AT&T Co. v. Central Office Telephone*,[55] which dealt with long-distance telephone rates, the court reasoned that "a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law."[56] Additionally, the court held

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[49] *Id.* at 985-86.
[50] *Id.* at 986.
[51] *Id.*; Bastien v. AT&T Wireless Svcs., Inc., No. 99 C 49, 1999 WL 259939, at *4 (N.D. Ill. Apr. 21, 1999).
[52] *Bastien*, 205 F.3d at 986.
[53] *Id.* at 987.
[54] *Id.*
[55] 524 U.S. 214 (1998).
[56] *Bastien*, 205 F.3d at 988 (citing *Cent. Office Tel.*, 524 U.S. at 223 ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.")).

that since the quality of service is directly related to the number of cellular towers and other infrastructure, an attack on service quality is preempted by the FCC's regulation of the terms of market entry.[57] Thus, the court determined that Bastien's complaint was actually an attack on the rates charged for service, the terms on which AT&T entered the Chicago market, and the FCC-approved schedule for building cellular towers and establishing service in the Chicago area. Since the FCA expressly preempts state regulation of rates and market entry, the court held that the state law breach of contract and consumer fraud claims were removable to federal court.[58]

¶19 The impact of *Bastien* was felt almost immediately in courts throughout the country. Wireless service providers had been arguing for some time that the standard applied to long distance telephone rates in *Central Office Telephone* should be applied to wireless regulations.[59] Now a circuit court had finally agreed with them. Within a few weeks of the Seventh Circuit's decision in *Bastien*, state courts in California and New York held that breach of contract claims touched upon rates and were therefore preempted by the FCA.[60] Some federal district courts, mostly within the Seventh Circuit, also followed the *Bastien* court's complete preemption analysis.[61] Many others, however, did not.[62] They instead chose to follow the Second Circuit's narrower reading of Section 332. Yet,

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[57] *Id.* (citing 47 C.F.R. §§ 24.103 (geographic and population coverage requirements), 24.132 (narrowband antenna power and height requirements)).
[58] *Id.* at 989-90. The court's conclusion was bolstered by the fact that Bastien's allegations of fraud and misrepresentation were conclusory and contained few supporting facts. Rather, the factual allegations in the complaint mostly suggested that AT&T had not sufficiently built up its wireless network.
[59] *See In re* Wireless Consumer Alliance, Inc., 15 F.C.C.R. 17021, 17029 n. 47 (2000) ("CMRS providers regularly cite filed rate cases [which apply to land-line telephone service] in support of their position.").
[60] Union Ink Co., Inc. v. AT&T Corp., 801 A.2d 361, 372 (N.J. Super. Ct. App. Div. 2002) (citing Ball v. GTE Mobilnet, 81 Cal. App. 4th 529 (2000); Naevus Int'l, Inc. v. AT&T Corp., 713 N.Y.S.2d 642 (N.Y. Sup. Ct. 2000)).
[61] *See, e.g.*, Phillips v. AT&T Wireless, No. 4:04-CV-40240, 2004 WL 1737385, at *6 (S.D. Iowa July 29, 2004); Franczyk v. Cingular Wireless, LLC, No. 03 C 6473, 2004 WL 178395, at *3 (N.D. Ill. Jan. 21, 2004); Alport v. Sprint Corp., No. 03 C 6246, 2003 WL 22872134, at *3 (N.D. Ill. Dec. 4, 2003); Aubrey v. Ameritech Mobile Comms., No. 00-75080, 2002 WL 32521813, at *3 (E.D. Mich. June 17, 2002). *But see* Fedor v. Cingular Wireless Corp., 355 F.3d 1069, 1073 (7th Cir. 2004) (distinguishing, but not overruling, *Bastien*).
[62] *See, e.g.*, Smith v. GTE Corp., 236 F.3d 1292, 1313 (11th Cir. 2001); *In re* Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig., 327 F. Supp. 2d 554, 565-66 (D. Md. 2004); Lewis v. Nextel Comms., Inc., 281 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2003); Gattegno v. Sprint Corp., 297 F. Supp. 2d 372, 377 (D. Mass. 2003).

in courts throughout the country, wireless service providers continue to cite *Bastien* in support of their motions to dismiss state law claims and remove them to federal court on complete preemption grounds.[63] Hence, four years after *Bastien* was decided, its holding is still vigorously disputed in consumer lawsuits against wireless service providers.

III. MISAPPLICATION OF THE COMPLETE PREEMPTION DOCTRINE?

¶20 Since it was decided, *Bastien* has been criticized on numerous grounds. Although it is often criticized for its broad interpretation of "rates and market entry," few courts have addressed the *Bastien* court's application of the complete preemption doctrine to circumvent the well-pleaded complaint rule. In this area, as the Eleventh Circuit noted in *Smith v. GTE Corp.*,[64] *Bastien* has caused "a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption."[65] Even if Bastien's claims were preempted, the Seventh Circuit misapplied the complete preemption doctrine by permitting their removal to federal court. Instead, the Seventh Circuit should have remanded Bastien's claims back to state court where AT&T's preemption defense belonged.

A. Congressional Intent

¶21 Congressional intent is the "touchstone" of a federal district court's removal jurisdiction.[66] Removal by complete preemption is therefore only permitted when "Congress has clearly manifested an intent" to make a specific action within a particular field subject to federal jurisdiction.[67] No such intent can be found in the FCA. The Seventh Circuit thus erred in applying the complete preemption doctrine to Bastien's breach of contract and state fraud claims and by permitting their removal to federal court.

¶22 The *Bastien* court's improper application of the complete preemption doctrine is best seen when compared with the Supreme Court's analysis of other statutes found to have the preemptive force necessary to circumvent the well-pleaded complaint rule. The most recent case finding a

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[63] *See, e.g.*, *Wireless Tel. Radio*, 327 F. Supp. 2d at 565 n.16 ("defendants...have relied on *Bastien* in their briefs"); Petitioners' Brief on the Merits, Bryceland v. AT&T Corp., 114 S.W.3d 552 (Tex. App. 2002), *appeal docketed*, No. 03-0948 (Tex. April 9, 2004) (relying on *Bastien* to argue that plaintiff's state law claims were preempted by the FCA). Brief is available at 2004 WL 874837, at *13.
[64] 236 F.3d 1292 (11th Cir. 2001).
[65] *Id.* at 1313 (discussing preemption in the context of a claim arising under FCA § 207).
[66] Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987).
[67] Marcus v. AT&T Corp., 138 F.3d 46, 54 (2d Cir. 1998) (citing *Metro. Life*, 481 U.S. at 66).

new area of complete preemption is *Beneficial National Bank v. Anderson*,[68] which dealt with the National Bank Act's[69] ("NBA") preemption of state usury claims against national banks.[70] The Court in *Beneficial* began its analysis by stating that the focus of the complete preemption inquiry is on whether the NBA "provide[s] the exclusive cause of action" for such claims.[71] The Court found that it did, reasoning that "[b]ecause §§ 85 and 86 provide 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."[72] Central to the Court's analysis were early cases decided soon after the passage of the NBA holding that the NBA formed a comprehensive system of usury regulations and "the power to supplement it by State legislation is conferred neither expressly nor by implication."[73] The Court also recognized the importance of "[u]niform [national] rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges," which are needed to protect the banking system from "possible unfriendly State legislation."[74]

¶23 Unlike the *Beneficial* Court, the *Bastien* court failed to engage in a comprehensive analysis of the legislative intent behind the FCA's preemption clause. Had the court done so, it would have identified several factors indicating Congress intended only ordinary preemption. Each will be addressed in turn.

1. Savings Clause

¶24 The first, and perhaps most obvious, factor limiting the FCA's preemption power is the savings clause. None of the statutes that have previously been found to have the preemptive force necessary for complete preemption, such as Section 301 of the Labor Management Relations Act ("LMRA")[75] and ERISA, have such extensive limitations on their preemption powers.[76] In contrast to the *Beneficial* Court's conclusion that

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[68] 539 U.S. 1 (2003)
[69] 12 U.S.C. §§ 85-86 (2000).
[70] *Beneficial*, 539 U.S. at 3-4. It is not uncommon for courts to evaluate the preemptive force of a statute by comparing it to the language of other statutes that have also been found to completely preempt state law claims. *See Metro. Life Ins.*, 481 U.S. at 65-66 (comparing the language of the LMRA and ERISA to determine ERISA's preemptive force).
[71] *Beneficial*, 539 U.S. at 9.
[72] *Id.* at 11.
[73] *Id.* at 10 (quoting Farmers' and Mechanics' Nat'l Bank. v. Dearing, 91 U.S. 29, 35 (1875)).
[74] *Id.* (quoting Tiffany v. Nat'l Bank. of Mo., 85 U.S. 409, 412 (1874)).
[75] 29 U.S.C. § 185(a) (2000).
[76] *See* Gatton v. T-Mobile USA, Inc., No. SAVC 03-130, 2003 WL 21530185, at *6 (C.D. Cal. April 18, 2003) (lack of savings clauses in LMRA and ERISA is

there is no such thing as a state law usury claim, the existence of the FCA's savings clause, the *Smith* court explained, "contemplates the application of state-law and the exercise of state-court jurisdiction" and "counsels against a conclusion that the purpose behind the [FCA] was to replicate" the preemptive force found in ERISA and the LMRA.[77] Had Congress intended to completely preempt all state law claims that even remotely involve the setting of rates, as the *Bastien* court held, such an expansive savings clause would not have been included.

2. No Fear of State Interference

¶25 Unlike other statutes that completely preempt state regulations in their respective fields, there is no evidence that Congress feared state intrusion in wireless regulation.[78] One of the goals of the NBA was to protect the national banking systems from "unfriendly State litigation."[79] Similarly, the "expansive pre-emption provisions" of ERISA "are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'"[80]

¶26 To the contrary, the FCA refuses to make wireless regulation an exclusively federal concern by explicitly providing for a substantial state role in regulating "other terms and conditions" of wireless service.[81] Notably, the House Committee Report accompanying the Omnibus Budget

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indicative of limited FCA preemption). *Cf.* 29 U.S.C. § 1144(b)(2)(A) (2000) (limiting ERISA's preemption power specifically in the areas of insurance, banking, and securities).

[77] Smith v. GTE Corp., 236 F.3d 1292, 1313 (11th Cir. 2001) (savings clause discussed in the context of § 207 of the FCA) (quoting Blab TV of Mobile, Inc. v. Comcast Cable Comm., Inc., 182 F.3d 851, 854 (11th Cir. 1999)). *See also* Lewis v. Nextel Comm., 281 F. Supp. 2d 1302, 1305 (N.D. Ala. 2003) (applying *Smith* to § 332).

[78] The FCC has been ambiguous in its view on the role of state CMRS regulation. *Compare In re* Implementation of Sections 3(n) and 332 of the Communications Act, 9 F.C.C.R. 1411, 1421 (1994) ("While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as a burden to the development of this competition.") *with In re* Southwestern Bell Mobile Sys., Inc., 14 F.C.C.R. 19898, 19903 (1999) ("We therefore do not agree . . . [that the FCA's] preference for competition over regulation results in a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws.").

[79] *Beneficial*, 539 U.S. at 9.

[80] Aetna Health Inc. v. Davila, __ U.S. __, 124 S.Ct. 2488, 2495 (2004) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). *See also* ERISA § 514, 29 U.S.C. § 1144 (preemption provision).

[81] 47 U.S.C. § 332(c)(3)(A) (2000).

Reconciliation Act of 1993 specifically states that "consumer billing information and practices and billing disputes and other consumer protection matters" are subject to state regulation.[82] Moreover, "Congress allowed a state to retain regulatory authority over CMRS rates on a showing that market conditions fail adequately to [sic] protect consumers."[83] Thus, as the Second Circuit recognized in *Marcus*, "while the FCA does evidence a federal interest in uniformity of charges in telecommunications, . . . it does not indicate a *uniquely* federal interest" in protecting customers from unfair business practices.[84]

3. Lack of Comprehensiveness

¶27 The FCA's preemptive force is also limited by its failure to establish a comprehensive legislative scheme for addressing all claims that relate to rates and market entry. Unlike the NBA's comprehensive system of usury regulations, the FCA's causes of action only cover a limited piece of the telecommunications pie.

¶28 Because of its limited scope, the FCA is not the exclusive remedy available to aggrieved consumers. For instance, the FCA provides consumers with a federal cause of action to challenge a wireless provider's unreasonable rates or inadequate service.[85] It fails, however, "to provide any federal remedies for deceptive advertising or billing practices," which are commonly covered by state law causes of action.[86] This negates a "vital feature" of complete preemption, which is the existence of a federal remedy replacing all preempted state causes of action.[87] Consequently, the FCA not only fails to manifest a clear Congressional intent to preempt state law consumer protection claims, it actually "evidences Congress's intent to allow such claims to proceed under state law."[88]

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[82] H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.
[83] Conn. Dept of Pub. Util. Control v. FCC, 78 F.3d 842, 850 (2d Cir. 1996) (citing 47 U.S.C. §§ 332(c)(3)(A)(i) & (B) (Sup. V 1993)).
[84] Marcus v. AT&T Corp., 138 F.3d 46, 54 (2d Cir. 1998) (internal citations omitted). *See also* Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874, 880 (8th Cir. 2002) (citing California v. ARC Am. Corp., 490 U.S. 93, 101 (1989)) ("States have a long history of regulating against unfair business practices.").
[85] Moriconi v. AT&T Wireless PCS, LLC, 280 F. Supp. 2d 867, 874 (E.D. Ark 2003). *See, e.g.*, 47 U.S.C. § 207 (2000) (establishing a federal cause of action for persons injured by FCA violations).
[86] *Moriconi*, 280 F. Supp. 2d at 874.
[87] King v. Marriott Int'l, Inc., 337 F.3d 421, 425 (4th Cir. 2003).
[88] *Marcus*, 138 F.3d at 54. *See also Moriconi*, 280 F. Supp. 2d at 874 ("The statutory language, the legislative history, and the savings clause compel the conclusion that Congress envisioned that consumers would not be deprived of their state law causes of action for consumer related fraud.").

4. Similarities to Ordinary Preemption Statutes

¶29 Rather than bearing much similarity to statutes found to completely preempt state law claims such as the NBA and ERISA, the FCA's preemption provision more closely resembles statutes recently found to contain only ordinary preemption powers. One of these statutes is the Federal Cigarette Labeling and Advertising Act ("FCLAA"),[89] which, as the Supreme Court recently recognized in *Lorillard Tobacco*, preempts certain state laws regulating cigarette advertising through ordinary preemption.[90] The FCLAA's preemption clause provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[91]

¶30 Interpreting the scope of the FCLAA's preemption powers, the Supreme Court concluded that although the FCLAA prohibits state regulation of cigarette advertising, the statute "still leaves significant power in the hands of States to impose generally applicable zoning regulations and to regulate conduct."[92] The Court noted a Senate Report that explained that the FCLAA's preemption clause

> [W]ould in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes.[93]

¶31 Comparing the language of the FCA to both the FCLAA and the NBA reveals that the FCA has much more in common with the former than the latter. The limited language of the FCLAA's preemption clause and the qualifications on its preemption power noted in the accompanying Senate Report closely resemble the FCA's preemption clause and House Budget Committee Report. Like the FCA, the FCLAA exhibits no fear of state interference and in fact envisions a substantial state role in cigarette regulation. The narrow scope of these statutes is strikingly different from the broad preemption clauses contained in statutes such as the NBA and ERISA.

¶32 These differences strongly suggest that Congress intended the FCA's preemption clause to only support the ordinary preemption of specific state law claims. The FCA clearly envisions states having a

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[89] 15 U.S.C. § 1331, *et seq.* (2000).
[90] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551 (2001).
[91] 15 U.S.C. § 1334 (2000).
[92] *Lorillard Tobacco*, 533 U.S. at 551.
[93] *Id.* at 552 n.* (quoting S. Rep. No. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663).

substantial role in wireless regulation. It was therefore a misapplication of the Supreme Court's preemption jurisprudence for the Seventh Circuit to circumvent the well-pleaded complaint rule by permitting the removal of Bastien's state law claims to federal court.

B. Statutory Context

¶33 The *Bastien* court's misapplication of the complete preemption doctrine is at least partially explained by its failure to interpret the FCA's Section 322 preemption clause in its proper statutory context. The Supreme Court recently reiterated that when interpreting statutory language that may be ambiguous, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[94] Yet, the *Bastien* court's heavy reliance on *Central Office Telephone* reflects a misunderstanding of Section 332's proper context within the FCA's regulatory regime.

¶34 The court in *Central Office Telephone* held that the filed-tariff requirements of the FCA preempted a plaintiff's state law claims against AT&T's long-distance telephone service.[95] Under the FCA, common carriers are "required to file with the FCC 'schedules,' *i.e.*, tariffs, 'showing all charges' and 'showing the classifications, practices, and regulations affecting such charges.'"[96] Consequently, the "filed rate doctrine forbids a regulated entity from charging rates 'for its services other than those properly filed with the appropriate federal regulatory authority.'"[97]

¶35 Unlike their land-line cousins, wireless service providers do not have to file rate schedules with the FCC. Instead, the FCA envisions wireless rate setting through market competition.[98] The FCC has accordingly held that the filed rate doctrine is inapplicable to wireless service.[99] It was therefore inappropriate for the Seventh Circuit to extrapolate Congress's preemptive intent from a case arising under the filed rate doctrine to a case concerning wireless regulation. Hence, the court read the ambiguous language of the FCA's preemption clause out of context and without proper reference to its overall place in the FCA's statutory scheme.

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[94] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).
[95] AT&T Co. v. Cent. Office Tel., 524 U.S. 214, 228 (1998).
[96] *Id.* at 221 (quoting 47 U.S.C. § 203(a) (2000)).
[97] *In re* Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, 17029 (2000) (quoting Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981)).
[98] *See id.* at 17032 ("the CMRS-customer relationship" is governed "by the mechanisms of a competitive marketplace").
[99] *See id.* ("[T]he argument of CMRS providers ignores the fact that the filed rate cases arose under a totally different regulatory regime . . . .").

¶36 Interpreting ambiguous language out of context increases the danger of misinterpreting Congress's true intention. This is particularly true when dealing with the complete preemption doctrine, where Congressional intent is of paramount importance. It is quite possible, for instance, that because the FCA gives the FCC a greater role in land-line rate setting (through rate filing) than in wireless rate setting, Congress intended the preemptive force of land-line regulation to be greater than that of wireless regulation. Accordingly, the interpretations of the statutes' respective preemption clauses are not interchangeable. The *Bastien* court's reliance on *Central Office Telephone* thus meant that its interpretive signals were crossed, making an improper result almost inevitable.

CONCLUSION

¶37 In light of *Beneficial* and *Lorillard Tobacco*, it is clear that the *Bastien* court misapplied the complete preemption analysis in finding that Steven Bastien's state law claims were removable to federal court. Although his claims may indeed have been preempted by federal law, Congress did not intend for the FCA to have the same extraordinary preemptive power contained in the NBA, ERISA, and the LMRA. Unlike these latter statutes, the FCA's preemption power is limited by its savings clause, failure to establish a comprehensive regulatory scheme, and provision of a significant role for state regulation. The FCA instead closely resembles statutes such as the FCLAA that only possess ordinary preemption powers. The Seventh Circuit should therefore have remanded Bastien's case back to state court for further adjudication.[100]

¶38 As similar issues are sure to be litigated for some time, courts attempting to reconcile *Bastien* should keep its missteps in mind. Federal courts can avoid a messy attempt at defining the scope of FCA preemption by adhering to the well-pleaded complaint rule and remanding cases to state court. State courts could then use the ordinary preemption analysis to evaluate claims on a case by case basis. If Congress really meant to make all state law claims affecting rates and market entry an exclusively federal concern removable to federal court, it must pass legislation explicitly stating this intent.[101]

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[100] *See* Smith v. GTE Corp., 236 F.3d 1292, 1313 (11th Cir. 2001) ("our conclusion that the complete preemption doctrine does not provide a basis for federal jurisdiction in this action [arising under 47 U.S.C. § 207] does not preclude the parties from litigation about the preemptive effect . . . of the . . . [FCA] in any subsequent state court action.").

[101] *See, e.g.*, El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 484 (1999) (explaining that the Price-Anderson Act, 42 U.S.C. § 2210(n)(2) (2000), expressly provides for removal of tort actions arising out of nuclear accidents to federal court even when they assert only state law claims).