Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Wireless Consumers Alliance, Inc.	)	
	)	
Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws.	)	WT Docket No. 99-263

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2000 **Released:** August 14, 2000

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, the Commission responds to a Petition for Declaratory Ruling filed on July 16, 1999 by the Wireless Consumers Alliance, Inc. ("WCA Petition"). The Petition concerns whether the provisions of the Communications Act of 1934, as amended, serve to preempt state courts from awarding monetary relief against Commercial Mobile Radio Service ("CMRS") providers: (a) for violating state consumer protection laws prohibiting false advertising and other fraudulent business practices, or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws.[1]

[1] In addition, in an order responding to a Petition for a Declaratory Ruling filed by Southwestern Bell Mobile Systems, we stated that we would decide whether the Communications Act preempts the award of damages by state courts against CMRS providers as part of our response to the WCA petition. (continued….)

2. In this order we address the issue of whether damage awards against CMRS providers are preempted by Section 332(c)(3) of the Communication Act. We hold that Section 332 does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims. We note, however, that whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case. As set forth below, we therefore grant WCA's petition to the extent indicated below and otherwise deny the petition.

II. BACKGROUND

3. WCA brought this petition to resolve the issue of awarding monetary damages in a class action suit involving a CMRS carrier. The California Court of Appeals has stayed the case, *Spielholz v. Los Angeles Cellular Telephone Co.*,[2] pending any Commission action on this request for a declaratory ruling.[3] WCA underscores the importance of resolving the issues raised in its petition, arguing that state courts throughout the country have reached inconsistent rulings based on their interpretations of Section 332(c)(3)(A)'s preemption of damage awards and that such inconsistent rulings are likely to continue without FCC guidance. Although WCA argues that the issue of the preemption of monetary damages can be decided as a matter of law without delving into the facts of the underlying case,[4] the petition does include some information regarding the facts of *LA Cellular* and its procedural history.[5]

4. The *LA Cellular* case centers on an allegation of false advertising on the part of LA Cellular for its practice of claiming a "seamless calling area" throughout Southern California.[6] Plaintiffs allege that LA Cellular's advertising was intentionally deceptive because it was aware that its system did not have the capacity to offer a seamless calling area even where there were no dead zones. The Second Class Action Amended Complaint in the *LA Cellular* action includes six counts alleging false advertising, fraud, and breach of contract, including three alleged violations

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Southwestern Bell Mobile Systems Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-365, *Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19908-09 (para 24) (1999) (*SBMS Ruling*).

[2] The litigation is currently titled *Spielholz v. Los Angeles Cellular Telephone Co.*, No. BC186787 (*LA Cellular*).

[3] *Spielholz v. The Superior Ct.*, No. B131655, Order Staying Proceedings, slip op. at 1 (Cal. Ct. App. June 15, 1999).

[4] WCA Petition at ii, 2-3, 5-6, 27-28.

[5] *Id.* at 6-11. Many of the supporting materials including the lower court briefs and cited cases from other state courts can be found in the appendix to the petition.

[6] *Id.* at 7.

of the California consumer protection and business and professions code.[7] On February 11, 1999, the trial court granted the defendants' motion to strike the plaintiffs' prayer for monetary damages based on violation of state consumer protection, tort and contract laws on the grounds that CMRS providers are immune from state monetary claims due to the preemptive effect of Section 332.[8] The court accepted the argument that awarding any form of monetary relief would require the state court to regulate rates.[9] Plaintiffs filed a writ of mandate with the appellate court. On June 15, 1999, after being informed of the Petitioner's intent to seek a declaratory ruling from the FCC, the court issued a stay pending any Commission determination of "whether the Federal Communications Act preempts state courts from awarding monetary relief as a remedy for fraud and false advertising claims."[10]

5. The WCA petition focuses on the issue of whether, as a matter of law, the Communications Act preempts state courts from awarding monetary relief to consumers against CMRS providers for violating state consumer protection, tort, or contract laws.[11] WCA states that ordinarily state courts have the power to award monetary relief against businesses in connection with such acts, whether in the form of restitution or compensatory, exemplary or punitive damages.[12] WCA asks the Commission to declare that CMRS providers are not endowed with a special status in the marketplace that shields them from state laws that regulate normal commercial practice.[13] WCA admits that Section 332 preempts states from regulating the rates charged for CMRS services.[14] WCA contends, however, that Section 332 also clearly says that states are not prohibited from regulating other terms and conditions of CMRS service.[15] WCA finds support in the legislative

[7] *Id*. at 9 and n.10; WCA Petition Exhibit 1, (Second Amended Class Action Complaint at 2-3, *Spielholz v. LA Cellular*, BC186787 (Super. Ct. of Cal., Cty of Los Angeles, action first filed 02/27/98)).

[8] WCA Petition Exhibit 4, Minutes at 1, (*Spielholz v. LA Cellular*, No. BC186787 (Super. Ct. of Cal., Cty of Los Angeles, February 11, 1999) (noting that defendant's motion to strike improper claims for relief in second amended complaint granted)).

[9] WCA Petition Exhibit 4, Minutes at 1, (*Spielholz v. LA Cellular*, No. BC186787 (Super. Ct. of Cal., Cty of Los Angeles, February 11, 1999) (noting that defendant's motion to strike improper claims for relief in second amended complaint granted)). *See also*, WCA Petition at i, 10, 18.

[10] WCA Petition Exhibit 8, (*Spielholz v. The Superior Ct.*, No. B131655, Order Staying Proceedings, slip op. at 1 (Cal. Ct. App. June 15, 1999)).

[11] WCA Petition at 2, 5-6, 27-28.

[12] *Id*. at 2. As the different types of monetary damage awards, *e.g.*, restitution, compensatory, exemplary and punitive damages, have not been specifically differentiated in the record, we will use the term "damages" to include all types of monetary damages.

[13] *Id*. at ii.

[14] *Id*. at 12.

[15] *Id*. at 13.

history and policy underlying Section 332 for its contentions that "terms and conditions" was intended to include state consumer protection matters and that the award of monetary damages is not tantamount to regulating rates.[16] WCA also cites the "Savings Clause" in Section 414, which generally preserves remedies created by common law or statute, as supporting its position.[17] If the award of monetary damages is not equivalent to rate regulation, then claims for monetary damages based on state consumer protection laws are not preempted.[18]

6. WCA argues that monetary damage awards do not prescribe, set, or fix rates.[19] WCA alleges that CMRS defendants have clouded this issue and caused much confusion in state courts by erroneously urging the misapplication of the filed rate doctrine in these cases.[20] WCA asserts that, because prices for CMRS services are determined by CMRS carriers as a result of competitive market forces, there are no filed rates for CMRS services and the filed rate doctrine does not apply.[21] WCA argues that monetary awards cannot impinge upon nonexistent regulated rates.[22] Thus, monetary damages based on actions taken in a competitive market are permissible remedies to be awarded in state court.[23]

7. We received comments from a number of CMRS providers in opposition to the position of WCA regarding the award of monetary damages.[24] They argue that: Section 332 prohibits state regulation of CMRS providers' rates;[25] a state court's decision constitutes state action;[26] and the

[16] *Id*. at 12-13, 16.

[17] *Id*. at 14-16, citing 47 U.S.C. § 414, which provides, "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

[18] WCA Petition at 13.

[19] *Id*. at 13-14, 26.

[20] *Id*. at 5, 18-19, 27.

[21] *Id*. at 5, 13

[22] *Id*. at 13, 26.

[23] *Id*. at 13, 16-18.

[24] Lists of comments and reply comments to the WCA petition, as well as lists of comments and reply comments to the SBMS petition are attached in the Appendix.

[25] AirTouch Comments at 12; AT&T Comments at 1; BAM Comments at 6; Centennial Comments at 4; CTIA Comments at 2, 8; GTE Comments at 2-3; SBC Comments at 2; Sprint Comments at 3; Tritel Comments at 4; USCC Comments at 14-15; AirTouch Reply at 5; AT&T Reply at 1; CTIA Reply at 4; GTE Reply at 2; SBC Reply at 2. *See also* AirTouch SBMS Comments at 2; BAM SBMS Comments at 13; Century SBMS Comments at 4-5; Comcast SBMS Comments at iii, 6, 7; PCIA SBMS Comments at 4; Vanguard SBMS Comments at 2, 4; Comcast SBMS Reply at 12-13.

calculation of monetary damages unavoidably requires the court to engage in rate-making.[27] More specifically, these commenters assert that, in order to assess the dollar amount of liability, the court must determine the difference between a reasonable rate for the service promised (either by contract or in promotional material) and the service received.[28] To support their position, many commenters cite cases premised on the filed rate doctrine, whereby monetary damages are considered to be modifications to the lawful tariff rate and thus equivalent to ratemaking.[29] In addition, commenters argue that the savings clause, Section 414, cannot preserve common law or statutory remedies that vitiate the express provisions of the Act.[30] Accordingly, wireless carrier commenters view the award of monetary damages as contradicting Section 332's preemption of state regulation of the entry or the rates charged by commercial or private mobile services.

8. In November 1999, we issued a decision on Southwestern Bell Mobile Systems' Petition for Declaratory Ruling. In that decision, we determined, among other things that, although states may not prescribe how much is charged for CMRS services or rate structures for CMRS, the CMRS industry is not exempt from the neutral application of state contractual or consumer fraud

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[26] *See, e.g.*, AT&T Reply at 3-6, and nn. 8-15 (citing Supreme Court precedent, *Shelley v. Kraemer*, 334 U.S. 1 (1948), establishing that judicial action constitutes state action.); BAM Comments at 16; Centennial Comments at 7; GTE Comments at 4; Sprint Comments at 5. *See also* SBMS Petition at 16 n.28; AirTouch SBMS Comments at 3; Century SBMS Comments at 5.

Some commenters also cite cases which support the proposition that a judgment is a form of regulatory action. *See, e.g.*, AT&T Comments at 10 and n.21; CTIA Comments at 12; GTE Comments at 4-5; SBC Comments at 4; Sprint Comments at 3; Texas Comments at 7; USCC Comments at 15-16; AT&T Reply at 6 n.15. *See also* SBMS Petition at 16 n.28; Comcast SBMS Comments at 14.

[27] *See, e.g.*, AT&T Comments at 4; BAM Comments at 10-11, 21; CTIA Comments at 2, 13-14; SBC Comments at 4-5; Sprint Comments at 3; Tritel Comments at 4-5; USCC Comments at 16-17; AT&T Reply at 6-8; CTIA Reply at 3; GTE Reply at 4; SBC Reply at 2. *See also* SBMS Petition at 16-18; 360 SBMS Comments at 6; AirTouch SBMS Comments at 3; BAM SBMS Comments at 8, 13, 27; Century SBMS Comments at 5; Comcast SBMS Comments at 17, 21; PCIA SBMS Comments at 5; Comcast SBMS Reply at 12-13; USCC SBMS Reply at 3; Vanguard SBMS Reply at 8.

[28] *See, e.g.*, AT&T Comments at 7-8, 12-13; BAM Comments at 10; CTIA Comments at 13; SBC Comments at 4-5; Sprint Comments at 4. *See also* SBMS Petition at 20-22; BAM SBMS Comments at 14, 25; Century SBMS Comments at 6; Comcast SBMS Comments at 17; PCIA SBMS Comments at 5; Vanguard SBMS Comments at 9; Vanguard SBMS Reply at 7-8.

[29] AT&T Comments at 11-12; BAM Comments at 12-15; Centennial Comments at 8 n.16; CTIA Comments at 15 n.37, 15-19; Sprint Comments at 4, 6 and n.4; AirTouch Reply at 7; AT&T Reply at 5 n.10, 6 n.18; CTIA Reply at 6; SBC Reply at 2 n.6. *See also* SBMS Petition at 19-22 and nn.38-39; BAM SBMS Comments at 17 and n.19; SBMS Reply at 18-20; Comcast SBMS Reply at 13, 14.

[30] AirTouch Comments at 14; AT&T Comments at 20-21; CTIA Comments at 23-24; Sprint Comments at 11-12. *See also* BAM SBMS Comments at 24-25; GTE SBMS Comments at 9; SBMS Reply at 16-18; Sprint SBMS Comments at 9 n.17.

laws.[31] We also determined that, although under Section 332 states do not have authority to prohibit CMRS carriers from charging in whole minute increments or charging for incoming calls, state contract or consumer fraud laws relating to the disclosure of rates and rate practices are not generally preempted under Section 332.[32] We, however, declined to address the issue of whether damage awards against CMRS providers are preempted by Section 332, indicating that we would address that issue in the context of this proceeding.[33]

III. DISCUSSION

9. Section 332 does not generally preempt the award of monetary damages by state courts based on state tort or contract claims. We note, however, that whether a specific damage award is prohibited by Section 332 will depend on the specific details of the calculation methodology as applied in a particular case. In reaching this decision, we find that the filed rate doctrine is inapposite because there are no filed rates or tariffs for CMRS services. We also conclude that, because the purposes behind the filed rate doctrine do not apply to CMRS services, the analysis and logic of the filed rate cases regarding the issue of whether awarding monetary damages is tantamount to ratemaking are inapplicable in cases dealing with Section 332.

10. Several commenters allege that WCA is seeking an overbroad ruling that neither the Communications Act nor the FCC's rules can ever preempt a state court from awarding monetary relief against CMRS providers for violations of state consumer protection laws or in connection with state contract disputes or tort claims.[34] Some opposing commenters argue that the Commission can only make a decision based on the facts of the particular case and since the facts were not properly pleaded we should deny the petition.[35] We find, however, that in light of both the WCA Petition and the SBMS Petition, we can and should address the legal question of whether Section 332 of the Federal Communications Act generally preempts state courts from awarding monetary relief as a remedy for state consumer protection, tort or contract claims.

A. Section 332(c)(3)(A)

11. CMRS providers assert that awarding monetary damages for violation of state consumer protection or breach of contract claims necessarily constitutes state regulation of rates, which is

[31] *SBMS Ruling*, 14 FCC Rcd at 19902-03, 19906-07 (paras. 10, 20).

[32] *Id*. at 19908 (para. 23).

[33] *Id*. at 19908-09 (para. 24).

[34] *See e.g.*, AirTouch Comments at 5-6; AT&T Comments at 1; BAM Comments at 2, 5; CTIA Comments at 5-6.

[35] *See e.g.*, AirTouch Comments at 7-9; AT&T Comments at 3, 6-7; BAM Comments at 6-7.

prohibited by Section 332(c)(3)(A) of the Act.[36] This Section provides that:

> . . . no State or local government 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 service.

The parties raise a number of issues concerning the proper interpretation of the statutory language as applied to damage awards against CMRS carriers in state courts. We address these in turn below.

1. The Award of Monetary Damages Constitutes State Action

12. In interpreting the preemptive scope of Section 332, as a first step we face the issue raised by Public Citizen of whether state court actions are regulatory actions subject to Section 332.[37] We conclude that judicial action can constitute state regulatory action for purposes of Section 332.[38] This conclusion comports with the Supreme Court's determination that a judicial decision can constitute state action,[39] as well as with the determinations of the Supreme Court and other courts that, like legislative or administrative action, judicial action constitutes a form of state regulation.[40] We agree with AT&T and others that the judicial branch of state government is included within the meaning of "State or local government" under Section 332(c)(3).[41]

[36] *See e.g.*, AirTouch Comments at 7; AT&T Comments at 4; BAM Comments at 10-11; CTIA Comments at 12, 16; BAM SBMS Comments at ii, 13; Vanguard SBMS Comments at 5; 360 SBMS Comments at 6; AirTouch SBMS Comments at 3; Century SBMS Comments at 5; Comcast SBMS Comments at 17, 21; PCIA SBMS Comments at 5; Comcast SBMS Reply at 12-13; USCC SBMS Reply at 3; Vanguard SBMS Reply at 8.

[37] *See* Public Citizen Comments at 5-7.

[38] *See, e.g.*, AT&T Comments at 10 and n.21; AT&T Reply at 2, 6 n.15; CTIA Comments at 12; GTE Comments at 4-5; SBC Comments at 4; Sprint Comments at 3; Texas Comments at 7; USCC Comments at 15-16; SBMS Petition at 16 n.28; Comcast SBMS Comments at 14.

[39] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[40] *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (*San Diego*); *Comcast Cellular Telecommunications Litigation*, 949 F.Supp. 1193, 1201 n.2 (E.D. Pa. 1996) (*Comcast*).

[41] *See* GTE Comments at 4-5 (citing *San Diego*, 359 U.S. 236 and *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*Arkansas*)); AT&T Reply at 4-6; SBMS Petition at 16 n.28.

2. The Award of Monetary Damages Does Not *Per Se* Constitute Impermissible Rate Regulation

13. At the outset of our analysis on the preemptive scope of Section 332, we observe that Section 332(c)(3)(A) bars state regulation of, and thus lawsuits regulating, the entry of or the rates or rate structures of CMRS providers.[42] Section 332(c)(3)(A) also expressly preserves the right of states to regulate the terms and conditions of CMRS providers. Therefore, our primary inquiry becomes: Is the award of monetary damages necessarily equivalent to rate regulation and thus preempted, or does awarding damages generally fall under allowable state action on terms and conditions?

14. We initially note that in the *SBMS Ruling*, we found that the language and the legislative history of Section 332 does not support the preemption of state contract or consumer fraud laws relating to the disclosure of rates and rate practices.[43] We noted that the legislative history of Section 332 clarifies that billing information, practices, and disputes -- all of which might be regulated by state contract or consumer fraud laws -- fall within "other terms and conditions" which states are allowed to regulate.[44] We thus ruled that state law claims stemming from state

[42] Section 332(c)(3)(A), however, does provide that a state may petition the Commission for authority to regulate CMRS rates where: 1) CMRS market conditions fail to protect subscribers from unjust, unreasonable, or discriminatory rates, or 2) CMRS has become a replacement for land line telephone exchange service for a substantial portion of such service within the state. 47 U.S.C. § 332(c)(3)(A).

[43] *SBMS Ruling*, 14 FCC Rcd at 19908 (para. 23). In the *SBMS Ruling*, we found that it was clear from the language and purpose of Section 332(c)(3) that states do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments because this would regulate the rates charged by a commercial mobile service.

[44] The House Report on the Omnibus Budget Reconciliation Act of 1993, in which the amended language in Section 332 was enacted, states that:

> 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. . . . 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. This list is 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, 103rd Congress, 1st Sess. 1993 211, 261 (cited in part in *SBMS Ruling*, 14 FCC Rcd at 19901 (para. 7)).

See also Esquivel v. Southwestern Bell Mobile Services, 920 F.Supp. 713, 716 (S.D. Tex. 1996) (*Esquivel*) (interpreting the legislative history of Section 332).

contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.[45] For the same reasons, we hereby find that the language and legislative history of Section 332 do not support the view that state courts are, as a general matter, prevented by Section 332(c)(3)(A) from awarding damages to customers of CMRS providers based on violations of state contract or consumer fraud laws.

a. The Filed Rate Doctrine Does Not Apply

15. We note that, in arguing that an award of monetary damages is equivalent to rate regulation and thus prohibited by Section 332(c)(3)(A), many commenters rely on cases in which the courts have held that the award of damages was barred by the "filed rate doctrine."[46] We find, however, that these cases are not dispositive of the question of whether damages may be awarded resulting from state law claims against CMRS providers, whose rates are not subject to tariff and have not been prescribed by the Commission.[47]

16. 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."[48] As commenters

[45] *SBMS Ruling*, 14 FCC Rcd at 19908 (para. 23). See *Tenore v. AT&T Wireless Services*, 136 Wash.2d 322, 962 P.2d 104 (1998), *cert. denied, AT&T Wireless Services v. Tenore*, 525 U.S. 1171 (1999) (*Tenore*).

[46] *See, e.g.*, SBMS Petition at pp. 19-23; AT&T Comments at 11-12; BAM Comments at 12-15; Centennial Comments at 8 n.16; CTIA Comments at 15 n.37, 15-19; Sprint Comments at 4, 6 and n.4; AirTouch Reply at 7; AT&T Reply at 5 n.10; 6 n.18; CTIA Reply at 6, 8; SBC Reply at 2 n.6; SBMS Reply at 18-20.

[47] It appears that CMRS providers have engendered much confusion over the issue of the applicability of the filed rate doctrine in cases concerning the preemptive effect of Section 332. For example, CMRS providers regularly cite filed rate cases to support their position, often without any acknowledgement that Section 332 cases do not involve filed rates. While some may admit that the filed rate doctrine does not apply, they urge that the same analysis be used in Section 332 cases without clarifying that Section 332 cases arise under a totally different regulatory regime.

[48] *Arkansas*, 453 U.S. at 577, quoted in *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1169 (S.D.N.Y. 1996) *aff'd* 138 F.3d. 46 (2nd Cir. 1998) (*Marcus*). In *Marcus*, the Court described the filed rate doctrine further:

> The doctrine creates "strict filed rates requirements and . . . forbid[s] equitable defenses to collection of the filed tariff." *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127, 110 S.Ct. 2759, 2766, 111 L.Ed.2d 94 (1990) [*Maislin*] (invalidating an ICC policy that relieved a shipper of the obligation to pay the filed rate when the shipper and carrier has privately negotiated a lower rate). That means that the filed rate governs the legal relationship between carrier and subscriber, and "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Keogh v. Chicago & N.W. Ry.*, 260 U.S.

(continued….)

discuss in detail, the filed rate doctrine has been held to preempt a customer's state law claims relating to a tariffed communications service, for breach of contract, and for tortious interference with contract against a common carrier.[49] Similarly, a claim by a customer against a communications common carrier for damages based on fraud has been dismissed, because "[a]ny remedy that requires a refund of a portion of the filed rate . . . is barred" by the filed rated doctrine.[50]

17. The application of the filed rate doctrine sometimes has resulted in hardship to customers, as the Supreme Court acknowledged in *Central Office Telephone*, saying "[t]hus, even if a carrier intentionally misrepresents its rates and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff."[51] The Commission, accordingly, has concluded that the application of the filed rate doctrine "may undermine consumers' legitimate business expectations"[52] and that its application with respect to competitive communications services is contrary to the public interest.[53] In part for this reason, it has been this Commission's policy to eliminate the filing of tariffs for services it judges to be substantially competitive.[54]

18. In the case of CMRS there are no longer any "filed rates." In the 1993 amendments to the Communications Act, Congress not only provided in Section 332(c)(3) for the preemption of state regulation of the "entry of or the rates charged" for CMRS service, but also granted the Commission forbearance authority to specify, by regulation, provisions in Title II of the Act as

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156, 163, 43 S.Ct. 47, 49, 67 L.Ed.2d 413 (1922).

[49] *See American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) (*Central Office Telephone*).

[50] *Marcus*, 938 F. Supp. at 1170.

[51] *Central Office Telephone*, 524 U.S. at 222.

[52] Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act, CC Docket No. 96-61, *Second Report and Order*, 11 FCC Rcd 20730, 20762 (para. 55) (1996) (*Detariffing Second Order*) *aff'd sub nom. MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (*MCI WorldCom*) (holding that the 1996 Act granted the FCC authority to order mandatory detariffing and recognizing the anti-competitive effects of the filed rate doctrine.).

[53] Policy and Rules Concerning the Interstate, Interexchange Marketplace,Implementation of Section 254(g) of the Communications Act of 1934, CC Docket No. 96-61, *Second Order on Reconsideration*, 14 FCC Rcd 6004, 6006 (para. 2) (1999).

[54] For example, the Commission initiated efforts to prohibit filing of tariffs by non-dominant interexchange carriers in the early 1980's and revived these efforts in 1996 after receiving statutory forbearance authority. *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *MCI Telecommunications Corp. v. American Tel. & Tel Co.*, 512 U.S. 218 (1994). *See also Detarrifing Second Report and Order*, 11 FCC Rcd at 20733 (para. 4).

inapplicable to CMRS and CMRS providers.[55] Pursuant to this authority, the Commission has exempted CMRS providers from the requirements of Section 203, which requires communications common carriers to file tariffs for interstate services with the Commission and prohibits carriers from charging, demanding, collecting, or receiving "a greater or less or different compensation" [56] than that specified in their filed tariffs.[57] CMRS carriers are not only exempt from filing tariffs, they are also prohibited from filing tariffs with the Commission.[58] The intrastate services of CMRS providers, in accordance with Section 332(c)(3)(A), are also no longer subject to any comparable tariffing requirements or other rate regulation imposed by state agencies. We therefore find that, since there are no filed rates for CMRS services, the filed rate doctrine does not preclude a state court's ability to award monetary relief against wireless telephone companies.[59] We have similarly held that our subsequent forbearance action, pursuant to Section 10 of the Communications Act,[60] not to require or allow nondominant interexchange carriers to file tariffs for their interstate wireline services also eliminated the ability of carriers to invoke the filed rate doctrine for those services.[61]

b. Filed Rate Rationale Should Not Apply in CMRS Cases

19. Several commenters acknowledge that the filed rate doctrine is not controlling in the CMRS context because there are no filed CMRS rates.[62] They argue, however, that the logic or analysis of the filed rate cases applies equally in the CMRS situation.[63] Some commenters allege that under the filed rate doctrine a plaintiff is prevented from bringing a cause of action for damages under the principle of nonjusticiability.[64] For example, AT&T argues that under the filed rate

[55] 47 U.S.C. § 332(c)(1)(A).

[56] 47 U.S.C. § 203.

[57] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-25, *Second Report and Order*, 9 FCC Rcd 1411, 1418, 1478 (paras. 14, 174) (1994). *See also* Section 20.15(a) of the Commission's Rules, 47 C.F.R. § 20.15(a).

[58] *See* Section 20.15(c) of the Commission's Rules, 47 C.F.R. § 20.15(c).

[59] The court in *Tenore*, 962 P.2d at 108-110 held that, since there are no filed rates at the federal or state level, the filed rate doctrine does not apply with respect to CMRS services. *See also* Texas Comments at 6; States' Attorneys General at 2; WCA Reply at 10; Smilow SBMS Comments at 13.

[60] 47 U.S.C. § 160.

[61] *Detariffing Second Order*, 11 FCC Rcd at 20762 (para. 55).

[62] *See* AT&T Comments at 21-22; BAM Comments at 15-16; CTIA Comments at 16-19; Sprint Comments at 6; USCC Comments at 5-6; SBMS Reply at 18-20; Comcast SBMS Reply at 13, 14.

[63] *See* AT&T Comments at 21-22; BAM Comments at 15-16; CTIA Comments at 16-19; Sprint Comments at 6; USCC Comments at 5-6; SBMS Reply at 18-20; Comcast SBMS Reply at 13, 14.

[64] AT&T Comments at 21-22; CTIA Comments at 16-17; Comcast SBMS Reply at 13-14.

doctrine, nonjusticiability is aimed at preserving the role of federal agencies in approving rates for telecommunication services and keeping courts out of the rate making process.[65] They argue that the purpose of Section 332 is identical to the nonjusticiability principle of the filed rate doctrine: that is, Section 332 grants exclusive jurisdiction over CMRS rates to the FCC and the federal courts.[66] If CMRS providers had limited their argument to the principle that under both the filed rate doctrine and Section 332 rates are nonjusticiable by state courts we would be in agreement, as evidenced by the *SBMS Ruling*.[67] CMRS providers, however, take their argument one step further and contend that, because under the analysis found in filed rate cases, courts have found that calculating and awarding damages in filed rate situations is tantamount to rate regulation, the same should hold true for cases involving Section 332.[68] We reject the sweeping extension of this broad analysis to CMRS cases. Section 332 is consistent with the policy of nonjusticiability underlying the filed rate doctrine to the extent that Section 332 prohibits states from regulating CMRS rates. However, the very structure of Section 332 limits the scope of its preemption by distinguishing nonjusticiable rates from terms and conditions which are subject to state jurisdiction. The distinction between the two is not part of the logic or analysis of the filed rate doctrine. Moreover, we find no evidence in the legislative history of Section 332, that it was the intent of Congress to impose the broad scope of the filed rate doctrine judicial analysis in cases dealing with CMRS services.

20. In addition, the argument of CMRS providers ignores the fact that the filed rate cases arose under a totally different regulatory regime, one in which carriers file tariffs with a regulatory agency that are subject to scrutiny by the agency and the public, and under which carriers are bound to charge only the filed rate for the services they provide.[69] The FCC has a different regime, in which the CMRS-customer relationship is not governed by terms set out by carriers in regulatory tariff filings, but by the mechanisms of a competitive marketplace. There is a distinction between rates that are filed with an agency and are subject to public and regulatory review, and prices that are determined and published by the carrier in a competitive marketplace.

21. The purposes behind the filed rate doctrine do not have the same relevance in CMRS

[65] AT&T Comments at 22. *See also* CTIA Comments at 16-17; Comcast SBMS Reply at 13-14.

[66] AT&T Comments at 22. *See also* Comcast SBMS Reply at 14-15.

[67] The *SBMS Ruling* supports this position by upholding Section 332's preemption of state courts from deciding claims which specifically address CMRS carriers' rates including such issues as billing in whole minute increments. *SBMS Ruling*, 14 FCC Rcd at 19908 (para. 23).

[68] *See* AT&T Comments at 21-22; BAM Comments at 15-16; CTIA Comments at 16-19; Sprint Comments at 6; USCC Comments at 5-6; SBMS Reply at 18-20; Comcast SBMS Reply at 13, 14.

[69] We note that in some "filed rate" situations there may be an actual determination on the part of a regulatory body of the appropriate costs and rate of return which are factored into a rate fixed by the agency as a result of the regulatory process.

cases.[70] The statutory scheme of Section 203 directs the agency to assure reasonable rates, rate uniformity, and the absence of price discrimination by carriers through tariff filings and the filed rate doctrine. A mandatory detariffing regime, when applied to both CMRS and other nondominant carriers, constitutes a totally different framework for fulfilling our statutory responsibilities. We do not set CMRS rates or require that carriers only charge rates as filed. Rather than file tariffs to establish the legally effective rates (and other terms and conditions) for their offering, CMRS carriers enter into service contracts with their customers. We rely on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination.[71] We have found that this approach produces better results for CMRS consumers than assuring reasonable rates through tariffing and the application of the filed rate doctrine. Since the economic and regulatory regime is different and the purposes behind the filed rate doctrine do not apply to the unregulated CMRS market, we conclude that the analysis and logic found in the filed rate cases regarding the issue of whether the award of monetary damages are equivalent to rate regulation is not applicable.

22. As WCA points out, the decision we reach today is in accord with our views regarding other competitive services.[72] In the *Detariffing Proceeding*, we considered the question of whether services which are not subject to tariffs should be immune from liability for damages. We determined that once detariffing has been implemented,

> carriers in the interstate, domestic interexchange marketplace will be subject to the same incentives and rewards that firms in other competitive markets confront. We seek ultimately to accomplish the same result in every telecommunications market, because we believe that effectively competitive markets produce maximum benefits for consumers, carriers and the nation's economy.[73]

We further concluded that once these services were detariffed, consumers would be "able to take advantage of remedies provided by state consumer protection laws and contract laws against

[70] *See Tenore*, 962 P.2d at 110, "[N]ot only are there no tariffs on file, but the two purposes behind the 'filed rate' doctrine -- preserving the agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged -- do not apply in this case." *See also, Wegoland, Ltd. v. Nynex Corp.*, 806 F.Supp, 1112, 1113-15 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 17 (2d Cir. 1994); *Maislin*, 497 U.S. at 126-27.

[71] *But see* USCC Comments at 6-8; BAM SBMS Comments at 17; Comcast SBMS Comments at 19-20; GTE SBMS Comments at 7; Comcast SBMS Reply at 14.

[72] WCA Reply at 5-6. *See also* States' Attorneys General Comments at 5-6.

[73] *Detariffing Second Order*, 11 FCC Rcd at 20733 (para. 4), *aff'd sub nom. MCI WorldCom v. FCC*, (holding that not only did the 1996 Act grant the FCC authority to order mandatory detariffing but that the probability of increased transaction costs for carriers would be insignificant compared to the competitive benefits of nonregulated market conditions. *See also W*CA Reply at 5.

abusive practices."[74] We thus found that eliminating the filed rate doctrine "would serve the public interest by preserving reasonable commercial expectations and protecting consumers."[75] Similarly, we find today that refusing to apply a filed rate doctrine rationale in CMRS cases also serves the public interest.

c. In CMRS Cases, the Award of Monetary Damages Is Not Necessarily Equivalent to Rate Regulation

23. We find there are several arguments which support our decision that awarding monetary damages is not necessarily equivalent to rate regulation. First, we agree with commenters that there is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior.[76] For example, if a company is found monetarily liable for false advertising, it will presumably alter its advertising. The impact on its prices and other behavior, however, is uncertain. The indirect and uncertain effects of monetary damage awards based on tort and contract law do not correspond to the mandatory corporate actions that are required as a result of legislative or administrative rate regulation activities.[77]

24. In addition, as Public Citizen points out, tort and contract law have the additional and separate function of compensating victims, which sets them apart from direct forms of regulation.[78] Nader argues that the tort system is the traditional prerogative of the states and is the means through which consumers are able to seek redress for injustices.[79] We agree with those commenters who contend that Section 332 was designed to promote the CMRS industry's reliance on competitive markets in which private agreements and other contract principles can be enforced.[80] It follows that, if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts. We also agree with commenters who assert that enforcement of such laws through a monetary remedy is compatible with a free market.[81] As

[74] *Detariffing Second Order*, 11 FCC Rcd at 20733 (para. 5).

[75] *Id*. at 20762 (para. 55).

[76] *See* Public Citizen Comments at 11. *See also* Texas Comments at 8.

[77] *See* Public Citizen Comments at 11.

[78] *Id*.

[79] Nader Comments at 1.

[80] Public Citizen Comments at 16-17 (referencing Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. Rev. 303, 315 (1983) and R. Posner, ECONOMIC ANALYSIS OF LAW 90-91 (4th ed. 1992)); WCA Reply at 3.

[81] *See* Public Citizen Comments at 17; WCA Reply at 3.

Public Citizen asserts, "these duties fall no more heavily on CMRS providers than on any other business."[82]

25. We also specifically disagree with those commenters who claim that any determination of monetary liability is equivalent to a finding that the service was inadequate for the price charged and therefore necessarily constitutes a finding that the rates originally charged were unreasonable.[83] If a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332. Likewise, if a state court were to set a prospective price for CMRS service, this action would also be preempted by Section 332.

26. On the other hand, a case may present a question of whether a CMRS service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier's advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court. In such a situation, a court need not rule on the reasonableness of the CMRS carrier's charges in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages.[84] In our view, the court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a difference between promise and performance.

27. In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service.[85] A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a "reasonable rate" for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations

[82] Public Citizen Comments at 17.

[83] *See* CTIA Comments at 13; AT&T Reply at 6.

[84] For instance, if a CMRS carrier promised to charge $.20 per minute for certain calls and, in fact, charged its customers $.30 per minute for these calls, the difference between the promised rate and the one actually assessed would presumably be the basis for one potential measure of damages. While this involves the court in examining a carrier's prices, it would not be doing so to determine whether they were set at a "reasonable" or "just" level.

[85] *See Tenore*, 962 P.2d at 112. *See also* AT&T Comments at 16-17; Centennial Comments at 5; SBC Comments at 5; Sprint Comments at 3-4, 8; Tritel Comments at 4-5; CTIA Reply at 3; GTE Reply at 4; Memorandum of Points and Authorities of Defendants L.A. Cellular and AT&T Wireless Services in Support of Motion to Strike Improper Claims for Relief in Second Amended Complaint, WCA Petition Exhibit 1 at 6-7.

on the service it is providing. We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.[86]

28. A number of courts deciding CMRS cases have also found that the award of monetary damages is not equivalent to regulating rates and therefore, not preempted by Section 332.[87] We find that *Tenore* and similar cases are more persuasive than those cases upholding preemption, in part because the cases that have held monetary awards to be preempted have tended to rely on the type of analysis founded on the filed rate doctrine.[88] We also note that in an *ex parte* filing, AT&T argues that the *Bastien* case, in which the court determined that certain state law claims were preempted, is controlling in the present context.[89] AT&T contends *Bastien* is further support for their position that Section 332 prohibits the award of damages in the *LA Cellular* case, and thus the WCA petition for declaratory ruling should be denied. We disagree. The Bastien court did not decide the question before us: whether the award of monetary damages is equivalent to impermissible ratemaking prohibited by Section 332. Instead, we read *Bastien* as standing for the more general proposition, with which we agree, that state law claims may, in specific cases, be preempted by Section 332.[90] We also read *Bastien* as standing for the

[86] *See, e.g.*, BAM Comments at 12-15; CTIA Comments at 13-14; AT&T Reply at 6; SBMS Petition at 20-23; Bell Atlantic SBMS Comments at 13-15, 28; GTE SBMS Comments at 2; BellSouth SBMS Comments at 7-8; Comcast SBMS Comments at 5, 17; Comcast SBMS Reply at 12-13; USCC SBMS Comments at 3.

[87] *See, e.g., Tenore, Esquivel, DeCastro v. AWACS, Inc.*, 935 F. Supp. 541 (D.N.J. 1996) (*DeCastro); Bennett v. Alltel Mobile Communications of Alabama*, 1996 WL 1054301 (M.D.Ala. 1996); *Sanderson v. AWACS, Inc.*, 958 F.Supp. 947 (D. Del. 1997) (*Sanderson)* allow state causes of action to go forward in state courts. *But see, Comcast* which found two state causes of action went to the reasonableness of rates and were therefore preempted by Section 332. Commenters such as AT&T Comments at 13 n.31, and Centennial Comments at 4-5, also cite several unreported lower court state cases which they assert involved dismissals of state law claims for monetary damages due to preemption by Section 332.

[88] *See, e.g.*, *Comcast*, 949 F.Supp at 1202.

[89] Letter from Howard J. Symons to Kris Monteith, Chief, Policy Division, WTB (March 13, 2000), (discussing *Bastien v. AT&T Wireless*, 205 F.3d 983 (7th Cir. 2000) (*Bastien*)).

[90] In the *Bastien* case, the plaintiff alleged that AT&T "signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections." *Bastien*, 205 F.3d at 989. The court found that the plaintiff's claims bore directly on the areas reserved to the FCC – "the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market" – because they were are "all founded on the fact that AT&T Wireless [had] not built more towers and more fully developed its network at the time Bastien tried to use the system." *Id*. Because the court found that AT&T Wireless was in compliance with the FCC requirements for building towers and establishing service in the Chicago market, it held that the particular claims at issue in that case were preempted. *Id*. at 989-90.

proposition that it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332.[91] We recognize the line between prohibited and permissible claims may not always be clear. While we provide legal guidance on this issue in this order, the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by a state trial court based on the specific claims before it.

29. As indicated, *Tenore* is an example of a case in which a court could find that awarding damages based on state deceptive advertising or non-disclosure claims is not equivalent to prohibited ratemaking.[92] In *Tenore* the court reversed the trial court's finding of preemption under Section 332 (c)(3)(A) and dismissal of state law false advertising claims brought against AT&T Wireless. The court viewed the central point at issue in *Tenore* as identical to the one that is before us in this proceeding: that is, whether a request for monetary damages requires a court to retroactively establish new rates in determining damages, thus constituting state ratemaking explicitly preempted by Section 332. The court cited other cases dealing with non-disclosure by CMRS providers. Those courts had found that awarding damages for such non-disclosure allegations does not enmesh the court in ruling on the reasonableness or lawfulness of the company's rates.[93] The court in *Tenore* held that "[t]he award of damages is not *per se* rate regulation, and as the United States Supreme Court has observed, does not require a court to 'substitute its judgment for the agency's on the reasonableness of a rate.'"[94]

30. In reaching this decision, the Supreme Court of Washington relied on the United States

[91] In *Bastien*, the plaintiff did not explicitly challenge AT&T's "entry" into the Chicago market or style his complaint as one seeking regulation of AT&T's entry strategy. Nevertheless, the court found that this was the substance of the complaint and that allowing it to be litigated would inevitably entangle the court in effectively regulating the means and manner of entry by a CMRS carrier. Similarly, actions under state law could in substance and effect amount to regulation of CMRS rates even though not formally styled as such. In a number of cases, however, courts have examined complaints dealing with state law claims against CMRS carriers and determined that the substance of the complaint in essence challenged only the non-disclosure of billing practices and not the rates charged. *See DeCastro, Sanderson, Tenore, Bennett.*

[92] The claims in *Tenore* arose from AT&T's alleged failure to disclose the billing practice of rounding up charges to the next minute. Appellants did not attack the reasonableness of the practice of rounding up; they challenged only the nondisclosure of the practice. *Tenore*, 962 P.2d at 112. AT&T contended that Section 332 preempted the state law claims because the monetary relief sought would necessarily require a court to engage in rate regulation in determining the refund award for partial minutes of telephone service. *Id*. at 107. Appellants argued that they were challenging only the allegedly misleading advertising practices and not the underlying rates. *Id*.

[93] *Id*. at 113 (citing *Kellerman v. MCI Telecommunications Corp.*, 493 N.E.2d 1045 (S.Ct. Ill. 1986), *cert. denied, MCI Telecommunications Corp. v. Kellerman*, 497 U.S. 949 (1986) and *DeCastro*).

[94] *Id*. at 115 (citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976) (*Nader*)).

Supreme Court's decision in *Nader v. Allegheny Airlines, Inc*.[95] In *Nader*, the plaintiff was bumped from his reserved and confirmed seat because the airline had overbooked its flight. Nader claimed fraudulent misrepresentation because the defendant did not disclose its deliberate overbooking practices. The Court of Appeals ruled that the matter had to be transferred to the Civil Aeronautics Board to determine whether the alleged failure to disclose its deliberate overbooking practices was deceptive. The Court held that neither the filed rate doctrine nor the doctrine of primary jurisdiction precludes an action for damages on common law fraud grounds against an airline by one of its customers based on the alleged failure to disclose its undisclosed policy of deliberately overbooking its flights.

31. The *Nader* Court distinguished its prior decision in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*,[96] holding that state-court common-law actions challenging the tariffed rates of railroad carriers as "unjust and unreasonable" are precluded by the Interstate Commerce Act. The Court stated, "The court in the present case, in contrast [to the circumstances in the *Abilene* line of cases] is not called upon to substitute its judgment for the agency's on the reasonableness of a rate or, indeed, on the reasonableness of any carrier practice."[97] In allowing the case to proceed at the state level, the Court held, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental. Under the circumstances, the common-law action and the statute are not 'absolutely inconsistent' and may coexist . . . ."[98]

32. This reasoning by the Supreme Court answers AT&T's syllogism that a monetary award is necessarily equivalent to both retroactive and prospective rate regulation.[99] AT&T sets up its argument as follows: AT&T contends that, if a court awarded monetary relief in the *LA Cellular* case, the monetary award would be equivalent to a rebate or refund off a previous CMRS rate.[100] By ordering a monetary award, the state court would be retroactively resetting the CMRS rates and thus determining a reasonable rate for an earlier time period.[101] In addition, AT&T contends that the court would also be regulating future rates because it would be impossible for the CMRS carriers to charge more than the rate the state court "determined was reasonable" for the earlier

[95] *Nader*, 426 U.S.at 299.

[96] *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (*Abilene*).

[97] *Nader*, 426 U.S. at 299.

[98] *Id*. at 300.

[99] It should be noted that AT&T urges that this syllogism be applied as a matter of law before a court even reaches a decision on liability rather than after a court has made what AT&T feels is an inappropriate damage award. *See* AT&T pleadings in *LA Cellular* in Appendix to WCA Petition.

[100] AT&T Reply at 7.

[101] *Id*.

time period.[102]

33. The Supreme Court, however, has determined that imposition of a state damage award has merely an incidental effect upon the prices charged by a carrier.[103] Given this reasoning, we disagree with AT&T that, on a prospective basis, if a court awarded damages for past conduct, the court would necessarily be regulating rates because it would be impossible for the carrier to charge more than that amount.[104] AT&T makes the unsupported assumption that any damage award, which is a one-time payment, can be automatically transformed into a prospective monthly rate. Courts across this nation have for many years awarded damages based on breach of contract and consumer fraud claims for all types of products and services. Such litigation costs and awards are simply a cost of doing business.[105]

34. As commenters have noted, in a case involving Section 332, appellants argued that Texas universal service contribution requirements are impermissible rate regulation because they increase the cost of doing business in a state and thus impact rates charged.[106] The U.S. Court of Appeals for the D.C. Circuit found this to be analogous to state consumer protection laws, which also "increase the cost of doing business."[107] The court stated that, "To equate state action that may increase the cost of doing business with rate regulation would, the Commission reasonably concluded, forbid nearly all forms of state regulation, a result at odds with the 'other terms and conditions' portion of the first sentence."[108]

35. Finally, our conclusions regarding the scope of Section 332 are not affected by the availability, as some comments point out, of remedies under Sections 207 and 208 of the Communications Act.[109] Under the statutory scheme, CMRS providers remain obligated to comply with Sections 201 and 202 of the Act.[110] These alternate avenues of relief supplement

[102] *Id.*

[103] *Nader*, 426 U.S. at 300.

[104] AT&T Reply at 7.

[105] *See* Landin Reply at 2; Texas Comments at 8. *See also* Public Citizen Comments at 16-17.

[106] WCA Reply at 9. *See also* Texas Comments at 6-7; *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (*CTIA*).

[107] *CTIA*, 168 F.3d at 1336.

[108] *Id.*

[109] 47 U.S.C. §§ 207-208.

[110] *See* Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Biennial Regulatory Review – Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, (continued….)

rather than replace claims under state law, particularly those common law claims for fraudulent or tortious behavior.

36. For these reasons, we hold that the award of monetary damages based on state contract or tort causes of action is not necessarily equivalent to rate regulation and thus is not generally preempted by Section 332. We further conclude that the award of monetary damages in these types of causes of action would generally fall under the terms and conditions provisions of Section 332, which can be the subject of state action. Finally, we conclude that whether a specific damage award or damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case.

B. Savings Clause

37. Some commenters have argued that despite the possible effect of Section 332 to preempt ratemaking, the savings clause, Section 414,[111] would preserve the right to seek monetary damages.[112] Under accepted principles of statutory construction, however, the savings clause cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act. Because we conclude that Section 332 does not generally preempt state court award of monetary damages, there is no inherent conflict between state common law or statutory remedies and the Communications Act, and thus, no need for us to reach the issue of interpreting the savings clause.

IV. CONCLUSIONS

38. A state court, by awarding damages to customers damaged by a CMRS provider's breach of contract or fraud violation, would not *per se* be engaged in ratemaking prohibited by Section 332(c)(3) of the Communications Act. If liability is established, an award of monetary relief would not normally require a court to prescribe, set or fix wireless rates. As the Supreme Court

(Continued from previous page)
Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GTE Petition for Reconsideration or Waiver of a Declaratory Ruling, WT Docket No. 98-100, GN Docket No. 94-33, MSD-92-14, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16872 (para. 31) (1998) (declining to forbear from applying Sections 201 and 202 of the Communications Act with respect to broadband personal communication services).

[111] 47 U.S.C. § 414, which provides, "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

[112] Public Citizen Comments at 17-18; Texas Comments at 5, 10; Smilow SBMS Comments at 12. *But see* AirTouch Comments at 14; AT&T Comments at 20-21; GTE Comments at 7-8; BAM SBMS Comments at 24-25; GTE SBMS Comments at 9; SBMS Reply at 16-18; Sprint SBMS Comments at 9 n.17.

stated in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental."[113] Furthermore, a consideration of the price originally charged, for the purposes of determining the extent of the harm or injury involved, is not necessarily an inquiry into the reasonableness of the original price and therefore is permissible.

39. Of course, a court will overstep its authority under Section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services. Thus, while we conclude that Section 332 does not generally preempt damage awards based on state contract or consumer protection laws, this is not to say that such awards can never amount to rate or entry regulation. Nor do we here conclude that a damage award in the WCA litigation or any other specific case would or would not be consistent with Section 332(c)(3). We believe the question of whether a specific damage award or a specific grant of injunctive relief constitutes rate or entry regulation prohibited by Section 332(c)(3) would depend on all facts and circumstances of the case.

V. ORDERING CLAUSE

40. Accordingly, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 154 (j), Section 5 (d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, IT IS ORDERED, that the Petition for Declaratory Ruling filed by Wireless Consumer Alliance, Inc. IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[113] *Nader*, 426 U.S. at 300.

APPENDIX

PARTIES FILING COMMENTS IN RESPONSE TO WIRELESS CONSUMERS ALLIANCE PETITION

AirTouch Communications, Inc.	(AirTouch)
Attorneys General of the States of California, Connecticut, and Wisconsin	(States' Attorneys General)
AT&T Corp., Bellsouth Cellular Corp., and AB Cellular Holding, LLC	(AT&T)
BellAtlantic Mobile, Inc.	(BAM)
Centiennial Communications Corporation	(Centennial)
Cellular Telecommunications Industry Assoc.	(CTIA)
GTE Service Corporation	(GTE)
Landin, Erika	(Landin)
Nader, Ralph	(Nader)
Public Citizen Litigation Group	(Public Citizen)
SBC Wireless, Inc.	(SBC)
Sprint PCS	(Sprint)
Texas Office of Public Utility Counsel	(Texas)
Tritel Communications, Inc.	(Tritel)
United States Cellular Corporation	(USCC)
Richard Panza and William Kolis, Wicken, Herzer & Panza; Robert Gary and Thomas Theado, Gary, Naegele & Theado; Ronald Futterman and Michael Behn, Futterman & Howard, Chtd.	(Wickens)

PARTIES FILING REPLY COMMENTS IN RESPONSE TO WIRELESS CONSUMERS ALLIANCE PETITION

AirTouch
AT&T Corp., Bellsouth Cellular Corp., and AB Cellular Holding, LLC
Cellular Telecommunications Industry Assoc.
GTE Service Corp.
Landin, Erica
SBC Wireless
Wireless Consumers Alliance

PARTIES FILING COMMENTS IN RESPONSE TO SOUTHWESTERN BELL MOBILE SYSTEMS (SBMS) PETITION FOR DECLARATORY RULING

360 Communications Company	(360 SBMS)
AirTouch Communications, Inc.	(AirTouch SBMS)
Ameritech	(Ameritech SBMS)
AT&T Wireless Services, Inc.	(AT&T SBMS)
Bell Atlantic Mobile, Inc.	(BAM SBMS)
BellSouth Corporation	(BellSouth SBMS)

Carr, Korein, Tillery, Kunin, Montory, Cates & Glass	(Carr SBMS)
Cellular Telecommunications Industry Association	(CTIA SBMS)
Century Cellnet, Inc.	(Century SBMS)
Comcast Cellular Communications, Inc.	(Comcast SBMS)
GTE Service Corporation	(GTE SBMS)
Liberty Cellular Inc. and North Carolina RSA 3 Cellular Telephone Company	(Liberty SBMS)
Omnipoint Communications, Inc.	(Omnipoint SBMS)
Personal Communications Industry Association	(PCIA SBMS)
Primacy Rural Telecommunications Group	(Primacy SBMS)
Jill Ann Smilow	(Smilow SBMS)
Sprint PCS	(Sprint SBMS)
Vanguard Cellular Systems, Inc.	(Vanguard SBMS)

PARTIES FILING REPLY COMMENTS IN RESPONSE TO SOUTHWESTERN BELL MOBILE SYSTEMS PETITION FOR DECLARATORY RULING

Comcast Cellular Communications, Inc.	
GTE Service Corporation	
Southwestern Bell Mobile Systems, Inc.	
Staack and Klemm, P.A.	(Staack SBMS)
United State Cellular Corporation	(USCC SBMS)
Vanguard Cellular Systems, Inc.	