IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP THIBODEAU	:	CIVIL ACTION
	:	
v.	:	
	:	
COMCAST CORPORATION, ET AL.	:	NO. 04-1777

MEMORANDUM

Padova, J. **October , 2004**

Plaintiff Philip Thibodeau originally filed this putative class action in the Philadelphia County Court of Common Pleas against Defendants Comcast Corporation; Comcast Cable Communications, Inc.; Comcast Holdings Corporation; Comcast Cable Communications Holdings, Inc.; Comcast Cable Holdings, LLC; Comcast MO Group, Inc.; Comcast MO of Delaware, Inc.; Comcast of Massachusetts II, Inc.; and AT&T Corporation. Defendants removed to this Court on April 23, 2004. The Notice of Removal alleges that this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1441 because this action is based on federal law.[1] Presently before the Court is Plaintiff's Motion to Remand. For the reasons that follow, the Motion is granted.

I. BACKGROUND

Plaintiff has brought this action on behalf of two classes, the Converter Box Equipment Class and the Remote Control Class.

[1] There is no diversity jurisdiction in this case because Plaintiff and two Defendants are alleged to be Massachusetts residents. (Compl. ¶¶ 13, 21-22.)

The Converter Box Equipment Class is defined as:

> All present and former customers of defendants that have a cable-ready television set(s) or a video cassette recorder who subscribe to basic programming, expanded basic, standard programming or other comparable basic service provided by defendants and have paid defendants rental charges for cable converter box equipment, including a converter box and a remote control, at any time from at least May 31, 1994 to the present.

(Compl. ¶ 68.) The Remote Control Class is defined as "[a]ll present and former customers of defendants that rented and paid for a remote control at any time from May 31, 1994 to the present." (Id. ¶ 69.)

The Complaint alleges the following pertinent facts. Prior to 1994, Defendants scrambled their Basic Programming, which includes basic level cable, expanded basic cable, and other non-premium programming, and used proprietary remote control technology. (Id. ¶¶ 36-39.) As a result, subscribers to Defendants' Basic Programming were required to rent converter box equipment in order to view the Basic Programming channels. (Id.) Moreover, Defendants' cable subscribers were required to rent remote controls from Defendants in order to view all levels of service. (Id.) In 1994, the Federal Communications Commission ("FCC") adopted various rules and regulations that prohibited cable system operators from scrambling basic cable service and required cable system operators to: permit consumers to view all non-scrambled stations without the need to rent a converter box; establish equipment compatibility

requirements for cable-ready televisions ("TVs") and video cassette recorders ("VCRs") that prohibited the manufacture or importation of non-compatible cable-ready equipment; promote the commercial availability of third party equipment, including remote controls; and adequately inform subscribers that they no longer needed to rent converter box equipment or remote controls from cable system operators. (Id. ¶¶ 3, 43.) Defendants were aware of these rules and regulations because they had filed comments in response to the FCC's First Report and Order addressing the rules and regulations. (Id. ¶¶ 40, 42.) The FCC rules and regulations changed the cable industry from one that required the use and rental of converter box equipment and remote controls from Defendants to one that did not require the use or rental of converter box equipment and remote controls for the vast majority of cable subscribers. (Id. ¶ 46.)

Defendants thereafter ceased scrambling their Basic Programming signal. (Id. ¶¶ 48-49.) Thus, Defendants knew that their Basic Programming subscribers who owned a cable-ready TV or VCR could view Basic Programming channels without the need to rent converter box equipment. (Id. ¶¶ 6, 50.) Defendants also knew that none of its cable subscribers who owned cable-ready TVs or VCRs needed to continue renting remote controls from Defendants because universal remote controls often came with such TVs or VCRs and/or were commercially available from retail outlets. (Id. ¶ 55.) Independent of any federal rules and regulations, Defendants

had an obligation to notify their Basic Programming subscribers that they did not need to rent converter box equipment from Defendants in order to view the Basic Programming stations, and to cease billing Basic Programming subscribers for such equipment. (Id. ¶ 65.) Independent of any Federal rules and regulations, Defendants also had an obligation to notify all of their cable subscribers that they did not need to rent a remote control from Defendants, and to cease billing their cable subscribers for such equipment. (Id. ¶ 65.) From at least October 31, 1994 and continuing to date, Defendants knowingly or recklessly engaged in fraudulent conduct by:

1. Improperly charging their Basic Programming customers who rent or rented cable converter box equipment that was not required to view Basic Programming;
2. Improperly charging their customers for the rental of a remote control because remote controls were commercially available and Defendants were required to make their equipment compatible with their customers' equipment;
3. Misrepresenting through their billing statements and/or suppressing material facts designed to confuse or mislead Plaintiff and the putative class members into believing that such rental charges were in fact proper, thereby overcharging Plaintiff and the class members;
4. Failing to adequately advise Plaintiff and the putative

class members that there were alternatives to renting converter box equipment from Defendants, including purchasing compatible cable converter box equipment and remote controls from a retail outlet; and

5. Failing to adequately advise Plaintiff and the putative class members that they no longer needed to rent cable converter box equipment.

(Id. ¶ 67.)

Based on these allegations, Plaintiff asserts the following state law claims against Defendants: violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") (Count I); breach of contract (Count II); fraud (Count III); negligent misrepresentation (Count IV); and unjust enrichment (Count V). Plaintiff also seeks an accounting of all funds paid by Plaintiff and the putative class members to Defendants and an accounting of all funds drawn from Defendants' accounts (Count VI), as well the imposition of a constructive trust (Count VII).

II. LEGAL STANDARD

Plaintiff has moved to remand this action to the Philadelphia County Court of Common Pleas. A defendant may remove a civil action filed in state court if the federal district court has original jurisdiction to hear the matter. 28 U.S.C. § 1441(b); Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). Once a case has been removed from state court, however, the federal

district court must remand the case "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). The removing party bears the burden of establishing removal jurisdiction. Boyer, 913 F.2d at 111. In ruling on a motion for remand, "the district court must focus on the plaintiff's complaint at the time the petition for removal was filed . . . [and] must assume as true all factual allegations of the complaint." Steel Valley Auth. v. Union Switch and Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987). "Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts resolved in favor of remand." Brown v. Francis, 75 F.3d 860, 865 (3d Cir. 1996) (quoting Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985)); see also Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) ("A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.").

III. DISCUSSION

Defendants argue that removal was proper because the Court has original federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331. The presence or absence of federal question

jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); see also Bracken v. Matgouranis, 296 F.3d 160, 163 (3d Cir. 2002) (noting that well-pleaded complaint rule permits removal "only when the *plaintiff's* statement of his own cause of action shows that it is based upon [federal] laws or th[e] Constitution") (quoting Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908))(emphasis added). The well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, 482 U.S. at 392. Under the well-pleaded complaint rule, a case ordinarily may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. Id. at 393 (citing Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 12 (1983)).

On its face, Plaintiff's Complaint in this case sounds entirely in state law. However, a well-established corollary to the well-pleaded complaint rule is the "artful pleading doctrine," under which "a court will not allow a plaintiff to deny a defendant

a federal forum when the plaintiff's complaint contains a federal claim 'artfully pled' as a state law claim." Goepel v. Nat'l Postal Mail Handlers Union, 36 F.3d 306, 311 n.5 (3d Cir. 1994) (citation omitted). Removal is permitted under the artful pleading doctrine if "(1) federal law has completely preempted the state law that serves as the basis for the plaintiff's complaint, or (2) a federal question, not pleaded in the plaintiff's complaint, is nonetheless both intrinsic and central to the plaintiff's cause of action." Guckin v. Nagle, 259 F. Supp. 2d 406, 410 (E.D. Pa. 2003) (citing 14B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3722 (3d ed. 1999)). Courts should invoke the artful pleading doctrine "only in limited circumstances[,] as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." Lippitt v. Raymond James Fin. Services, Inc., 340 F.3d 1033, 1041 (9th Cir. 2003) (citation omitted).[2]

[2] Defendants assert that the artful pleading doctrine provides an independent basis for removal. Courts have, however, generally concluded that "artful pleading is not a separate removal doctrine, but rather refers to the manner in which some plaintiffs manage to plead claims that are actually federal (because they are either completely preempted, or based entirely on substantial federal questions) under state law." In re Wireless Tel. Radio Frequency Emissions Prod. Liab. Litig., 327 F. Supp. 2d 554, 563 (D. Md. 2004); accord Guckin, 259 F. Supp. 2d at 410. See also Arthur R. Miller, Artful Pleading: A Doctrine in Search of a Definition, 76 Tex. L. Rev. 1781, 1784 (1998) (noting that courts have addressed the complete preemption and substantial federal question doctrines "under the single heading of artful pleading").

A. Complete Preemption

Defendants argue that removal jurisdiction is proper under the complete preemption doctrine. Complete preemption applies where "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 Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987)). Complete preemption is a "narrow" exception to the well-pleaded complaint rule, Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir. 1997), and the United States Supreme Court has only applied the doctrine to certain causes of action under the Labor Management Relations Act, the Employees Retirement Income Security Act, and the National Bank Act. See generally Aetna Health Inc. v. Davila, 124 S.Ct. 2488, 2495 (2004); Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 7-11 (2003). Two prerequisites must be satisfied for the complete preemption doctrine to apply. First, the statute relied upon by the defendant as preemptive must contain "civil enforcement provisions within the scope of which the plaintiff's state claim falls." Goepel, 36 F.3d at 311 (quoting Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co., 858 F.2d 936, 942 (3d Cir. 1988)); see also Railway, 858 F.2d at 942 ("If the federal statute creates no federal cause of action vindicating the same interest the plaintiff's state cause of action seeks to vindicate, . . .

there is no claim arising under federal law to be removed and litigated in the federal court."). Second, there must be a clear indication that "Congress intended the federal cause of action to be exclusive." Beneficial, 539 U.S. at 9 n.5.

Defendants argue that Plaintiff's claims are completely preempted by Sections 544(e) and 401(b) of the Federal Communications Act (the "Act"), as amended by the Cable Television Consumer Protection and Competition Act of 1992. Section 544(e) of the Act provides as follows:

> Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. *No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment . . . .*

47 U.S.C. § 544(e) (emphasis added). Section 401(b) of the Act creates a private cause of action for enforcement of FCC "orders." The statute provides that:

> If any person fails or neglects to obey any order of the [FCC] other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If . . . that court determines . . . that the person is in disobedience of [the order], the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents,

> or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. § 401(b).[3] The Third Circuit has held that an agency regulation should be considered an "order" under § 401(b) "if it requires a defendant to take concrete actions." Mallenbaum v. Adelphia Communications Corp., 74 F.3d 465, 468 (3d Cir. 1996).

Assuming, *arguendo*, that Plaintiff's state law claims may be construed as seeking to prohibit, condition, or restrict Defendants' use of subscriber equipment, the Court cannot conclude that Plaintiff's claims are completely preempted by § 544(e). Section 544(e) does not create a federal cause of action which permits Plaintiff to challenge the use of subscriber equipment by Defendants. Thus, while the express preemption language contained in § 544(e) may afford Defendants an affirmative defense to Plaintiff's state law claims, it does not confer removal jurisdiction under the complete preemption doctrine. Caterpillar, 482 U.S. at 393. Moreover, although cable television subscribers may seek injunctive relief under § 401(b) for violations of the "technical standards" regulations promulgated under §544(e), those regulations are not implicated by Plaintiff's claims in this case.

Defendants also contend that Plaintiff's claims are completely preempted by the regulations promulgated under § 544a(c)(2) of the

[3] Neither party disputes that Defendants are "persons" for purposes of § 401(b). See 47 U.S.C. § 153(i) (listing categories of entities that the term "person" includes).

Act, which require cable system operators to provide consumer education programs on the compatibility of their cable equipment with commercially available converter devices and remote control units. See 47 C.F.R. §§ 76.630, 76.1622. As these consumer protection regulations require cable system operators to take concrete actions, aggrieved cable subscribers may seek injunctive relief under § 401(b) for a cable system operator's failure to comply with such regulations.

However, even if Plaintiff's claims fall within the scope of the FCC's consumer protection regulations, Defendants have failed to establish that Congress intended § 401(b) to provide the exclusive cause of action for Plaintiff's state law claims. Section 556(c), the Act's general preemption provision, applies only to state laws that are "inconsistent" with the Act. In this case, Plaintiff's claims rely on state laws that complement, rather than undermine, the consumer protection regulations promulgated under the Act. See Total TV v. Palmer Communications, Inc., 69 F.3d 298, 302 (9th Cir. 1995). Moreover, courts in this Circuit have found that Congress's decision to restrict the application of a federal preemption provision to "inconsistent" state laws does not support a finding of complete preemption. See Goepel, 36 F.3d at 316 (Stapleton, J., concurring) ("[T]he fact that Congress chose to . . . limit the preemptive effect of the [Federal Employees Health Benefits Act to "inconsistent" state laws] is inconsistent

with the notion that Congress intended to 'completely' preempt state law."); Nott v. Aetna U.S. Health Care, Inc., 303 F. Supp. 2d 565, 573 n.10 (E.D. Pa. 2004) ("The fact that the [Medicare] regulations themselves point out that only inconsistent state laws are preempted necessarily undermines Aetna's position that Congress intended that [the pertinent Medicare statutes] completely preempt all state law causes of action."). The lack of Congressional intent to completely preempt Plaintiff's state consumer protection and related fraud-based claims is reinforced by the savings clause contained in § 552(d)(1) of the Act, which provides that "[n]othing in this subchapter shall be construed to prohibit any State or franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter." 47 U.S.C. § 552(d)(1). The Court concludes, therefore, that none of the provisions cited by Defendant has a preemptive force that 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 (internal quotations omitted). Accordingly, removal jurisdiction cannot be established under the complete preemption doctrine.

B. Substantial Federal Question

Defendants argue that removal jurisdiction is proper under the

substantial federal question doctrine.[4] "The vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 809 (1986) (internal quotation omitted). However, federal question jurisdiction is also appropriate where "the vindication of a right under state law necessarily turn[s] on some construction of federal

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[4] In U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383 (3d Cir. 2002), the United States Court of Appeals for the Third Circuit ("Third Circuit") noted that the substantial federal question doctrine is not limited to "situation[s] in which federal law completely preempts state law." Id. at 389. Subsequent to U.S. Express Lines, however, the United States Supreme Court held in Beneficial that "a state claim may be removed to federal court in *only two circumstances* – when Congress expressly so provides . . ., or when a federal statute wholly displaces the state-law cause of action through complete pre-emption." Id. at 8 (emphasis added). Although the Third Circuit has not yet addressed the issue, some courts in other Circuits have suggested that Beneficial eliminated the substantial federal question doctrine as an independent basis for removal jurisdiction, even though the case exclusively involved removability under the complete preemption doctrine. See, e.g., City of Rome, N.Y. v. Verizon Communications, Inc., 362 F.3d 168, 176 (2d Cir. 2004) (rejecting application of substantial federal question doctrine based on Beneficial); Burton v. Southwood Door Co., Mea, Inc., 305 F. Supp. 2d 629, 634 n.4 (S.D. Miss. 2003) ("Whether the presence of a 'substantial federal question' in a given case remains a proper basis for removal would seem somewhat in doubt in light of the Supreme Court's declaration in [Beneficial]"); Bourke v. Carnahan, Civ. A. No. C2-03-144, 2003 WL 23412975, at *3 (S.D. Ohio July 1, 2003) ("By recognizing removal *only* in cases involving a congressional mandate or complete pre-emption, the [Beneficial] Court arguably eliminated the substantial federal question exception.") (emphasis in original). Because the existence of a substantial federal question was not directly at issue in Beneficial, and because the Third Circuit has previously found that the substantial federal question doctrine is not fully subsumed by the complete preemption doctrine, the Court concludes that the substantial federal question doctrine still constitutes an independent basis for removal jurisdiction.

law." Id. at 808-09 (quoting Franchise Tax Bd., 463 U.S. at 9); see also Franchise Tax Bd., 463 U.S. at 13 (noting that "original jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims"). The mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction. Merrell Dow, 478 U.S. at 813. Rather, removal is only permitted under the substantial federal question doctrine if federal law is "in the forefront of the case and [is] not collateral, peripheral, or remote." U.S. Express Lines, 281 F.3d at 389 (quoting Merrell Dow, 478 U.S. at 813)).

Although the Complaint cites various FCC rules and regulations, the Court concludes that a substantial, disputed question of federal law is not a necessary element of Plaintiff's state law claims. The Court notes that Plaintiff's UTPCPL, fraud, and negligent misrepresentation claims will require proof that Defendants acted with a culpable state of mind. See Giannone v. Ayne Institute, 290 F. Supp. 2d 553, 566-67 (E.D. Pa. 2003) (noting that the elements of common law fraud under Pennsylvania law are "(1) a representation; (2) that is material to the transaction at hand; (3) *made falsely, with knowledge of its falsity or recklessness as to whether it is true or false*; (4) with the intent of misleading another into relying on it; (5) justifiable reliance

on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance") (citation omitted) (emphasis added); Floyd v. Brown & Williamson Tobacco Corp., 159 F. Supp. 2d 823 (E.D. Pa. 2001) (noting that elements of common law fraud must be proved under sections of the UTPCPL grounded in fraud); Mill Run Assoc. v. Locke Prop. Co., Inc., 282 F. Supp. 2d 278, 292 (E.D. Pa. 2003) (noting that the elements of negligent misrepresentation under Pennsylvania law are "(1) a misrepresentation of material fact; (2) *made under circumstances in which the misrepresenter ought to have known of its falsity*; (3) with the intent to induce another to act on it; (4) which results in injury to the party acting in justifiable reliance on the misrepresentation") (emphasis added).[5] In pleading his state law claims, therefore, Plaintiff includes several allegations concerning the information known to Defendants during the class period. Among other things, Plaintiff relies on FCC rules and regulations to establish that Defendants knew that members of the Converter Box Class no longer needed to rent converter box equipment to view Basic Programming channels and that members of the Remote Control Class no longer needed to rent remote controls from Defendants to view their subscription channels. The essence of Plaintiff's state law claims is that Defendants, armed with this knowledge, had an affirmative duty

[5] Plaintiff's remaining claims are similarly grounded in Defendants' fraudulent and deceptive conduct.

under state consumer protection and related fraud-based laws - independent of Defendants' duties under pertinent FCC rules and regulations - to advise the putative class members that they no longer needed to rent converter box equipment and remote controls and to cease billing the class members for such equipment. Thus, vindication of Plaintiff's rights under state law does not necessarily turn on some construction of federal law. Indeed, a disputed issue of federal law will arise only if Defendants defend against Plaintiff's state law claims on the basis of their compliance with FCC rules and regulations. It is well-settled, however, that "[a] defense that raises a federal question is inadequate to confer federal question jurisdiction." Merrell Dow, 478 U.S. at 808. Moreover, to the extent that Plaintiff anticipates this defense by alleging that Defendants violated FCC rules and regulations, it is equally well-settled that the mere anticipation of a federal defense in the Complaint is insufficient to establish removal jurisdiction. Caterpillar, 482 U.S. at 393. Accordingly, removal jurisdiction cannot be established under the substantial federal question doctrine.

IV. CONCLUSION

Strictly construing the removal statute and resolving all doubts in favor of remand, the Court concludes that Defendants have failed to meet their burden of establishing removal jurisdiction. Accordingly, Plaintiff's Motion to Remand is granted.

An appropriate Order follows.

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O R D E R

AND NOW, this day of October, 2004, upon consideration of Plaintiff's Motion to Remand (Docket No. 7), Defendants' response thereto, and all related submissions, **IT IS HEREBY ORDERED** that the Motion is **GRANTED**. The above-captioned case shall be **REMANDED** to the Court of Common Pleas for Philadelphia County. All pending Motions are hereby **DISMISSED** as moot.

BY THE COURT:

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John R. Padova, J.