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The Road Less Traveled

A Case for the Consideration of Hidden Constitutional Claims in Evaluating Removal and the Possible Pitfalls

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After being retained to represent a client who has been served with a state court complaint, most defense attorneys can predict many of the questions the client will ask in the initial call. One such question is whether the case can be removed, as there are a plethora of reasons why a defendant may prefer to litigate in federal court. The initial response of most defense attorneys is to look at the citizenship of the parties and evaluate pled damages to determine whether diversity jurisdiction exists under 28 U.S.C. § 1332, as that is usually the strongest basis for removal of most actions. While less common, the attorney will also peruse the complaint for citations to federal statutes to determine whether a federal question exists, which would confer jurisdiction under 28 U.S.C. § 1331. However, it is important to remember the precise language of 28 U.S.C. § 1331, which states that “[t]he district courts shall have original jurisdiction of all civil actions arising under the *Constitution*, laws, or treaties of the United States.” An often-overlooked opportunity for removal lies in possible constitutional claims within a complaint. Upon first impression, using the federal constitution as a basis for removal may sound attractive, as there are certainly many instances where a creative defendant could tie a constitutional claim to a plaintiff’s state court complaint. However, it is important to proceed with caution because of the risk of remand.

As the Supreme Court of the United States has dictated, federal-question jurisdiction is governed by the well-pleaded complaint rule. The well-pleaded complaint rule provides that federal jurisdiction exists only when a federal question is presented on the face of a plaintiff’s properly pleaded complaint. The high court has gone so far as to explicitly state that this discretion makes a plaintiff the “master of the claim” and that “he or she may avoid federal jurisdiction by exclusive reliance on state law”. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). If a complaint does not reference a federal constitutional provision, however, there is still a limited exception that could be utilized in “extremely rare” circumstances. Under this exception, a federal issue presented in a state-law claim may trigger federal-question jurisdiction if a state-law claim necessarily raises a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314, (2005). As set forth in *Gunn v. Milton*, the Supreme Court of the United States held that “federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” 568 U.S. 251, 258. Therefore, if a plaintiff has creatively disguised a federal constitutional claim as a state law claim to avoid federal court, there is still an opportunity for removal irrespective of the stated basis for the claim.

Proceeding with removal on this basis is certainly an uphill battle because of the “extremely rare” utilization of the *Gunn* exception to the well-pleaded complaint rule and the related unsettled law. Within *Gunn*, even, the Supreme Court conceded that “[i]n outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first.” An example of the mirky nature of removal under the *Gunn* exception comes from the Eastern District of Wisconsin. In *Sebring v. Milwaukee Public Schools*, No. 21-C-0959, 2021 WL 5049352 (E.D. Wis. Nov. 1, 2021), the plaintiff brought an action in Wisconsin state court with a stated claim for relief arising under the free speech provision of the Wisconsin Constitution. The defendants sought removal under the *Gunn* exception, stating that this free speech claim necessarily involves the resolution of a substantial question of federal law because the Wisconsin Supreme Court generally interprets the free-speech guarantee of the Wisconsin Constitution consistently with the Free Speech Clause of the First Amendment. The plaintiff moved to remand, stating his claim was purely a state law claim that this case did not meet the *Gunn* exception. While the federal court recognized the congruence cited by defendants, it ultimately remanded the action to the state Court. The court determined even though the Wisconsin Supreme Court has historically interpreted its free-speech clause the same as federal courts have interpreted the related federal constitutional provision, the interpretation of the Wisconsin Constitution does not “necessarily raise” a stated federal issue. *Sebring* is a prime example of the risks involved in seeking removal on constitutional grounds and the need for extensive deliberation regarding the possible attacks a motion for remand may bring.

As defense attorneys must act quickly to remove a matter once served, we are often tasked with making quick decisions on whether removal is feasible and the risk of being remanded. It is important that we consider all possible avenues for removal of a case if federal court appears advantageous, and the federal constitution may be a possible avenue when other options appear bleak. However, because of the risks of remand, it is important to evaluate each case distinctly to determine the strength of removal and discuss these risks with clients prior to removing.