

PRODUCTS LIABILITY STRATEGIES

for the
pharmaceutical litigator

In-depth Analysis of Today's Complex Products Liability Cases

Volume IV, Number 6

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Have a question or comment? Email Editor-in-Chief Deanne Morgan at deannem@litigationbureau.com.

Mission Statement

Products Liability Strategies for the Pharmaceutical Litigator provides up to the minute information and analysis on what works — and what doesn't — in products liability lawsuits. Each month, the issues keep readers on the cutting edge of products liability litigation, with everything plaintiffs' attorneys need to know about recent judicial decisions, legislation impacting their practices, and trial strategies from your colleagues.

SUBJECT MATTER JURISDICTION

You Can Litigate Wireless Phone Injury Claims In State Court

► **Hint: Zoning laws do not apply to wireless phones themselves.**

Save yourself time and money: Remind the federal district court judge that the substantial federal question doctrine is a defense he should not anticipate or consider until after you've established the elements of your state law claims. So says the **Fourth U.S. Circuit Court of Appeals**.

Facts: The Judicial Panel on Multidistrict Litigation transferred five class action lawsuits against **Nokia, Inc.** to the **U.S. District Court for the District of Maryland** for consolidation and pretrial proceedings. Plaintiffs in four of the cases (referred to as the "Pinney" plaintiffs) moved to remand their lawsuits to the state courts where they originated. The plaintiffs in the fifth suit are the "Nanquin" plaintiffs.

The district court ruled that the Pinney plaintiffs' claims arose under federal law pursuant to the substantial federal question doctrine, and denied the remand motion. The court then dismissed all five cases on the ground that the Federal Communications Act (FCA) of 1934 preempted the plaintiffs' state law claims. The plaintiffs appealed both rulings to the Fourth Circuit (to read the opinion, go to pg. 296).

The complaints: The plaintiffs alleged that wireless telephones emit an unsafe level of radio frequency (RF) radiation and that Nokia negligently and fraudulently endangered consumers when it sold wireless phones without headsets. The plaintiffs sought compensatory damages in an amount sufficient to allow each plaintiff to purchase a headset, an injunction against Nokia requiring the company to provide headset-compatible telephones to consumers with phones that cannot use a headset, punitive damages, costs and attorneys' fees.

Held: Federal Law 'Lurked In The Background'

The Pinney plaintiffs' claims did not arise under federal law pursuant to the substantial federal question doctrine, the Fourth Circuit determined. The Pinney plaintiffs alleged causes of action for: (1) defective design; (2) failure-to-warn; (3) consumer protection law violations; (4) breach of the implied warranty of merchantability; (5) negligence; (6) fraud and misrepresentation; and (7) civil conspiracy. None of the claims involved federal law or federal questions, the Fourth Circuit reasoned.

The district court erred when it did not limit its inquiry to the well-pleaded complaint rule. Instead, the court anticipated that Nokia would raise FCA preemption as an affirmative defense and that the Pinney plaintiffs would have to rebut the defense. "Federal law becomes relevant only as a defense, and only after the Pinney plaintiffs have made out the elements of their state law claims," the Fourth Circuit wrote. "The most one can say is that a question of federal law is lurking in the background," the panel quipped.

Held: The FCA Does Not Provide The Exclusive Claim For Wireless Phone Consumers

After rejecting Nokia's substantial federal question arguments, the Fourth Circuit addressed the company's contention that the FCA completely preempted the Pinney plaintiffs' state law claims. Nokia lost again.

Neither § 201 nor § 207 of the FCA (47 U.S.C. §§ 201 and 207) provides an exclusive claim for consumers alleging injuries from wireless telephones. Additionally, the provisions' legislative histories do not support the proposition, the Fourth Circuit said.

Held: A Wireless Telephone Is Not A Facility

The appeals court next turned to the Nanquin plaintiffs. Their complaint alleged state and federal law claims, and they appealed the district court's dismissal of their suit. Nokia contended that §§ 332(c)(7) and 332(c)(3)(A) of the FCA expressly preempted the Nanquin plaintiffs' claims.

Section 332(c)(7) precludes state and local governments from regulating the placement and construction of personal wireless service facilities, so long as the facilities comply with the Federal Communications Commission's RF radiation standards. Nokia insisted that wireless telephones are wireless service facilities. The Fourth Circuit did not buy the argument, even though the statute does not define "facility."

Section 332(c)(3)(A) prohibits state and local governments from regulating the entry of or the rates of commercial mobile services. Nokia argued that the Nanquin plain-

Pinney case continued on page 283

Pinney case *continued from page 282*

tiffs were trying to use state law to regulate technical specifications for wireless telephones, thus hindering entry into the commercial mobile market. Rubbish, the appellate panel responded. A headset requirement does not constitute a barrier for companies that want to enter the personal communications services market. A headset requirement does not obstruct or burden a wireless service provider's

ability to provide a network of wireless service coverage, the court concluded.

Conflict and field preemption: Finally, the Fourth Circuit rejected Nokia's arguments that the doctrines of conflict and field preemption preempted the Nanquin plaintiffs' claims.

Pinney v. Nokia, Inc., <<http://207.41.17.117/ISYSquery/IRLCAA0.tmp/1/doc>> (4th Cir. Mar. 16, 2005). ❖

CONFLICT PREEMPTION

FDA Statutes And Regs Do Not Preempt Your State Law Failure-To-Warn Claim

► *You have more ammunition to support your claims against anti-depressant makers.*

The attention Congress, consumer groups and trial lawyers have given to the link between selective serotonin reuptake inhibitors (SSRIs) and suicide paid off for Texas plaintiffs recently. A federal judge ruled that the link did not preclude additional warnings on the drugs.

Facts: The plaintiffs, **Bethany Cartwright's** estate and heirs, sued **Pfizer, Inc.** contending that the company's anti-depressant drug Zoloft caused Cartwright's suicide. Cartwright took Zoloft for two weeks before her death. The plaintiffs alleged Pfizer knew of the association between Zoloft and suicide before Cartwright's death but failed to warn of the drug's risks.

Pfizer moved to dismiss the plaintiffs' state law tort claims on the grounds of conflict preemption. Specifically, the drugmaker maintained that the Federal Food, Drug and Cosmetic Act preempted Texas' failure-to-warn laws.

Judge William Steger of the **U.S. District Court for the Eastern District of Texas** followed the majority view among the nation's courts and ruled that the FDCA and the **Food and Drug Administration's** regulations implementing the FDCA do not preempt state failure-to-warn claims. The federal laws "merely set minimum standards with which manufacturers must comply," he explained. They expressly do not prohibit a manufacturer from adding to or strengthening a warning. Judge Steger wrote. States can impose stricter requirements for labeling and warning, so long as the labels and warnings are not false or misleading.

Warnings About Suicidality Wouldn't Be False Or Misleading

New development: The twist that sets this case apart from failure-to-warn suits that involve prescription drugs is the recent attention to the link between anti-depressants and suicide. Given the hearings by Congress and the FDA on suicide and SSRIs, the agency's recent decision to recommend black box warnings regarding suicidality in children and adolescents and the numerous experts who have concluded that there is a link between SSRIs and suicidality, "it would be inconceivable to this Court to argue that an additional warning regarding suicidality would be false or misleading," Judge Steger wrote.

Finally, Judge Steger rejected Pfizer's argument that the plaintiffs' state law failure-to-warn claims interfere with the FDA's objective of ensuring that scientific evidence supports all drug warnings so that they're not false or misleading. Texas law, like that from the FDA, requires that drugmakers provide consumers with all the safety information about their drugs as soon as the information is known. The plaintiffs' claims do nothing to thwart the FDA's objective.

Result: Judge Steger denied Pfizer's summary judgment motion.

Cartwright v. Pfizer, Inc., 2005 U.S. Dist. Lexis 5599 (E.D. Tex. Mar. 31, 2005). ❖

"Clearly, Congress knows how to enact FDA legislation that contains a preemption clause. Thus, the absence of any such clause with respect to prescription drugs demonstrates an implied intent not to preempt cases, such as this."

— Judge William Steger

PHARMACEUTICAL LITIGATION UPDATE

Pfizer Pulls Bextra From Market

► Federal judge selects plaintiffs' steering committee for Vioxx litigation

Pursuant to a **Food and Drug Administration** request, **Pfizer** removed its non-steroidal anti-inflammatory drug (NSAID) Bextra from the market on April 8. The reason: The drug's risks for causing Stevens-Johnson Syndrome (SJS) and Toxic Epidermal Necrolysis (TENs) outweigh its benefits as a pain reliever.

Pfizer "respectfully disagree[s] with FDA's position regarding the overall risk/benefit profile of Bextra," according to an April 7 company press release. Pfizer will continue discussions with the FDA to find options for returning the drug to the market.

Bowing to pressure from Canadian and European Union regulators, Pfizer pulled Bextra from those markets as well.

► **Prescription NSAIDs:** The FDA asked all NSAID manufacturers to revise their warning labels. The new black box labels must highlight the risks of cardiovascular events and gastrointestinal bleeding associated with NSAIDs. The agency also specifically asked Pfizer to revise its warning for Celebrex. You can find a list of prescription and over-the-counter (OTC) NSAIDs at www.fda.gov/cder/drug/infopage/cox2/default.htm.

► **Over-The-Counter NSAIDs:** Manufacturers of OTC NSAIDs must revise warning labels and add specific information on cardiovascular events and gastrointestinal bleeding risks, as well as the risks of skin reactions, such as SJS and TENs. OTC drugs include ibuprofen sold under brand names, such as Motrin, Aleve and Advil. The FDA wants revised labels on all ibuprofen drugs manufactured for children, such as Children's Advil.

In Other News: Vioxx Plaintiffs Have Steering Committee

Judge Eldon Fallon, of the **U.S. District Court for the Eastern District of Louisiana**, April 8 selected a plaintiffs' steering committee to navigate the 127 Vioxx cases pending in his court through the pre-trial stage. An additional 400 cases may be added to Judge Fallon's docket.

Co-lead counsel are **Andy Birchfield, Jr.** with **Beasley Allen Crow & Methvin** in Montgomery, AL and **Christopher Seeger**, with **Seeger & Weiss** in New York.

Other committee members are:

- ♦ **Richard Arsenault, Neblett, Beard & Arsenault**, Alexandria, LA;
- ♦ **Elizabeth Cabraser, Lief Cabraser Heimann & Bernstein**, San Francisco;
- ♦ **Thomas Kline, Kline & Specter**, Philadelphia;
- ♦ **Arnold Levin, Levin, Fishbein, Sedran & Berman**, Philadelphia;
- ♦ **Carlene Rhodes Lewis, Goforth Lewis Sanford**, Houston;
- ♦ **Gerald Meunier, Gainsburgh Benjamin David Meunier & Warshauer**, New Orleans;
- ♦ **Troy Rafferty, Levin Papantonio Thomas Mitchell Echsner & Proctor**, Pensacola, FL;
- ♦ **Drew Ranier, Ranier Gayle & Elliott**, Lake Charles, LA;
- ♦ **Mark Robinson, Jr., Robinson, Calcagnie & Robinson**, Newport Beach, CA; and
- ♦ **Christopher Tisi, Ashcraft & Gerel**, Washington. ❖

LITIGATION BRIEFS

► Philip Morris Must Cough Up \$16.7 Million To Pay A Verdict

The **U.S. Supreme Court** March 21 denied **Philip Morris'** petition for certiorari in *Philip Morris U.S.A. v. Henley* (docket no. 04-816). The Court's refusal to hear the case means a 1999 verdict stands against the tobacco giant.

A San Francisco jury held **Philip Morris** liable for **Patricia Henley's** cancer and found the company lied about the risks of smoking and its addictive properties.

The jury awarded Henley \$51.5 million. Appeals courts reduced the verdict to \$10.5 million. Interest that accrued during the years the case was on appeal brings the total payout to \$16.7 million. The award is the largest payment and the first punitive damages paid to an individual smoker, the *Los Angeles Times* reported.

Madelyn Chaber, with **Paul Hanley & Harley** in San Francisco, represented Henley.

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Litigation Briefs *continued from page 284*

► **Wyeth Appeals Class Action Status In Prempro Litigation**

A Miami-Dade County Circuit Court judge granted class action status to a lawsuit seeking medical monitoring for 300,000 Florida women who took Prempro.

Wyeth Inc., Prempro's manufacturer, has appealed the decision to the **Court of Appeal of Florida**.

The trial judge granted class action status to the lawsuit because doctors prescribed Prempro for all the women in the class, and all took high doses of the drug for at least six months. ❖

DIETARY SUPPLEMENTS

You May Not Have Seen The Last Of Ephedra — Or Ephedra Litigation

► **Why the FDA overstepped its bounds in banning the supplement.**

A federal district court April 13 declared the **Food and Drug Administration's** final rule banning ephedrine-alkaloid dietary supplements (EDS) invalid, and issued an injunction precluding the feds from enforcing the rule.

Litigation opportunity: If the decision survives on appeal, dietary supplements containing ephedra will return to the market and you'll be representing consumers the supplements have allegedly injured.

The final rule became effective April 12, 2004. It bans all EDS regardless of dose. The FDA weighed EDS' benefits against their risks for heart attack, stroke and death, and concluded that all EDS pose an unreasonable risk and are adulterate under the Dietary Supplement Health and Education Act (DSHEA).

EDS manufacturers **Nutraceutical Corp.** and **Solaray Inc.** sued **Lester Crawford**, acting FDA commissioner, and various federal agencies contending the regulation is invalid. **Judge Tena Campbell** of the **U.S. District Court for the District of Utah** agreed.

"[I]f food producers were required to show a benefit as a precondition to sale, the sale of foods such as potato chips might be prohibited."

— Judge Tena Campbell

Judge Campbell disagreed with the feds' interpretation. The statute regulating medical devices specifically calls for a risk-benefit analysis. The DSHEA includes no such provision. Instead, the DSHEA regulates dietary supplements as a subset of foods (21 U.S.C. § 321(ff), unless the supplement producers make disease claims that bring the products within the definition of a drug (21 U.S.C. § 321(g)(1)). The feds presume a dietary supplement, as with any food, is safe, Judge Campbell noted.

Second, imposing a risk-benefit analysis puts the burden on EDS makers to show that their products' benefits outweigh risks. Congress did not intend such a result. The government "bears the burden of proof on each element to show that a dietary supplement is adulterated," the DSHEA says.

The Law Presumes Dietary Supplements Are Safe

The next time you litigate a dietary supplement case, remember the two reasons that the risk-benefit analysis is not appropriate under the DSHEA.

First, a dietary supplement is adulterated within the meaning of the DSHEA if it "presents a significant or unreasonable risk of illness or injury" (21 U.S.C. § 342(f)(1)(A)). The FDA maintained that the word "unreasonable" required a risk-benefit analysis consistent with provisions of the Food, Drug and Cosmetic Act governing medical devices and toxic substances.

The FDA Did Not Prove That EDS Are Unsafe At 10mg Per Day

To declare all EDS adulterated, the FDA had to prove by a preponderance of the evidence that any dose, no matter how small, presented a significant or unreasonable risk of illness or injury. The agency failed to make that showing, Judge Campbell concluded.

The dose amount involved in the plaintiffs' products was 10 mg per day. The one expert the FDA presented was unable to determine a safe level of EDS intake. Additionally, the FDA's Food Advisory Committee on Dietary Supplements Containing Ephedrine Alkaloids could not find a safe level.

Nutraceutical case continued on page 286

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That evidence, and the negative inferences it created, was not enough to establish the risks the FDA associated with low doses of EDS. “The statement that a safe level cannot be determined is simply not sufficient to meet the government’s burden. To find otherwise would be to place the burden on the manufacturers of EDS to show that their recommended dosages are safe,” Judge Campbell concluded (underline in original).

Judge Campbell remanded the regulation to the FDA for additional rulemaking and enjoined the agency from taking enforcement actions against the plaintiffs for their sales of dietary supplements containing 10 mg or less of EDS per daily dose.

Nutraceutical Corp. v. Crawford, www.utd.uscourts.gov/reports/204cv409-28.pdf (D. Utah Apr. 14, 2005). ❖

RISK-UTILITY ANALYSIS

Do You Know When The Risk-Utility Test Does Not Apply? Find Out.

► *Not all design defect cases are alike — check out the differences between strict liability and negligence.*

Whether a product’s danger was open and obvious is a question of law for the court, not the jury. That’s the take-away message from a recent state supreme court decision.

Facts: **Glen Blue** sustained injuries when he placed his foot into a commercial trash compactor to push a cardboard sofa box farther down into the machine. The machine grabbed Blue, dragged him into the compactor and rammed him three times, crushing his pelvis, leg and foot.

Blue sued **Browning-Ferris Industries Inc.** and the **John M. Smyth Co.** Browning sold the trash compactor to Smyth and installed it in Smyth’s Downers’ Grove, IL warehouse. Smyth installed a gate at the compactor’s mouth to turn the machine off when the compactor opened.

Jury Found Blue Contributorily Negligent

Blue’s products liability complaint alleged causes of action for strict liability and negligence. The trial court dismissed the strict liability count because Blue missed the limitations period for filing the claim. The negligence count went to a jury.

The jury returned a general verdict against Browning and Smyth and found Blue 32 percent contributorily negligent. Additionally, the jury answered a special interrogatory Browning submitted. The interrogatory asked if the risk of

injury in sticking a foot into a moving compactor was open and obvious. The jury said it was.

The trial judge entered judgment for Browning on the special interrogatory. The intermediate appeals court reversed, and Browning appealed to the **Supreme Court of Illinois**. The only basis of the appeal was the special interrogatory.

Errors: Both parties made mistakes the court took time to point out. The state supreme court was not convinced that Blue produced sufficient evidence on the standard of care. Browning failed to attack Blue’s evidence with a summary judgment motion or motion to dismiss. Because Browning did not challenge Blue’s evi-

dence, the issue was not before the court.

Instead, the court first decided on the correct analysis to use in determining the special interrogatory’s propriety. Then it looked at the interrogatory itself.

The Risk-Utility Test Does Not Apply To Negligence Cases

The risk-utility test is not appropriate in a negligence case, the court held. Instead, in a design defect case based on negligence, you must prove that the defendant:

“In a negligence defective design case, the focus is on the conduct of the defendant, but in a strict liability defective design case, the focus is on the product.”

— Illinois Supreme Court

Blue case continued on page 287

Blue case *continued from page 286*

(1) deviated from the standard of care that other manufacturers in the industry followed at the time of the product's design, or

(2) "knew or should have known, in the exercise of ordinary care, that the product was unreasonably dangerous and the defendant failed to warn of its dangerous propensity," the state supreme court explained.

Advice: The Illinois Supreme Court advised using a strict liability theory to show a design defect. Strict liability is easier to prove than negligence, the court commented.

Held: The risk-utility test does not apply to negligence cases, the court ruled.

Don't Use An Interrogatory To Resolve Issues Of Law

Having determined that the risk-utility test did not apply, the court next examined the special interrogatory Browning submitted using negligence standards. The interrogatory was not proper, the court ruled. The interrogatory "did not resolve, and indeed could not have resolved, the ultimate issue in the case." That issue was a question of law: whether the compactor's open and obvious danger was an absolute bar to Blue's recovery.

The supreme court affirmed the intermediate appellate court's decision to reinstate the jury verdict.

Blue v. Environmental Engineering, Inc., 2005 Ill. Lexis 621 (Apr. 7, 2005). ❖

INDUSTRY NOTES

If You're Litigating Lipitor Or Norvasc Cases, Don't Miss These Studies

Lipitor and Norvasc are not performing as their manufacturer had hoped. That's the conclusion two **Pfizer**-sponsored studies reveal about the statin drugs.

The Lipitor study showed that high doses reduce the incidence of heart attack and strokes more than lower doses, but the mortality rate among those taking high doses remains the same. The study, "Intensive Lipid Lowering With Atorvastatin in Patients With Stable Coronary Disease," appears in the April 7 issue of *The New England Journal of Medicine*. To read an abstract, go to <http://content.nejm.org/cgi/content/abstract/352/14/1425>.

The Norvasc study did not prove Pfizer's hypothesis that the drug lowers the rate of fatal coronary heart disease as compared to other similar medications.

Experts Say Ford Withheld Rollover Crash Data From The Feds

When **Ford Motor Co.** presented test data on the role of roof strength in causing injuries in rollover accidents to the **National Highway Traffic Safety Administration** in March 2004, it did not reveal all the data it collected. That's the conclusion Dr. **Martha Bidez** reached after studying Ford's data on its Explorer SUV.

"Regardless of the motive surrounding Ford's failure to reference the data that we reference in this report, we felt the findings were significant enough to bring to your attention," Bidez stated in a March 30 letter to the NHTSA. Bidez and her colleagues found "roof crush can and does cause catastrophic injury and death. The science is irrefutable." The study's purpose was to refute the manufacturer's claims that no relationship exists between roof strength and injuries in rollover accidents.

To read the report, go to <http://dmses.dot.gov/docimages/p80/323052.pdf>.

Nautilus Pays Beefy Fine For Unfit Bowflex Machines

In January 2004, **Nautilus** and the **Consumer Product Safety Commission** recalled about 420,000 Bowflex Power Pro fitness machines with a "Lat Tower" and a backboard bench. The recall wasn't Nautilus' only punishment. On April 12, 2005, the CPSC fined the company \$950,000 for failing to report problems with the machines. The product's problem: the backboard benches broke and collapsed during use, causing 25 injuries between 1998 and 2002.

Industry Notes *continued on page 304*

Filed: March 28, 2005

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 03-1433

(CA-01-1421-CCB; CA-01-1456-CCB; CA-01-3259-CCB; CA-01-3260-CCB; CA-01-3261-CCB; CA-01-3899-CCB)

J. DOUGLAS PINNEY, M. D.; PATRICIA S. COLONELL, individually and on behalf of all others similarly situated; FRANCIS J. FARINA, individually and on behalf of all those similarly situated; GARRETT J. NAQUIN; RONALD LEBLANC; JUDITH A. KAUFMAN; ASHER RUBENSTEIN; CRYSTALL GILLIAM; DIMITRI MACK; RIEDY GIMPELSON, individually and on behalf of all others similarly situated; SARAH DAHLGREN, on behalf of herself and all others similarly situated; LINDA BARRELL; BLAYNE MINOGUE; BRIAN LANE BARRETT; DIANA BARRETT; DAVID C. KELLER; MARSHA L. KELLER,

Plaintiffs - Appellants,

versus

NOKIA, INCORPORATED, a/k/a Nokia Mobile Phones, Incorporated, a/k/a Nokia Corporation; NEC AMERICA, INCORPORATED; ERICSSON WIRELESS COMMUNICATIONS, INCORPORATED, a/k/a Ericsson, Incorporated; SPRINT PCS LIMITED PARTNERSHIP, a/k/a Sprint PCS, a/k/a Sprint Spectrum, LLP, a/k/a Sprint Spectrum; AUDIOVOX COMMUNICATIONS CORPORATION; NEXTEL COMMUNICATIONS, INCORPORATED, a/k/a Nextel Communications of the Mid-Atlantic, Incorporated, a/k/a Nextel Partners, Incorporated, a/k/a Nextel; MATSUSHITA CORPORATION OF AMERICA, a/k/a Panasonic Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; QUALCOMM INCORPORATED; SAMSUNG ELECTRONICS AMERICA, INCORPORATED, a/k/a Samsung Electronics; SANYO NORTH AMERICA, INCORPORATED, a/k/a Sanyo Business Systems Corporation, a/k/a Sanyo North America Group; SONY ELECTRONICS, INCORPORATED; AT&T CORPORATION, a/k/a AT&T; VERIZON MARYLAND, INCORPORATED, a/k/a Verizon, a/k/a Verizon Wireless, formerly known as Bell Atlantic Maryland, Incorporated; VERIZON COMMUNICATIONS, INCORPORATED, formerly known as Bell Atlantic Corporation; VERIZON WIRELESS, a/k/a Nynex, a/k/a Bell Atlantic Nynex, a/k/a Bell Atlantic Mobile, Incorporated, a/k/a Bell Atlantic NYNEX Mobile; CELLCO PARTNERSHIP, d/b/a Verizon Wireless, formerly known as Bell Atlantic NYNEX Mobile, formerly known as Bell Atlantic Mobile; CINGULAR WIRELESS, LLC, formerly known as BellSouth Mobility, Incorporated, a/k/a Southwestern Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Incorporated; CINGULAR WIRELESS, a/k/a Washington/Baltimore Cellular Limited Partnership; SBC COMMUNICATIONS, INCORPORATED; CELLULAR ONE GROUP, a/k/a Cellular One; VOICESTREAM WIRELESS CORPORATION; C. E. I., INCORPORATED, a/k/a Communications Electronics, a/k/a Communications Electronics, Incorporated; BALTIMORE BUSINESS COMMUNICATIONS, INCORPORATED; COMCAST/METROPHONE; RADIOPHONE; POWERTEL, INCORPORATED; POWERTEL PCS, INCORPORATED; POWERTEL/ATLANTA, INCORPORATED; MITSUBISHI WIRELESS COMMUNICATIONS, INCORPORATED; MOTOROLA, INCORPORATED, a Delaware corporation; CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, a District of Columbia corporation; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, a/k/a TIA; NEXTEL PARTNERS OPERATING CORPORATION,

Defendants - Appellees,

and

WESTINGHOUSE COMMUNICATIONS; SOUTHERN TELECOM, INCORPORATED, a/k/a Southern LINC; JOHN DOES 1-100; LGIC CORPORATION PANASONIC CORPORATION; SAMSUNG SDI COMPANY; SANYO CORPORATION; SONY CORPORATION; PLANET CELLULAR COMMUNICATIONS, INCORPORATED; VISITOR CELLULAR L. L. C.; BELL SOUTH MOBILITY; KYOCERA WIRELESS CORPORATION; MCI WORLDCOM COMMUNICATIONS, INCORPORATED; U. S. WEST WIRELESS, L. L. C., A Colorado corporation; U. S. WEST COMMUNICATIONS, INCORPORATED, a Colorado corporation; GTE MOBILNET OF SAN DIEGO, INCORPORATED, a Delaware corporation; GTE WIRELESS SAN DIEGO, LLC, a California Limited Liability; CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA, a California corporation; AB CELLULAR HOLDINGS, LLC, d/b/a LA Cellular, d/b/a Los Angeles Cellular Telephone Company

Defendants.

ORDER

The court amends its opinion filed March 16, 2005, as follows:

On Page 6, line 16, substitute the name "Paul Walter" for the name "Paul F. Walter."

On Page 7, add at line 12, John A. Stewart, Jr., HULSE & WANER, New Orleans, Louisiana; Mark J. Jeansonne, MILLING, BENSON, WOODWARD, New Orleans, Louisiana, for Radiofone, Inc.

For the Court

/s/Patricia S. Connor

Clerk

PUBLISHED UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ü J. DOUGLAS PINNEY, M. D.; PATRICIA S. COLONELL, individually and on behalf of all others similarly situated; FRANCIS J. FARINA, individually and on behalf of all those similarly situated; GARRETT J. NAQUIN; RONALD LEBLANC; JUDITH A. KAUFMAN; ASHER RUBENSTEIN; CRYSTALL GILLIAM; DIMITRI MACK; RIEDY GIMPELSON, individually and on behalf of all others similarly situated; SARAH DAHLGREN, on behalf of herself and all others similarly situated; LINDA BARRELL; BLAYNE MINOGUE; BRIAN LANE BARRETT; DIANA BARRETT; DAVID C. No. 03-1433 y KELLER; MARSHA L. KELLER, Plaintiffs-Appellants,

v.

NOKIA, INCORPORATED, a/k/a Nokia Mobile Phones, Incorporated, a/k/a Nokia Corporation; NEC AMERICA, INCORPORATED; ERICSSON WIRELESS COMMUNICATIONS, INCORPORATED, a/k/a Ericsson, Incorporated; SPRINT PCS LIMITED PARTNERSHIP, a/k/a Sprint PCS, a/k/a Sprint Spectrum, LLP, a/k/a Sprint Spectrum; AUDIOVOX COMMUNICATIONS CORPORATION; NEXTEL COMMUNICATIONS, INCORPORATED, _

ü a/k/a Nextel Communications of the Mid-Atlantic, Incorporated, a/k/a Nextel Partners, Incorporated, a/k/a Nextel; MATSUSHITA CORPORATION OF AMERICA, a/k/a Panasonic Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; QUALCOMM INCORPORATED; SAMSUNG ELECTRONICS AMERICA, INCORPORATED, a/k/a Samsung Electronics; SANYO NORTH AMERICA, INCORPORATED, a/k/a Sanyo Business Systems Corporation, a/k/a Sanyo North America Group; SONY ELECTRONICS, INCORPORATED; AT& T CORPORATION, a/k/a AT& T; VERIZON MARYLAND, INCORPORATED, a/k/a Verizon, a/k/a Verizon Wireless, formerly known as Bell Atlantic Maryland, Incorporated; VERIZON COMMUNICATIONS, INCORPORATED, formerly known as Bell Atlantic Corporation; VERIZON WIRELESS, a/k/a Nynex, a/k/a Bell Atlantic Nynex, a/k/a Bell Atlantic Mobile, Incorporated, a/k/a Bell Atlantic NYNEX Mobile; CELLCO PARTNERSHIP, d/b/a Verizon Wireless, formerly known as Bell Atlantic NYNEX Mobile, formerly known as Bell Atlantic Mobile; CINGULAR WIRELESS, LLC, formerly known as BellSouth Mobility, Incorporated, a/k/a Southwestern

ü Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Incorporated; CINGULAR WIRELESS, a/k/a Washington/Baltimore Cellular Limited Partnership; SBC COMMUNICATIONS, INCORPORATED; CELLULAR ONE GROUP, a/k/a Cellular One; VOICESTREAM WIRELESS CORPORATION; C. E. I., INCORPORATED, a/k/a Communications Electronics, a/k/a Communications Electronics, Incorporated; BALTIMORE BUSINESS COMMUNICATIONS, INCORPORATED; COMCAST/METROPHONE; RADIOFONE; POWERTEL, INCORPORATED; POWERTEL PCS, INCORPORATED; POWERTEL/ATLANTA, INCORPORATED; MITSUBISHI WIRELESS y COMMUNICATIONS, INCORPORATED; MOTOROLA, INCORPORATED, a Delaware corporation; CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, a District of Columbia corporation; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, a/k/a TIA; NEXTEL PARTNERS OPERATING CORPORATION,

Defendants-Appellees,

and

WESTINGHOUSE COMMUNICATIONS; SOUTHERN TELECOM, INCORPORATED, a/k/a Southern LINC; JOHN DOES 1-100; LGIC CORPORATION; _

ü PANASONIC CORPORATION; SAMSUNG SDI COMPANY; SANYO CORPORATION; SONY CORPORATION; PLANET CELLULAR COMMUNICATIONS, INCORPORATED; VISITOR CELLULAR L. L. C.; BELL SOUTH MOBILITY; KYOCERA WIRELESS CORPORATION; MCI WORLDCOM COMMUNICATIONS, INCORPORATED; U. S. WEST WIRELESS, L. L. C., A Colorado corporation; U. S. WEST COMMUNICATIONS, INCORPORATED, a Colorado y corporation; GTE MOBILNET OF SAN DIEGO, INCORPORATED, a Delaware corporation; GTE WIRELESS SAN DIEGO, LLC, a California

Limited Liability; CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA, a California corporation; AB CELLULAR HOLDINGS, LLC, d/b/a LA Cellular, d/b/a Los Angeles Cellular Telephone Company,

Defendants. _

Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (CA-01-1421-CCB; CA-01-1456-CCB; CA-01-3259-CCB; CA-01-3260-CCB; CA-01-3261-CCB; CA-01-3899-CCB)

Argued: October 1, 2004

Decided: March 16, 2005

Before LUTTIG and MICHAEL, Circuit Judges, and Jackson L. KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Michael wrote the opinion, in which Judge Luttig joined. Senior Judge Kiser wrote a dissenting opinion.

COUNSEL

ARGUED: Michael R. Allweiss, LOWE, STEIN, HOFFMAN, ALLWEISS & HAUSER, L. L. P., New Orleans, Louisiana, for Appellants. Kenneth Winston Starr, KIRKLAND & ELLIS, L. L. P., Washington, D. C., for Appellees. ON BRIEF: H. Russell Smouse, John C. M. Angelos, Glenn E. Mintzer, LAW OFFICES OF PETER G. ANGELOS, P. C., Baltimore, Maryland; H. Thomas Howell, HOWELL & GATELY, Baltimore, Maryland, for Appellants. Garrett B. Johnson, Terrence J. Dee, Michael B. Slade, KIRKLAND & ELLIS, L. L. P., Chicago, Illinois, for Motorola, Inc. Seamus C. Duffy, Mary Catherine Roper, DRINKER, BIDDLE & REATH, L. L. P., Philadelphia, Pennsylvania, for Cingular Wireless, Inc., SBC Communications, Inc. Mark F. Horning, Thomas M. Barba, STEPTOE & JOHNSON, Washington, D. C., for AT& T Corp., AT& T Wireless PCS, LLC and AT& T Wireless Services, Inc. John H. Beisner, Brian P. Brooks, O'MELVENY & MEYERS, L. L. P., Washington, D. C., for Verizon Wireless, Cellco Partnership. Paul F. Strain, VENABLE, BAETJER AND HOWARD, L. L. P., Baltimore, Maryland; M. King Hill, III, VENABLE, BAETJER AND HOWARD, L. L. P., Towson, Maryland; Jane Fugate Thorpe, Scott A. Elder, ALSTON & BIRD, L. L. P., Atlanta, Georgia, for Cellco Partnership formerly d/b/a Bell Atlantic Mobile and Bell Atlantic Nynex Mobile d/b/a Verizon Wireless, Verizon Maryland, Inc. a/k/a Verizon Wireless, a/k/a Verizon, f/k/a Bell Atlantic-Maryland, Inc., Verizon Communications, Inc., f/k/a Bell Atlantic Corporation, Verizon Wireless, a/k/a Bell Atlantic Nynex, a/k/a Nynex, a/k/a Bell Atlantic Mobile, Inc. f/k/a Bell Atlantic Nynex Mobile, Inc. Thomas Watson, Curtis Renner, WATSON & RENNER, Washington, D. C., for Cingular Wireless, L. L. C. Michael Esher Yaggy, Jeffrey M. Yeatman, PIPER RUDNICK, L. L. P., Baltimore, Maryland, for Motorola, Inc. Steven M. Laduzinsky, Scott A. Hanfling, KANE, LADUZINSKY & MENDOZA, LTD., Chicago, Illinois; Robert B. Green, IRWIN, GREEN & DEXTER, L. L. P., Towson, Maryland, for Cellular Telecommunications and Internet.

Association. Michael H. O'Brien, Jason P. Sultzter, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, White Plains, New York; Laura N. Steel, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, Washington, D. C.; John B. Isbister, Harold M. Walter, TYDINGS & ROSENBERG, L. L. P., Baltimore, Maryland, for Samsung Electronics America, Inc., a/k/a Samsung Electronics. Paul S. Schleifman, SHOOK, HARDY & BACON, L. L. P., Washington, D. C.; J. Stan Sexton, Michael D. Moeller, SHOOK, HARDY & BACON, L. L. P., Kansas City, Missouri, for Sprint PCS Limited Partnership, a/k/a Sprint Spectrum; Sprint Spectrum, L. L. C., d/b/a Sprint PCS. Charles P. Goodell, James A. Frederick, GOODELL, DEVRIES, LEECH & DANN, Baltimore, Maryland, for North America, Inc. a/k/a Sanyo North America Group, Sanyo Corporation, Sanyo Business Systems Corporation. Steven M. Zager, Lance Lackey, Robert Pemberton, AKIN, GUMP, STRAUSS, HAUSER & FELD, L. L. P., Houston, Texas; Paul Walter, TYDINGS AND ROSENBERG, L. L. P., Baltimore, Maryland, for Nokia, Inc., a/k/a Nokia Mobile Phones, Inc., and Nokia Corporation. Ray M. Aragon, Raymond B. Biagini, MCKENNA, LONG & ALDRIDGE, L. L. P., Washington, D. C., for Electronics North America Corporation. Eugene A. Schoon, Tamar B. Kelber, SIDLEY, AUSTIN, BROWN & WOOD, L. L. P., Chicago, Illinois, for Voicestream Wireless Corporation a/k/a Voice-stream Wireless, Powertel, Inc., Powertel PCS, Inc., Powertel/Atlanta, Inc. Patrick R. Buckler, Walter T. Dudley, MCGUIREWOODS, L. L. P., Baltimore, Maryland; Edward M. Crane, David L. Hanselman, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Chicago, Illinois, for Nextel Communications of the Mid-Atlantic, Inc., Nextel of New York, Inc., and Nextel South Corp. James P. Ulwick, KRAMON & GRAHAM, P. A., Baltimore, Maryland, for NEC America, Inc. Francis A. Citera, GREENBERG & TRAUERIG, P. C., Chicago, Illinois, for Electronics Inc., Qualcomm Incorporated. Russell J. Rogers, Lawrence A. Slovensky, MCKENNA, LONG & ALDRIDGE, L. L. P., Atlanta, Georgia, for Partners Operating Corp. and Nextel Partners, Inc. Paul D. Krause, Laura N. Steel, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, L. L. P., Washington, D. C., for Matsushita Corporation of America, a/k/a Panasonic Corporation, and Sanyo North America, Inc. a/k/a Sanyo North America Group; Sanyo Corporation; Sanyo Business Systems, Corporation. Paul Vishny, Paul Freehling, D'ANCONA & PFLAUM, L. L. C., Chicago, Illinois, for Telecommunications Industry Association. Mark H. Kolman, Leslie R. Cohen, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L. L. P., Washington, D. C., for Audiovox Communications Corp. Charles L. Perry, ANDREWS & KURTH, L. L. P., Dallas, Texas, for Cellular One Group. Matthew T. Covell, Kevin B.

Getzendanner, ARNALL, GOLDEN & GREGORY, L. L. P., Atlanta, Georgia, for Mitsubishi Wireless Communications, Inc. Daniel S. Reinhardt, Steven J. Hewitson, TROUTMAN, SANDERS, L. L. P., Atlanta, Georgia, for Southern Telecom, Inc. Gregg L. Bernstein, Denis J. Charlesworth, MARTIN, SNYDER & BERNSTEIN, P. A., Baltimore, Maryland; Charles L. Babcock, David T. Moran, James M. McCown, Ryan C. Wirtz, JACKSON WALKER, L. L. P., Dallas, Texas, for Ericsson Inc. Maureen Ellen Murphy, MURPHY & MURPHY, L. L. C., Catonsville, Maryland, for Baltimore Business Communications, Inc. John A. Stewart, Jr., HULSE & WANEK, New Orleans, Louisiana; Mark J. Jeansonne, MILLING, BENSON, WOODWARD, New Orleans, Louisiana, for Radiofone, Inc.

OPINION

MICHAEL, Circuit Judge:

This multidistrict litigation includes five class actions brought initially in the state courts of Georgia, Louisiana, Maryland, New York, and Pennsylvania. The plaintiffs sue Nokia Inc. and other entities (collectively, "Nokia") involved in the manufacture and sale of wire-less telephones. The plaintiffs claim that wireless telephones emit an unsafe level of radio frequency radiation and that Nokia has hidden this fact from consumers. Nokia removed the five cases to various federal courts, and the Judicial Panel on Multidistrict Litigation (JPML) transferred the cases to the United States District Court for the District of Maryland (the district court) for consolidated pretrial proceedings. The district court denied the plaintiffs' motion to remand four of the cases to state court and then dismissed all five cases on the ground that the plaintiffs' state law claims are preempted by the Federal Communications Act of 1934 (FCA), 47 U. S. C. § 151 et seq. The plaintiffs appeal both rulings. Because federal subject matter jurisdiction is lacking in four of the cases, we reverse the district court's order denying the motion to remand those cases. There is diversity jurisdiction over the fifth case, and because the state law claims are not preempted, we reverse the order dismissing that case.

A wireless telephone (commonly called a cell phone) is actually a radio containing a low power transmitter. When a wireless telephone is turned on, it searches for a base station (usually a tower) within range. A base station is a fixed transmitter containing antennae and electronic equipment that communicates with the transmitter in a wireless telephone. If a wireless telephone finds a base station within range, the telephone identifies itself by transmitting its Mobile Identification

Number (MIN), its System Identification Code (SID), and its Electronic Serial Number (ESN). The ESN is a number permanently programmed into the telephone when it is manufactured. The SID and the MIN are programmed into the wireless telephone when a customer purchases a service plan and the telephone is activated. The base station relays the identifying information (MIN, SID, and ESN) to the local mobile telephone switching office (MTSO), which confirms that the telephone is assigned to a valid customer. An MTSO is a sophisticated computer that controls all of the base stations in a particular area for the purpose of coordinating radio transmissions to and from wireless telephones. Once an MTSO confirms that a wire-less telephone is assigned to a valid customer, the MTSO assigns a frequency on which the user may communicate.

Base stations receiving and routing transmissions from wireless telephones have a relatively small transmission range because they have low power transmitters. Accordingly, to provide continuous wireless telephone service coverage over an extended area, numerous base stations must be built. Cities and regions are divided into cells, typically ten square miles, each containing a base station. As a user moves out of one cell (and thus out of range of the base station in that cell) and into an adjoining cell, the MTSO hands the signal off to the base station in the adjoining cell. Marshall Brain & Jeff Tyson, *How Cell Phones Work*, at <http://www.howstuffworks.com/cell-phone.htm#printable> (last visited January 24, 2005).

Wireless telephones emit a low level of radio frequency (RF) radiation, a form of electromagnetic energy, from their antennae when they communicate with base stations. See *Cell Phone Facts: Consumer Information on Wireless Phones*, at <http://www.fda.gov/cellphones/qa.html> (last updated July 29, 2003). While it is well established that exposure to high levels of RF radiation can cause adverse health effects, there is no scientific consensus on the effects of low level exposure. The Federal Communications Commission (FCC) requires all transmitters that emit RF radiation to be authorized by the agency before they are marketed or sold. See 47 C. F. R. §§ 2.801, 2.803 (2004). Pursuant to the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 et seq., which requires agencies to consider the impact of their actions on the quality of the human environment, the FCC has promulgated rules that limit the amount of RF radiation that FCC-regulated transmitters (including wireless telephones) may emit. In re *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123, 15125 (1996) (In re *Guidelines*); see 47 C. F. R. §§ 1.1307, 1.1310, 2.1091, 2.1093.

The plaintiffs brought five class actions in state courts against Nokia, claiming, among other things, that (1) wireless telephones emit an unsafe level of RF radiation and (2) Nokia, in knowing this, negligently and fraudulently endangered the consuming public by marketing wireless telephones without headsets. According to the plaintiffs, they were exposed to the risk of adverse biological effects from the RF radiation emitted by their wireless telephones when they used the telephones without headsets. The plaintiffs purport to represent wire-less telephone users who have not been diagnosed with brain-or eye-related diseases and who were not provided headsets when they leased or bought their wireless telephones. Compensatory damages are sought in an amount sufficient to

buy a headset for each class member who lacks one and to reimburse each class member who has already bought one. For class members with wireless telephones that are not headset-compatible, an injunction is sought to require Nokia to provide them with telephones that can be used with a headset. The plaintiffs also seek punitive damages, costs, and attorneys' fees.

After these cases were filed in the five state courts, Nokia removed them, pursuant to 28 U. S. C. § 1447, to the five appropriate federal district courts. On October 31, 2001, the JPML transferred the five cases to the District of Maryland for consolidated or coordinated pre-trial proceedings. On January 7, 2002, the plaintiffs in four of the cases - those with lead plaintiffs named Pinney, Farina, Gilliam, and Gimpelson (collectively, the "Pinney plaintiffs") - filed a consolidated motion to remand their cases to the state courts in which they originated. The plaintiffs in the fifth case (the "Naquin plaintiffs") did not join this motion because there was federal subject matter jurisdiction over their case based on diversity of citizenship. On June 21, 2002, the district court denied the Pinney plaintiffs' motion to remand on the ground that their claims necessarily depend on the resolution of a substantial federal question. According to the district court, the claims are a disguised attack on the FCC's RF radiation standards, and resolution of the claims would require the court to rule on the validity of those standards.

After remand was denied, Nokia filed a consolidated motion to dismiss for failure to state a claim, see Fed. R. Civ. P. 12(b)(6), on the ground of federal preemption. On March 5, 2003, the district court granted Nokia's motion on the basis that the plaintiffs' claims are preempted by the FCA. More specifically, the district court concluded that the relief sought by the plaintiffs in all five cases conflicts with Congress's goal of achieving national uniformity in RF radiation emission levels for all wireless telecommunications equipment. The plaintiffs appeal the district court's orders.

II.

We turn first to the district court's order denying the Pinney plaintiffs' consolidated motion to remand their four cases to state court. Federal removal jurisdiction may be exercised over state court actions "of which the district courts of the United States have original jurisdiction." 28 U. S. C. § 1441(a). The original jurisdiction of the district courts includes jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. The propriety of Nokia's removal of the Pinney plaintiffs' state court cases depends on whether the claims "aris[e] under" federal law. See *Mulcahey v. Columbia Organic Chems. Co.*, 29 F. 3d 148, 151 (4th Cir. 1994). We must strictly construe our removal jurisdiction because removal "raises significant federalism concerns." *Id.* "If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed." *Franchise Tax Bd. of Cal. v. Constr. Laborer's Vacation Trust*, 463 U. S. 1, 8 (1983) (citing 28 U. S. C. § 1447(c)).

We begin with the issue of whether the Pinney plaintiffs' claims arise under federal law pursuant to the substantial federal question doctrine. We then address whether their claims arise under federal law pursuant to the doctrine of complete preemption. We ultimately conclude that the claims of the Pinney plaintiffs do not arise under federal law by reason of either doctrine. Accordingly, the district court lacked jurisdiction over these claims, and the court erred in denying the Pinney plaintiffs' consolidated motion to remand their cases to state court.

A.

In determining whether a plaintiff's claim arises under federal law, we apply the well-pleaded complaint rule, which holds that courts "ordinarily . . . look no further than the plaintiff's [properly pleaded] complaint in determining whether a lawsuit raises issues of federal law capable of creating federal-question jurisdiction under 28 U. S. C. § 1331." *Custer v. Sweeney*, 89 F. 3d 1156, 1165 (4th Cir. 1996). Thus, in examining the complaint, our first step is to "discern whether federal or state law creates the cause of action." *Mulcahey*, 29 F. 3d at 151; see also *Dixon v. Coburg Dairy, Inc.*, 369 F. 3d 811, 816 (4th Cir. 2004) ("The vast majority of lawsuits 'arise under the law that creates the cause of action.'") (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U. S. 257, 260 (1916)). If federal law creates a plaintiff's claim, then removal is proper. *Mulcahey*, 29 F. 3d at 151. The general rule, of course, is that a plaintiff is the "master of the claim," and he may "avoid federal jurisdiction by exclusive reliance on state law" in drafting his complaint. *Caterpillar Inc. v. Williams*, 482 U. S. 386, 392 (1987). Here, it is undisputed that state law creates the claims asserted by the Pinney plaintiffs, but this does not end our inquiry. We must also determine whether these cases fall within the small class of "cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded . . . claims." *Christianson v. Colt Indus. Operating Corp.*, 486 U. S. 800, 808 (1988) (quoting *Franchise Tax Bd.*, 463 U. S. at 13, 27-28) (internal quotation marks and citations omitted). Under the substantial federal question doctrine, "a defendant seeking to remove a case in which state law creates the plaintiff's cause of action must establish two elements: (1) that the plaintiff's right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial." *Dixon*, 369 F. 3d at 816. If the defendant fails to establish either of these elements, the claim does not arise under federal law pursuant to the substantial federal question doctrine, and removal cannot be justified under this doctrine. *Id.*

A plaintiff's right to relief necessarily depends on a question of federal law when "it appears that some . . . disputed question of

federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U. S. at 13. If a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law. See *id.* at 13-14; see also *Dixon*, 369 F. 3d at 817 ("[I]f the plaintiff can support his claim with even one theory that does not call for an interpretation of federal law, his claim does not 'arise under' federal law for purposes of § 1331."). This principle is illustrated in *Franchise Tax Board*. There, the Supreme Court found no substantial federal question when a California tax agency attempted to enforce a levy on funds held in trust for several taxpayers under an ERISA-covered benefit plan. 463 U. S. at 13-14. The claim did not necessarily depend on a resolution of federal law because "California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if [the state agency] has made out a valid claim for relief under state law." *Id.* at 13. "[I]t has been well-settled law," the Court noted, "that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Id.* at 14. We now examine the claims in the complaints filed by the Pinney plaintiffs. We note parenthetically that the district court allowed these plaintiffs to amend their complaints after it denied their motion to remand. Because amendment occurred after removal, we look at the original complaints rather than the amended complaints in determining whether removal was proper. See *Pullman Co. v. Jenkins*, 305 U. S. 534, 537 (1939). The Pinney plaintiffs assert seven claims in their original complaints. They first allege that Nokia is strictly liable for placing a defectively designed product into the stream of commerce. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. Under the laws of all four states, a manufacturer (and sometimes a seller) is strictly liable for selling a defectively designed product that causes personal injury. Georgia, Maryland, and New York assess whether a product suffers from a design defect by using the risk-utility balancing test. Under this test a fact-finder must determine whether the manufacturer acted reasonably in choosing a particular product design, given the probability and magnitude of the risk, the usefulness of the product in its particular condition, and the burden on the manufacturer to eliminate the risk. See *Banks v. ICI Ams., Inc.*, 450 S. E. 2d 671, 673-74 (Ga. 1994); *Nissan Motor Co. v. Nave*, 740 A. 2d 102, 118 (Md. Ct. Spec. App. 1999); *Voss v. Black & Decker Mfg. Co.*, 450 N. E. 2d 204, 208-09 (N. Y. 1983). Under Pennsylvania law a product suffers from a design defect if it lacks a component necessary to make it safe for its intended use. See *Harsh v. Petroll*, 840 A. 2d 404, 416-17 (Pa. 2003). Second, the Pinney plaintiffs allege that Nokia is strictly liable for its failure to warn about the adverse health risks associated with wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. According to these laws, when a manufacturer or a seller knows or should have known of the latent danger of a product and fails to warn the consuming public, the manufacturer or seller is strictly liable for injuries caused by the danger while the product is used in a foreseeable manner. See *Hunt v. Harley-Davidson Motor Co.*, 248 S. E. 2d 15, 16 (Ga. Ct. App. 1978); *Owens-Illinois, Inc. v. Zenobia*, 601 A. 2d 633, 639 (Md. 1992); *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N. E. 2d 222, 225 (N. Y. 1992); *Davis v. Berwind Corp.*, 690 A. 2d 186, 190 (Pa. 1997).

Third, the Pinney plaintiffs allege that Nokia is liable for violating various state consumer protection statutes. These claims are brought under the laws of Maryland, New York, and Pennsylvania, where the relevant statutes allow a plaintiff to recover for losses or injuries sustained when a merchant engages in deceptive trade practices. See Md. Code Ann., Com. Law II, § 13-408; N. Y. Gen. Bus. Law § 349(h) (McKinney); 73 Pa. Cons. Stat. § 201-9.2. These statutes generally require a plaintiff to prove either (1) that the defendant made materially false or misleading statements about its product that deceived, or had the tendency to deceive, consumers, or (2) that the defendant failed to state a material fact with respect to its product, and this failure deceived, or had the tendency to deceive, consumers. See Md. Code Ann., Com. Law II, § 13-301(1), (2)(i), (3), (9)(i); N. Y. Gen. Bus. Law § 350-a(1); 73 Pa. Cons. Stat. § 201-2(4)(v), (vii), (ix), (xxi).

Fourth, the Pinney plaintiffs allege that Nokia breached an implied warranty of merchantability by selling and distributing unreasonably dangerous wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. To make out a claim for breach of this implied warranty, a plaintiff must establish that a product is not of merchantable quality and that he suffered an injury as a result. A product is not of merchantable quality when it is not fit for the ordinary purposes for which it is used. See *Wilson v. J & L Melton, Inc.*, 606 S. E. 2d 47, 49 n. 1 (Ga. Ct. App. 2004); *Ford Motor Co. v. Gen. Acc. Ins. Co.*, 779 A. 2d 362, 370 n. 13 (Md. 2001); *Denny v. Ford Motor Co.*, 662 N. E. 2d 730, 736 (N. Y. 1995); *Phillips v. Cricket Lighters*, 852 A. 2d 365, 370-71 (Pa. Super. Ct. 2004). In determining whether a product is of merchantable quality, the fact-finder focuses on the "expectations for the performance of the product when used in the customary, usual, and reasonably foreseeable manners." *Denny*, 662 N. E. 2d at 736.

Fifth, the Pinney plaintiffs allege that Nokia was negligent (1) in failing to conduct adequate and appropriate scientific research on the adverse health effects of exposure to RF radiation from wireless telephones, (2) in misrepresenting to the public that wireless telephones are safe, (3) in suppressing any scientific evidence suggesting that wireless telephones are not safe, (4) in failing to provide warnings about the potential health risks from failing to use a headset, and (5) in failing to provide headsets and instructions encouraging their use. These claims are brought under the laws of Georgia and Maryland. To make out a claim for negligence, a plaintiff must establish the following elements: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the

plaintiff suffered an injury, and (4) there was a causal connection between the breach and the injury. See *Johnson v. Am. Nat'l Red Cross*, 578 S. E. 2d 106, 108 (Ga. 2003); *Hemmings v. Pelham Wood LLP*, 826 A. 2d 443, 451 (Md. 2003). A manufacturer generally has a duty to exercise reasonable care in manufacturing, designing, and selling its products "so as to make the products reasonably safe for intended or foreseeable uses." *Chrysler Corp v. Batten*, 450 S. E. 2d 208, 211 (Ga. 1994) (citation omitted); see also *Eagle Pitcher Indus., Inc. v. Balbo*, 604 A. 2d 445, 454 n. 9 (Md. 1992).

Sixth, the Pinney plaintiffs allege that Nokia engaged in fraud by misinforming and misleading the public as to the safety of wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. To make out a claim for fraud, a plaintiff must establish the following elements: (1) the defendant made a false representation, (2) the defendant knew the representation was false or was recklessly indifferent to its truth or falsity, (3) the defendant made the representation with the intent to defraud the plaintiff, (4) the plaintiff justifiably relied on the false representation, and (5) the plaintiff suffered damages as a result. See *Rhone v. Bol-den*, ___ S. E. 2d ___, 2004 WL 2567343 (Ga. Ct. App. 2004); *Mar-tens Chevrolet, Inc. v. Seney*, 439 A. 2d 534, 537 (Md. 1982); *P. Chimento Co. v. Banco Popular de Puerto Rico*, 617 N. Y. S. 2d 157, 158 (N. Y. App. Div. 1994); *Gibbs v. Ernst*, 647 A. 2d 882, 889 (Pa. 1994). Concealment of a material fact, with intent to deceive, satisfies the false representation element of fraud. See *Paul v. Desito*, 550 S. E. 2d 739, 744 (Ga. Ct. App. 2001); *Hoffman v. Stamper*, 843 A. 2d 153, 186 (Md. Ct. Spec. App. 2004); *Nasaba Corp. v. Harfred Realty Corp.*, 39 N. E. 2d 243, 245 (N. Y. 1942); *De Joseph v. Zambelli*, 139 A. 2d 644, 647 (Pa. 1958).

Seventh, the Pinney plaintiffs allege that Nokia engaged in a civil conspiracy to market unsafe wireless telephones by improper and wrongful means, and, in doing so, both defrauded the plaintiffs and failed to warn them of the health risks of using wireless telephones. These claims are brought under the laws of Georgia and Maryland. In a claim for civil conspiracy a plaintiff must establish that two or more defendants, acting in concert, engaged in conduct constituting a tort. Damages are assessed on the basis of the defendants' tortious conduct, not on the basis of their agreement to engage in such conduct. See *Miller v. Lomax*, 596 S. E. 2d 232, 242 (Ga. Ct. App. 2004); *Alleco, Inc. v. Harry & Jeannette Weinberg Found., Inc.*, 639 A. 2d 173, 176-77 (Md. Ct. Spec. App. 1994).

We have thoroughly examined the claims asserted by the Pinney plaintiffs in their complaints, and one thing is clear: the elements of each of the claims depend only on the resolution of questions of state law. There is no "substantial, disputed question of federal law [that] is a necessary element of [any] of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U. S. at 13. The district court, however, determined that these cases depend on the resolution of a substantial federal question because the claims "put . . . directly into dispute" the validity and sufficiency of the federal RF radiation standards for wireless telephones. See *In Re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F. Supp. 2d 474, 488 (D. Md. 2002) (*In re Wireless I*). The ultimate objective of these complaints, according to the district court, "is to attack the lack of a headset requirement under the federal RF safety rules." *Id.* Although the court acknowledged that the complaints contain no allegations attacking the federal RF radiation standards, it believed that it could ultimately resolve the case only by passing judgment on the validity of the federal standards. The court therefore determined that removal was justified under the substantial federal question doctrine. *Id.* at 488, 491-92. 1

The district court erred by not recognizing that its inquiry was limited by the well-pleaded complaint rule. It should have considered only whether a disputed question of federal law is an essential element of one of the well-pleaded state claims. See *Franchise Tax Bd.*, 463 U. S. at 13. The district court went beyond this restricted inquiry and in effect anticipated (1) that Nokia would raise the affirmative defense that the state law claims are preempted by the FCA and federal RF radiation standards and (2) that the Pinney plaintiffs would be called upon to rebut that defense. The cases could be decided, the court concluded, only by resolving whether the claims are preempted by the FCA and the federal RF radiation standards. Even if that is so, a preemption defense "that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U. S. 804, 808 (1986). Again, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption," even if the complaint begs the assertion of the defense, and even if "the defense is the only question truly at issue in the case." *Franchise Tax Bd.*, 463 U. S. at 14.

The thrust of the claims is that Nokia violated state law by manufacturing and selling a product that it knew, or should have known, was dangerous and by not adequately warning of the dangers. As was the case in *Franchise Tax Board*, state law establishes a set of elements, without reference to federal law, that the plaintiffs must establish in order to make out "valid claim[s] for relief." 463 U. S. at 13. Federal law becomes relevant only as a defense, and only after the Pinney plaintiffs have made out the elements of their state law claims. In this situation, as the Supreme Court has observed, "[t] he most one can say is that a question of federal law is lurking in the background." *Gully v. First Nat'l Bank*, 299 U. S. 109, 117 (1936). The lurking question of federal law is, of course, the affirmative defense of pre-emption, but that does not make the claims into ones arising under federal law.

B.

It becomes even clearer that the Pinney plaintiffs' claims do not contain a disputed question of federal law when we consider Nokia's arguments. Nokia argues that an issue of federal law must be resolved for the Pinney plaintiffs to establish the necessary elements for two of their claims. Nokia first points to the claim of strict liability due to a design defect. As discussed above, see *supra*

at 12-13, one element a plaintiff must establish is that the product suffered from a design defect. A design defect is established by proving that the product is unreasonably dangerous, as determined by the risk-utility standard. Nokia argues that the FCC's RF radiation standards establish the relevant "duty" with regard to RF radiation emissions from wireless telephones, and therefore the unreasonably dangerous inquiry depends on the resolution of a federal question. Br. for Appellees at 26. Nokia's use of the term "duty" is misplaced because the term is more commonly employed in a negligence context, not a strict liability context. In any event, the nub of Nokia's argument is that a wireless telephone's compliance (or noncompliance) with the federal RF radiation standards determines whether the telephone is unreasonably dangerous. Nokia is wrong. Under the laws of Georgia, Maryland, and New York, compliance with the federal RF radiation standards is only one factor in assessing whether a wireless telephone is unreasonably dangerous under the risk-utility standard. See *Doyle v. Volkswagenwerk Aktiengesellschaft*, 481 S. E. 2d 518, 521 (Ga. 1997); *Beatty v. Trailmaster Prods.*, 625 A. 2d 1005, 1014 (Md. 1993); *Denny*, 662 N. E. 2d at 735-36; *Sherman v. M. Lowenstein & Sons, Inc.*, 282 N. Y. S. 2d 142, 143-44 (N. Y. App. Div. 1967). And because Pennsylvania law rejects the importation of negligence concepts into its strict liability doctrine, compliance with the federal RF radiation standards is not relevant in determining whether Nokia is strictly liable under Pennsylvania law for selling a product that suffers from a design defect. See *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 528 A. 2d 590, 593-94 (Pa. 1987) (holding that product compliance with industry standards is irrelevant in strict liability case based on defective design). Thus, even if Nokia's wireless telephones comply with the federal RF radiation standards, the Pinney plaintiffs could still establish the defective design element of their strict liability claim. Conversely, if Nokia's wireless telephones do not comply with the federal RF radiation standards, the Pinney plaintiffs would not automatically establish the defective design element.

Nokia also argues that the Pinney plaintiffs "need to establish disputed federal-law propositions" to make out their fraud claims. Br. for Appellees at 27. To make out a claim of fraud, a plaintiff must establish, among other elements, that the defendants made a false statement. Nokia asserts that the Pinney plaintiffs, in order to prove that statements made by Nokia were false, must demonstrate that the "substantive content of federal wireless emissions regulations is inconsistent with [Nokia's] alleged characterizations of those regulations." *Id.* This is a mischaracterization of the fraud claims. The Pinney plaintiffs do not allege that Nokia fraudulently misrepresented the RF radiation standards. Rather, they allege that Nokia made false statements by misrepresenting the general safety of wireless telephones and by misrepresenting or failing to disclose the biological risks posed by wireless telephones. To prove the falsity of these statements, the Pinney plaintiffs must establish that the RF radiation emissions from wireless telephones create a health risk. This has nothing to do with the substantive content of the federal regulations. In sum, there is no substantial question of federal law that is a necessary element of the Pinney plaintiffs' strict liability (design defect) or fraud claims. 2

To get around this problem, Nokia advances a new theory - the "sufficient connection" to a federal regulatory scheme theory - for why the Pinney plaintiffs' claims are removable pursuant to the substantial federal question doctrine. Nokia relies on our decision in *Ormet Corp. v. Ohio Power Co.*, 98 F. 3d 799 (4th Cir. 1996), to argue that "where a plaintiff's state law complaint is sufficiently connected to a federal regulatory regime as to which Congress has expressed a need for uniform implementation and interpretation, that connection can provide a basis for federal question jurisdiction even if no explicitly federal claim is pled." Br. for Appellees at 25. Nokia does not suggest a standard for determining when a connection is sufficient to render removal proper under its theory, but it nonetheless asserts that a sufficient connection exists in the present cases. According to Nokia, there is a comprehensive federal scheme to regulate wireless telecommunications, and Congress has delegated to federal regulators the exclusive authority over all technical aspects of wireless telecommunications.

A sufficient connection exists between the telecommunications regulatory regime and the Pinney plaintiffs' claims, Nokia says, because the claims are premised on the amount of RF radiation that emits from wireless telephones, a technical aspect of wireless telephones that is regulated by the FCC. To begin with, Nokia's sufficient connection theory, as applied to these claims, is similar to, if not indistinguishable from, the argument that the Pinney plaintiffs' claims are removable under the substantial federal question doctrine because they are preempted by the FCA and the federal RF radiation standards. Nokia, of course, avoids couching its argument in preemption terms because it knows that the affirmative defense of preemption cannot serve as a basis for removal under the substantial federal question doctrine. Regardless of whether Nokia's sufficient connection theory is at bottom a preemption argument, we reject it because it is not supported by our *Ormet* decision, and it is inconsistent with Supreme Court precedent.

Ormet does not establish, or even support, Nokia's sufficient connection theory. In *Ormet* one of the elements of the plaintiff's state commercial law claim contained a disputed question of federal law: for the plaintiff to establish the element, it had to show that it was an owner (as defined by the federal Clean Air Act) of tradeable emission allowance permits. 98 F. 3d at 807. Nokia relies on our statement, "[w] here the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts." *Id.* at 807 (citation omitted). Nokia claims this language stands for the proposition that a nexus (or, in Nokia's words, a "sufficient connection") between a plaintiff's claim for relief and a federal regulatory scheme is sufficient to establish removal jurisdiction. Nokia's reliance on the quoted statement from *Ormet* is completely off the mark because the statement specifically addresses the issue of whether a federal question is substantial enough to justify removal jurisdiction, not the threshold issue of whether a federal question must be resolved in order for the plaintiff to establish a nec-

essary element of his claim. Nowhere in Ormet did we ever suggest that some "sufficient connection" between a federal regulatory regime and a state claim is enough to establish removal jurisdiction. In short, Ormet did not slacken in any way the principle that the substantial federal question doctrine applies only when a disputed issue of federal law is an essential element of at least one of the plaintiffs' state claims.

Ormet aside, Nokia's sufficient connection theory is inconsistent with Supreme Court precedent. By Nokia's reasoning, even if the Pinney plaintiffs can establish the necessary elements of their claims without resolving a question of federal law, the cases are still removable under the substantial federal question doctrine because of a connection between the federal scheme regulating wireless telecommunications and the Pinney plaintiffs' state claims. That is not enough. The Supreme Court has been quite clear that for removal to be proper under the substantial federal question doctrine, a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law. See *Merrell Dow*, 478 U. S. at 813 ("[T]he mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction."). In sum, removal of these cases cannot be sustained on the basis of the substantial federal question doctrine.

C.

Having determined that these cases do not arise under federal law pursuant to the substantial federal question doctrine, we consider whether they arise under federal law through the doctrine of complete preemption. Under complete preemption a state claim arises under federal law when Congress "so completely pre-empt[s] a particular area that any civil complaint raising th[e] select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U. S. 58, 63-64 (1987). There is, of course, a difference between the doctrine of complete preemption and the affirmative defense of federal preemption. "As a defense, [federal preemption] does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* at 63 (citation omitted). In contrast, the doctrine of complete preemption "converts an ordinary state common law complaint into one stating a federal claim," *id.* at 65, and the federal claim is deemed to appear on the face of the complaint. *Darcangelo v. Verizon Communications, Inc.*, 292 F. 3d 181, 187 (4th Cir. 2002). To remove an action on the basis of complete preemption, a defendant must establish that the plaintiff has a "discernible federal [claim]" and that "Congress intended [the federal claim] to be the exclusive remedy for the alleged wrong." *King v. Marriott Int'l, Inc.*, 337 F. 3d 421, 425 (4th Cir. 2003).

In assessing the removal of these cases on the basis of complete preemption, our basic inquiry is whether the FCA establishes the exclusive claim for consumers alleging injury by wireless telephones. Nokia argues that §§ 201 and 207 of the FCA provide the exclusive claim for the Pinney plaintiffs. Section 207 allows private parties to sue common carriers and recover damages resulting from a common carrier's breach of its obligations under the FCA. 47 U. S. C. § 207. Nokia argues that the Pinney plaintiffs' exclusive claim is to allege that Nokia violated § 201(b), which imposes on common carriers the obligation that "[a] ll charges, practices, classifications, and regulations for and in connection with [wire or radio] communication service, shall be just and reasonable." 47 U. S. C. § 201(b). Specifically, Nokia argues that the sale of dangerous wireless telephones constitutes a "practice in connection with" wireless service. Nokia is wrong in saying that the FCA provides the exclusive claim.

First off, § 207 does not provide any claim against a number of the defendants in these cases. Sections 201 and 207 allow recovery only against common carriers. Under the FCA " common carriers' are entities that must provide [transmission] service[s] to the public without discrimination and are heavily regulated by the FCC." *In re Application of the United States for an Order Authorizing the Roving Interceptions of Oral Communications*, 349 F. 3d 1132, 1137 n. 9 (9th Cir. 2003) (citations omitted); see also 47 U. S. C. § 153(10). In the wireless telecommunications arena, "[a] person engaged in the provision of" wireless service is treated as a common carrier. See 47 U. S. C. § 332(c)(1)(A). In their complaints the Pinney plaintiffs name two groups of defendants: providers of wireless service (that also market and distribute wireless telephones) and manufacturers of wireless telephones.

As to the second group, the plaintiffs allege that these defendants "engaged in the design, manufacture, marketing, and sale of" wireless telephones. See, e. g., *J. A.* 122-127. There are no allegations that these manufacturer-defendants are engaged in providing any wireless service, and we therefore conclude that these defendants cannot be treated as common carriers. As a result, they cannot be sued under §§ 201 and 207.

As to the first group of defendants (certain wireless service providers), Nokia does not cite to any authority that supports the proposition that §§ 201 and 207 provide wireless telephone users with a claim against wireless service providers for their role in marketing and distributing wireless telephones. An interpretation of § 201 that would construe the selling of dangerous wireless telephones as a "practice in connection with" wireless service would be dubious at best. A "practice in connection with" wireless service does not even include tortious conduct such as deceptive advertising and billing by wireless service providers in the provision of wireless telephone service. See *Marcus v. AT & T Corp.*, 138 F. 3d 46, 54 (2d Cir. 1998). Further, even if we were to broadly construe § 201 as Nokia urges, there is simply no evidence that Congress intended §§ 201 and 207 to be the exclusive claim for plaintiffs alleging injury from wireless telephones. Nokia fails to identify any evidence in the statute or legislative history that Congress intended §§ 201 and 207 to preempt completely state law claims that are based on a wireless service provider's sale and promotion of wireless telephones. The single authority to which Nokia cites is an FCC statement claiming that individual states should not be

permitted to add additional requirements to the standards the FCC imposes for cellular systems. See *Br. for Appellees* at 36 (citing *In re An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Sys.*; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communication Sys., 89 F. C. C. 2d 58 (1982)). This statement is not evidence of congressional intent, and we accord it no weight.

The FCA also contains a savings clause: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U. S. C. § 414. The presence of a savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area. Indeed, at least two circuits have recognized in other contexts that § 414 precludes such a finding. See *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) (concluding that § 414 counsels against a determination that the FCA completely preempts telecommunications customers' claims against a telecommunications service provider's fraudulent conduct in leasing telephones and related equipment); *Marcus*, 138 F.3d at 54 (concluding that § 414's savings clause counsels against a determination that the FCA completely preempts wireless service customers' claims against a wireless service provider based on the provider's deceptive billing and false advertising). Because there is no evidence that Congress intended the FCA to provide the exclusive remedy for claims like those of the Pinney plaintiffs, and because there is evidence that Congress intended to preserve state law claims such as the ones asserted in these cases, we conclude that these claims do not arise under federal law through the doctrine of complete preemption. Because the Pinney plaintiffs' claims do not arise under federal law, the district court lacked jurisdiction over them, making removal improper.

III.

After the district court denied the Pinney plaintiffs' motion to remand their four cases to state court, it dismissed all five cases, including the one brought by the Naquin plaintiffs, on the ground that the claims are preempted by the FCA. Because the district court lacked subject matter jurisdiction over the four cases brought by the Pinney plaintiffs, the district court had no power to dismiss them. However, as we noted earlier, the district court has diversity jurisdiction over the case brought by the Naquin plaintiffs. See 28 U. S. C. § 1332(a). We must therefore review the district court's order granting Nokia's motion to dismiss the claims of the Naquin plaintiffs.

A.

Before we address the substance of the dismissal, we consider the Naquin plaintiffs' argument that the district court erred in taking up Nokia's motion to dismiss their case. They first contend the dismissal should be vacated because there is no subject matter jurisdiction over the other four cases (the Pinney plaintiffs' cases) that were consolidated with their case. The Naquin plaintiffs argue that if the district court had not erred in failing to recognize that it lacked jurisdiction over the cases of the Pinney plaintiffs, only the Naquin case would have remained, and Nokia's motion to dismiss would not have been considered due to lack of venue over the lone remaining case. According to the Naquin plaintiffs, the district court's error also denied them the procedural right to petition the JPML or the district court for a re-transfer of their case to the transferor court, the United States District Court for the Eastern District of Louisiana. Finally, the Naquin plaintiffs argue that the district court should not have considered the motion to dismiss because it had been denied by the transferor court prior to transfer.

There is no merit to the argument that venue over the Naquin plaintiffs' case in the District of Maryland was improper due to the lack of federal jurisdiction over the other four consolidated cases. The statute authorizing transfer (and consolidation) of multidistrict actions, 47 U. S. C. § 1407, is a venue statute that allows the JPML to override a plaintiff's choice of forum when three factors are present: (1) "one or more common questions of fact are pending in different districts," (2) a transfer would serve "the convenience of parties and witnesses," and (3) a transfer would "promote the just and efficient conduct of [the] actions." 28 U. S. C. § 1407(a); see also *In re Vernitron Secs. Litig.*, 462 F. Supp. 391, 394 (J. P. M. L. 1979) ("Nor can the policies behind venue provisions designed to operate in the context of single independent actions prevail, in a multidistrict context, over the Panel's statutory mandate to weigh the interests of all the plaintiffs and all the defendants and to consider multidistrict litigation as a whole in light of the purposes of the law."). Transfer, of course, may be ordered only for the purpose of "coordinated or consolidated pretrial proceedings." 28 U. S. C. § 1407(a).

In the present cases, the JPML, after noting the presence of common questions of fact, found that "[c]entralization . . . in the District of Maryland [would] serve the convenience of the parties and witnesses and [would] promote the just and efficient conduct of the litigation, while accordingly being necessary in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary." *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, No. 1421 (J. P. M. L. Oct. 31, 2001) (order consolidating and transferring the cases to the District of Maryland). Because these findings satisfied the prerequisites for transfer, and because the proceedings were still in the pretrial stage, venue in the District of Maryland was proper. The Naquin plaintiffs essentially seek to add an additional requirement that subject matter jurisdiction must exist over all transferred and consolidated cases for venue to be proper in the transferee court. There is no basis for this requirement in either the multidistrict litigation statute or the case law.

The Naquin plaintiffs next argue that they were denied their procedural right to request a remand to the Eastern District of

Louisiana as a result of the district court's error in finding subject matter jurisdiction over the cases brought by the Pinney plaintiffs. We disagree. At any point in the district court proceedings, the Naquin plaintiffs could have petitioned the JPML directly for a remand, or they could have requested that the district court suggest a remand to the JPML. J. P. M. L. Rule 7.6(c)(i), (ii); see also *In re Roberts*, 178 F. 3d 181, 184 (3d Cir. 1999) (noting that once a case is transferred, only the JPML, and not the transferee court, has the authority to remand the case to the transferor court). The Naquin plaintiffs never moved the JPML for a remand nor asked the district court to suggest remand to the JPML. Because these plaintiffs failed to raise the remand issue with either the JPML or the district court, we consider the issue waived for purposes of this appeal. See *Holland v. Big River Minerals Corp.*, 181 F. 3d 597, 605 (4th Cir. 1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal.").

Finally, the Naquin plaintiffs argue that the district court's dismissal order should be vacated because Judge Lemelle of the Eastern District of Louisiana had denied, prior to transfer, motions to dismiss filed by some of the defendants. The Naquin plaintiffs claim that a transferee court may reconsider a prior order of a transferor court only when: (1) there is an intervening change in the law, (2) there is newly discovered (material) evidence, or (3) reconsideration is necessary to correct a clear error of law or prevent manifest injustice. The two cases relied on by the Naquin plaintiffs do not support such a constricted view of a transferee court's authority. In each of the cases, *Microbix Biosys., Inc. v. Biowhittaker, Inc.*, 184 F. Supp. 2d 434, 436 (D. Md. 2000), and *Potter v. Potter*, 199 F. R. D. 550, 552 (D. Md. 2001), the district court was ruling on a motion for reconsideration of its own order. The rules of constraint urged by the Naquin plaintiffs make sense when a district court is asked to reconsider its own order. "Were it otherwise, then there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties and the court - not to mention its patience." *Potter*, 199 F. R. D. at 553. This same constraint is not always justified in the multidistrict litigation context, where there is a need for consistent treatment of consolidated cases. See *Astarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F. 2d 86, 87 (5th Cir. 1985) ("The transferee court has the power and the obligation to modify or rescind any orders in effect in the transferred case which it concludes are incorrect."); *Degulis v. LXR Biotech., Inc.*, 928 F. Supp. 1301, 1309 (S. D. N. Y. 1996) ("A transferee court in a multi-district litigation thus has the power to modify interlocutory orders entered by the transferor court prior to transfer under 28 U. S. C. § 1407.") (citation omitted). Here, Judge Lemelle, in denying the motions to dismiss, denied them without prejudice and explicitly acknowledged that the issue of federal preemption could be revisited later in the litigation. In sum, the district court did not err in considering Nokia's motion to dismiss the Naquin case.

B.

In their amended complaint the Naquin plaintiffs allege both state and federal claims and seek the same remedy as the Pinney plaintiffs, headsets for wireless telephones. 3 We now consider whether the Naquin plaintiffs' state law claims are preempted by the FCA. Under the Supremacy Clause a state law that "interferes with, or is contrary to" federal law is invalid. *Free v. Bland*, 369 U. S. 663, 666 (1962). There are three theories under which Congress preempts state law. First, under express preemption Congress expressly declares its intent to preempt state law. *S. Blasting Svcs., Inc. v. Wilkes County*, 288 F. 3d 584, 590 (4th Cir. 2002) (citing *Hillsborough County v. Auto-mated Med. Labs., Inc.*, 471 U. S. 707, 713 (1985)). Second, under field preemption Congress impliedly preempts state law when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U. S. 504, 516 (1992) (internal quotation marks and citations omitted). Third, under conflict preemption Congress impliedly preempts state law when it "actually conflicts with federal law." *Hillsborough*, 471 U. S. at 713. We must remember that "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996) (internal quotation marks and citations omitted). Further, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981) (citation omitted). This presumption against preemption is particularly strong when Congress legislates "in a field which the States have traditionally occupied," such as health and safety. 4 *Medtronic*, 518 U. S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

1.

Nokia argues that the Naquin plaintiffs' claims are expressly pre-empted by two provisions of the FCA. The first provision appears in § 332(c)(7), which is aimed at the "[p] reservation of local zoning authority" over "decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U. S. C. § 332(c)(7)(A). Nokia asserts that the claims are expressly preempted by § 332(c)(7)(B)(iv), which limits the general authority of local bodies as follows: "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions" if the facilities comply with the FCC's RF radiation standards. 47 U. S. C. § 332(c)(7)(B)(iv). This section applies only to "personal wireless service facilities," a term defined in circular fashion as "facilities for the provision of personal wireless services." 47 U. S. C. § 332(c)(7)(C)(ii). The statute does not define the term "facilities" or "facility." We must therefore determine, as a matter of first impression, whether a wireless telephone constitutes a "facility" for purposes of § 332(c)(7)(B)(iv). We conclude that it does not.

"If the `statutory language is unambiguous and the statutory scheme is coherent and consistent,' our inquiry ends." *Alexander S. v. Boyd*, 113 F. 3d 1373, 1383 (4th Cir. 1997) (quoting *Robinson v. Shell Oil Co.*, 519 U. S. 337, 342 (1997)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the "other terms and conditions" of wireless service); 47 U. S. C. § 332(c)(7) (providing that state authority to regulate the "placement, construction, and modification of personal wireless service facilities" is preserved except in specific circumstances). While wireless telephones must meet the FCC's specifications and be authorized by the FCC before they can be sold, see 47 C. F. R. § 2.803, these provisions do not provide a remedy to someone injured by a defective wireless telephone. "The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists." *Abbot v. Am. Cyanamid Co.*, 844 F. 2d 1108, 1112 (4th Cir. 1988) (citation omitted). broader context of the statute as a whole." *Robinson*, 519 U. S. at 341. Although "facility" as used in § 332(c)(7)(B)(iv) is not defined, when the specific and broader contexts of its use are considered, it becomes plain that a wireless telephone is not a facility. The dictionary defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or serve or facilitate some particular end." *Webster's Third New International Dictionary* 812 (1993). If the dictionary definition was used here, a facility would be something "built, constructed, installed, or established" to provide personal wireless service. This might arguably include a wireless telephone. We continue our inquiry, however, and examine the specific statutory context in which the term "facility" is used. Section 332(c)(7) is entitled, " Preservation of local zoning authority" and provides, as the general rule, that "nothing [in the statute] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regard-ing the placement, construction, and modification of personal wireless service facilities." 47 U. S. C. § 332(c)(7)(A). The section goes on to provide limitations to the general rule, and in doing so attempts to strike a balance between the states' interests in regulating land use and the federal government's interest in facilitating the development of wireless telephone service. See *Omnipoint Communications Enters., L. P. v. Newtown Township*, 219 F. 3d 240, 242-43 (3rd Cir. 2000); *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F. 3d 9, 13 (1st Cir. 1999). Because § 332(c)(7) deals with the authority of the states over zoning and land use, we conclude that Congress intended the term "facility" to mean a structure or object, such as a base station or a mobile telephone switching office (MTSO), that falls within the states' zoning or land use authority. This interpre- tation excludes devices, such as wireless telephones, that are com-pletely portable and have no attachment to land. The broader context in which the term "facility" is used also supports the interpretation that the term does not include wireless telephones. As we discuss below, see *infra* at 33, Congress enacted the entire § 332 to ensure the availability of a nationwide network of wireless service coverage. Consistent with this objective, a facility should, at the very least, be part of the infrastructure (a base station or an MTSO, for example) that provides wireless service coverage. A wireless telephone, however, only accesses a wireless service provider's network of coverage; a wireless telephone itself is not part of the underlying infrastructure. Because both the specific context of the use of the term "facilities" in § 332(c)(7) and the broader context (and purpose) of § 332 reveal that a wireless telephone is not a facility under § 332(c)(7)(B)(iv), state tort claims relating to the manufacture and sale of wireless tele- phones are not expressly preempted by § 332(c)(7)(B)(iv).

Nokia next argues that § 332(c)(3)(A) expressly preempts the Naquin plaintiffs' claims. This section prohibits a state or local government from regulating "the entry of or the rates charged by any commercial mobile service," but allows it to regulate "other terms and conditions of commercial mobile services." 47 U. S. C. § 332(c)(3)(A). Nokia argues that the Naquin plaintiffs seek to use state law to regu-late technical specifications for wireless telephones; this, Nokia says, would hinder entry into the commercial mobile service market because the FCC requires that wireless service providers certify that they are using only FCC-authorized equipment. Because Nokia cites to the licensing provisions dealing with personal communications ser-vices (PCS), a specific type of commercial mobile service, we under-stand Nokia's argument to assert that state regulation of wireless telephone specifications constitutes a barrier to entry for PCS providers. 5

While § 332(c)(3)(A) is unclear as to what precisely constitutes a barrier to entry into the PCS market, we conclude that the relief sought by the Naquin plaintiffs (a headset requirement) is not such a barrier. To begin with, the PCS market is a market for wire- less ser-vice. Wireless service providers use base stations and MTSOs to create a network of coverage, a network that wireless tele- phone users generally pay a fee to access. The FCC licenses portions of the radio spectrum to wireless service providers so they can provide PCS cov-erage, see 47 C. F. R. § 24.1(a), (b), and one of the main requirements for the grant of a license is that the licens- ee must construct enough base stations to provide coverage to the area for which it receives a license. 47 C. F. R. §§ 24.103, 24.203. Accordingly, in order for state law to constitute a barrier to entry, it must, at a minimum, obstruct or burden a wireless service provider's ability to provide a network of wireless service coverage. See, e. g., *Bastien v. AT& T Wireless Svcs., Inc.*, 205 F. 3d 983 (7th Cir. 2000) (concluding that an action brought under state law to challenge the number of base stations in a coverage area con- stitutes a barrier to entry and is prohibited by § 332(c)(3)(A)).

A headset requirement for wireless telephones would not constitute a barrier to entry into the PCS market because wireless tele- phones are only used to access a wireless service provider's network of coverage; the telephones themselves do not provide the actu- al coverage. It is true that wireless service providers commonly market wireless tele- phones in conjunction with wireless service pack- ages, and the wire- less telephones that they sell must comply with federal RF radiation standards. See 47 C. F. R. § 24.52.

Nevertheless, a wireless service provider's choice to bundle service packages and telephones does not mean that a headset requirement would affect its ability to enter into the wireless service market or to provide a network of wireless service coverage. Furthermore, notwithstanding Nokia's assertion, we find nothing in the regulations that requires a wireless service provider to certify, as a condition for obtaining a license to provide PCS, that the wireless telephones used within its coverage area comply with the FCC's RF radiation standards. This certification is generally undertaken by the manufacturer of the telephones when it requests equipment authorization. See 47 C. F. R. §§ 24.51(b); 24.52. Because the relief sought by the Naquin plaintiffs would not be a barrier for wireless service providers seeking to enter the PCS market, § 332(c)(3)(A) does not expressly preempt the claims of the Naquin plaintiffs.

2.

We also hold that the Naquin plaintiffs' claims are not preempted under the doctrines of conflict preemption and field preemption. As noted above, a state statute can be set aside by conflict preemption "when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough*, 471 U. S. at 713 (internal quotation marks and citations omitted). Again, there is a strong presumption against preemption when the federal government regulates in areas traditionally left to the states, such as health and safety. *Medtronic*, 518 U. S. at 485.

The district court concluded that the Naquin plaintiffs' claims are preempted because their cases stand as an obstacle to "Congress' objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure." *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 248 F. Supp. 2d 452, 463 (D. Md. 2003). Reasoning that the plaintiffs were essentially seeking to impose a headset requirement or a stricter RF radiation standard, the district court concluded that allowing the cases to go forward would usurp the regulatory authority Congress entrusted to expert federal agencies that had already confronted these issues. *Id.* The district court relied on § 332 of the FCA to find a sweeping congressional objective of ensuring that all equipment used in connection with wireless telecommunications be subject to exclusive national RF radiation standards that have the effect of precluding state regulation on the subject. *Id.* at 464 (citing *In re Wireless I*, 216 F. Supp. 2d at 483-87).

We conclude that the district court erred because the FCA provides no evidence of such an objective. Congress enacted § 332 to ensure the availability of a nationwide network of wireless service coverage, more specifically, to develop the infrastructure necessary to provide wireless services. Thus, § 332(1) provides factors that the FCC must consider in managing the spectrum used for wireless services, 47 U. S. C. § 332(a); (2) classifies wireless service providers that provide wireless service to the public for profit as "common carriers" (subjecting them to numerous duties under the FCA), 47 U. S. C. § 332(c)(1)(A); (3) prevents states from regulating "the entry of or the rates charged by" wireless service providers, 47 U. S. C. § 332(c)(3)(A); and (4) limits in certain respects the ability of states and local zoning authorities to regulate the "placement, construction, and modification" of facilities that provide wireless service, 47 U. S. C. § 332(c)(7).

We do not infer from § 332 the congressional objective of achieving preemptive national RF radiation standards for wireless telephones. First, § 332 does not address the subject of wireless telephones, let alone the more specific issue of the permissible amount of RF radiation from wireless telephones. The FCC's RF radiation standards for wireless telephones were not promulgated pursuant to a mandate contained in § 332 of the FCA, but rather pursuant to the National Environmental Policy Act's mandate that all agencies assess the environmental impact of their actions. For the FCC, the action was authorizing transmitters that emit RF radiation. *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123, 15125 (1996). The complete absence of any provision addressing wireless telephones counsels against a finding that § 332 evidences a congressional goal of achieving preemptive national RF radiation standards for wireless telephones.

Second, in pursuing its objective of ensuring the availability of a nationwide network of wireless service coverage, Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation. For example, § 332(c)(3)(A) prohibits states from regulating "the entry of or the rates charged by" wireless service providers, but explicitly provides that states may still regulate "the other terms and conditions of commercial mobile service." 47 U. S. C. § 332(c)(3)(A). And § 332(c)(7) preserves a good measure of the states' authority over decisions regarding "placement, construction, and modification of personal wireless service facilities." 47 U. S. C. § 332(c)(7)(A). Consistent with this conscious and careful effort to carve out the areas of state laws that it wants to preempt, Congress has specifically allowed for preemptive national RF radiation standards only for personal wireless service facilities. Section 332(c)(7)(B)(iv) provides that state and local zoning authorities may not "regulate the placement, construction, and modification of personal wireless service facilities" on the basis of RF emissions as long as the facilities comply with the FCC's RF radiation standards. This specificity as to the preemptive nature of federal RF radiation standards for personal wireless service facilities weighs against a finding that Congress has an implicit goal of making preemptive the RF radiation standards for all other types of wireless telecommunications equipment, including wireless telephones.

Third, there are two applicable savings clauses. There is the general savings clause of the FCA, which provides that "[n]othing

contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U. S. C. § 414. And there is the savings clause in section 601(c)(1) of the Telecommunications Act of 1996. This Act added 47 U. S. C. § 332(c)(7), which preempts some of the states' authority to regulate the location of base stations (not wireless telephones); the savings clause, however, provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . ." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143. These savings clauses counsel against any broad construction of the goals of § 332 and § 332(c)(7) that would create an implicit conflict with state tort law.

Having determined that the FCA provides no evidence of a congressional objective to ensure preemptive national RF radiation standards for wireless telephones, we next examine whether the relief sought by the Naquin plaintiffs would stand as an obstacle to Congress' actual goal of establishing a nationwide network of wireless telephone service coverage. We conclude that it would not. It is difficult to understand how a headset requirement (the specific relief sought) would affect the establishment of a nationwide wireless service network or the availability of wireless service coverage. Wireless service providers generally provide wireless service coverage through a network of base stations that are coordinated by MTSOs. A wireless telephone user purchases a service plan from a wireless service provider, and the provider assigns the user a MIN and a SID, which allow the user to access this network of base stations and MTSOs. While wireless telephones access the network, they are not part of the infrastructure; accordingly, a headset requirement would not stand as an obstacle to Congress's goal of achieving nationwide coverage.

Finally, we reject Nokia's argument that the Naquin plaintiffs' claims are preempted on the basis of field preemption. As our previous discussion indicates, the FCA does not "so thoroughly occup[y] [the] legislative field [of wireless telecommunications] as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone*, 505 U. S. at 516. There is no evidence that Congress intended that state law claims, such as those asserted by the Naquin plaintiffs, be swept aside.

IV.

For the foregoing reasons, we reverse the district court's order denying the consolidated motion to remand made by the plaintiffs in the Pinney, Farina, Gilliam, and Gimpelson cases. Because federal subject matter jurisdiction does not exist over these four cases, we return them to the district court for remand to the state courts in which they originated. We also reverse the district court's order dismissing the Naquin plaintiffs' case as preempted by the FCA. That case is remanded to the district court for further proceedings.

REVERSED AND REMANDED

KISER, Senior District Judge, dissenting:

I dissent because, like the district court in its well-researched and well-reasoned opinion, I believe the case cannot be resolved without proving that the FCC's RF radiation emission standards are too high to protect the consuming public. This conclusion stems from a reading of the plaintiffs' complaint - not from any defense that the defendants may assert.

The majority opinion reviews in some detail what elements of the seven claims must be proved and concludes that none of the claims are dependent on whether or not the wireless telephones comply with the FCC standards. Apparently, the majority believes that the plaintiffs can prove their prima facie case of all seven claims without reference to the FCC standards regulating RF radiation emissions in wireless telephones and without proving that those standards are insufficient and invalid. I disagree. The plaintiffs are not trying this case in a vacuum. The FCC has enacted a uniform, nationwide regulatory scheme pertaining to wireless telephones which is the result of a thorough and complex rule-making process. The final rules reflect what the FCC believes will maintain the proper balance between the interest in promoting wireless communication throughout the country and the interest in protecting the health and safety of all consumers. The plaintiffs will not be able to ignore these standards. In proving their prima facie case for each claim, the plaintiffs will have to prove the unreasonableness of the RF radiation emitted by FCC-compliant wireless telephones. The plaintiffs will thus have to establish that the FCC standards are insufficient. It is well-settled that a suit to invalidate a federal regulation arises under federal law. See *Cahnmann v. Sprint Corp.*, 133 F. 3d 484, 488 (7th Cir. 1998). In this case, the FCC standards' validity vel non is a matter of plaintiffs' proof by the very words of the complaint which purport to attack the FCC regulations. This thinly-disguised attack on the validity of the FCC standards raises a substantial federal question.

The plaintiffs attack the FCC standards in three ways. First, the plaintiffs challenge the sufficiency of the FCC standard. The plaintiffs allege that the defendants' wireless telephones, which comply with the FCC standard, do not give adequate protection from RF radiation. Although the plaintiffs have not indicted the FCC standard by name, that is the effect of their allegations.

Second, the plaintiffs challenge the expertise of the FCC. The plaintiffs allege that defendants were dishonest when they stated to the public that "cell phones fall within the safety standards of the [FCC]." ¶ 79. Plaintiffs arrive at the conclusion that the above statement is false because the defendants "omitted the fact that the FCC had declared it does not consider itself the 'expert agency' for evaluating health effects," even though the FCC relied on experts in evaluating health effects, one of which was the FDA. See *Cellular Phone Task Force v. FCC*, 205 F. 3d 82, 88 (2nd Cir. 2000). This allegation is incorporated by reference in all of the plain-

tiffs' claims but is particularly pertinent to Count VI (Fraud) and Count VII (Fraud by Concealment). These allegations form a part of plaintiffs' factual basis on which these two counts are based. These are facts plaintiffs must prove along with any other alleged misrepresentations to sustain the allegations in the complaint. Therefore, the plaintiffs call into question the expertise of the FCC and the sufficiency of its standards.

Third, the plaintiffs question the procedure by which the FCC developed the regulations. Specifically, the plaintiffs challenge the data on which the FCC relied. In the rule-making process, the FCC relied in part on standards of the American National Standards Institute ("ANSI"). *Id.* Plaintiffs allege that the defendants "obtain[ed] and exercise[d] control over the [ANSI] Committee responsible for developing safety standards for RFR emitting devices." ¶ 71. The plaintiffs are therefore attacking the rule-making process that the FCC used in developing these standards. Because the plaintiffs are making a direct attack upon the validity and sufficiency of the FCC regulations, their claims arise under federal law. The majority finds that this case fails to raise a substantial federal question because it does not rise or fall on the resolution of a question of federal law. In support of this conclusion, the majority points out the holding of the Supreme Court that the "mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U. S. 804, 813 (1986). The situation in *Merrell Dow*, however, is inapposite to the one in this case. In *Merrell Dow*, the plaintiffs were supporting the Federal Food, Drug, and Cosmetic Act and claiming a violation of that act was negligence. Here, the plaintiffs are seeking to completely undo the FCC standard. Claims with the potential for severely limiting or eliminating a federal regulatory scheme raise a much more substantial federal question than those that merely seek to inure to the benefit of such a scheme. On the other hand, I find this case very similar to our holding in *Ormet Corp. v. Ohio Power Co.* In *Ormet*, the plaintiff's claim was couched in traditional commercial litigation language, but we held that because the plaintiffs had to make reference to the Clean Air Act to define one of the terms of the contract there was a sufficient nexus to the Clean Air Act to support federal question jurisdiction. *Ormet Corp. v. Ohio Power Co.*, 98 F. 3d 799, 807 (4th Cir. 1996). The same logic applies here. Although the FCC regulation must be dealt with by the plaintiffs in a negative manner, its inadequacy is a fact that plaintiffs must prove. This provides a sufficient nexus to support federal question jurisdiction.

Moreover, the need for uniformity in a federal regulatory scheme heightens the importance of the federal question. In *Ormet*, we held that "[w] here the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest justifying the exercise of jurisdiction by federal courts." *Id.* (citing *Martin v. Hunter's Lessee*, 14 U. S. 304, 347-48 (1816)). Here, plaintiffs are not merely raising a claim which may undermine a federal regulatory scheme through inconsistent interpretations; rather they are raising claims which, if successful, will result in the complete invalidation of federal regulatory standards. This presents a substantial federal question.

This Court has repeated the call by Justice Cardozo for "principled, pragmatic distinctions" in determining federal question jurisdiction. *Columbia Gas Transmission Corp. v. Drain*, 191 F. 3d 552, 558 (4th Cir. 1999). In the words of Justice Cardozo, "[w] hat is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Id.* (quoting *Gully v. First National Bank*, 299 U. S. 109, 117-18 (1936)). Although we have affirmed our commitment to Justice Cardozo's words, the majority today does not adhere to the principles espoused in these words. We should not dismiss this case as lacking federal question jurisdiction simply because the plaintiffs have filed claims cloaked in state law language. Instead, we should use common sense and recognize that plaintiffs' claims directly implicate a federal regulatory scheme and threaten to undermine that same scheme. I would affirm the district court's finding of federal question jurisdiction.

 1 *The dissent makes the same argument as the district court - that a substantial federal question exists because "the effect of [the Pinney plaintiffs'] allegations" is to "challenge the sufficiency of the FCC standard." Post at 37. As we explain in the text that follows, this argument cannot be sustained.*

2 *In arguing for removal jurisdiction, the dissent points to one of the many factual allegations made by the Pinney plaintiffs in support of their fraud claims. The Pinney plaintiffs allege that Nokia engaged in fraud on an occasion when it claimed that wireless telephones are safe and "fall within [FCC] safety standards," but "deceitfully omitted the fact that the FCC had declared that it does not consider itself the 'expert agency' for evaluating health effects." J. A. 142 (emphasis in original). According to the dissent, this allegation "call[s] into question the expertise of the FCC." Post at 37. That is not the case. To establish that the safety statement made by Nokia was false, a necessary element for fraud, the Pinney plaintiffs need only prove that the failure to disclose the FCC's statement was the concealment of a material fact or that Nokia's safety statement was false in light of the FCC's statement. The plaintiffs will not have to prove any lack of FCC expertise in the RF radiation area in order to establish that Nokia made false statements about the safety of wireless telephones. A "substantial, disputed question of federal law" is simply not a necessary element of the fraud claims. *Franchise Tax Bd.*, 463 U. S. at 13. The dissent also*

relies on a general allegation in the Pinney plaintiffs' complaint to support its argument that removal jurisdiction exists. This allegation is that Nokia "obtain[ed] and exercised control over the American National Standards Institute (ANSI) Committee responsible for developing safety standards for RFR emitting devices." J. A. 140. ANSI's proposals regarding RF radiation standards were generally adopted in FCC rulemaking. See *In re Guidelines*, 11 FCC Rcd. at 15123-25. According to the dissent, the allegation about Nokia's influence over ANSI means that the plaintiffs "are . . . attacking the rule-making process that the FCC used in developing [its RF radiation] standards." Post at 38. The dissent, however, does not explain how the allegation about ANSI raises a substantial question of federal law that is a necessary element of any one of the plaintiffs' state law claims.

- 3 For their federal claims the Naquin plaintiffs allege that Nokia has violated the Magnuson-Moss Warranty Improvement Act, 15 U. S. C. § 2310. More specifically, they allege that Nokia breached the implied warranty of fitness for a particular purpose by failing to provide headsets and by engaging in deceptive trade practices in failing to disclose the harmful effects of RF radiation from wireless telephones. This failure to disclose renders the manufacturers' express warranties for wireless telephones misleading, the amended complaint alleges. The district court appeared to dismiss the Naquin plaintiffs' amended complaint entirely on preemption grounds, even though federal claims are also alleged.
- 4 The district court decided that the presumption against preemption does not apply here because the Naquin plaintiffs' claims relate to wireless telecommunications, an area where, according to the court, "there has been a history of significant federal presence." *In re Wireless Tel. Radio Frequency Prods. Liab. Litig.*, 248 F. Supp. 2d 452, 463 (D. Md. 2003) (quoting *United States v. Locke*, 529 U. S. 89, 108 (2000)). In *Locke* the Supreme Court concluded that the State of Washington's oil tanker regulations were not entitled to the presumption against preemption because the regulations governed national and international maritime commerce, an area long regulated by Congress. 529 U. S. at 108. The district court's reliance on *Locke* is misplaced because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce. States continue to have considerable authority in the wireless telecommunications area. See, e. g., 47 U. S. C. § 332(c)(3)(A) (providing that states may not regulate "the entry of or rates charged by" wireless service providers, but that they may regulate).
- 5 There are basically two competing modes of wireless communications, cellular services and PCS. Malcom J. Tuesly, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L. J. 887, 888 (1999). Cellular systems operate in the 834-MHz to 894-MHz range, and PCS systems operate in the 1850-MHz to 1990-MHz range. Marshall Brain & Jeff Tyson, *How Cell Phones Work*, at <http://electronics.howstuffworks.com/cell-phone.htm/printable> (last visited Jan. 24, 2005). "As demand for cellular service has outgrown the available radio spectrum used for cellular signals, the wireless industry has turned to PCS, which utilizes digital technology that triples the capacity of traditional cellular systems." Tuesly, *supra* at 88.

INDUSTRY NOTES

Industry Notes *continued from page 287*

Warning: Your Tire Pressure Is Low

By the model year 2008, all vehicles weighing 10,000 pounds or less will have a system that detects when one or more tires are 25 percent or more below the recommended inflation pressure.

The **National Highway Transportation Safety Administration** issued the final rule on tire pressure monitoring on April 7. The rule's phase-in begins Sept. 1, 2005. The agency believes the new rule will save about 120 lives a year and will boost fuel economy as well.

To read the new rule, go to www.nhtsa.dot.gov/cars.rules/rulings/TPMSfinalrule.6/TPMSfinalrule.6.html.

Recall Roundup: Women Can't 'B-Sure' They're Pregnant

♦ **Harmony Brands** voluntarily recalled its B-Sure One-Step Home Pregnancy Test March 25 because its safety and efficacy "can no longer be assured," the company announced in a press release. Harmony recommends that women who used the test confirm results with their health care providers.

♦ **Rose Art Industries Inc.** voluntarily recalled face-painting kits sold under the name "Design A Face Make-Up." The March 24 recall came after the company received more than 200 reports of children suffering adverse reactions from the paints. Reactions included skin rash, swelling, irritation and redness, according to a company press release.

♦ Importers **DESA Heating Products** and **Scheu Manufacturing Co.** voluntarily recalled 88,000 propane heaters April 5. The plastic ring on the heaters' regulator may crack, causing gas leaks and crating a fire hazard if the tank and heater are turned on. The heaters involved in the recall include the brand names "ALL-PRO," "Reddy Heater" and "MASTER" Infrared. ❖

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