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The ‘Well-Pleaded Complaint Rule’ and Pushing the Bounds Post-‘McCulloch’

'McCulloch' is emblematic of the growing difficulties defendants face in attempting to remove cases to federal court.

By **Matthew J. Aaronson, Amanda Lyn Genovese and Marlee Waxelbaum** | March 09, 2018

The minute a state court complaint is served on a defendant, a thirty-day countdown clock starts ticking as the defendant must decide whether removal is appropriate under theories of diversity or federal question jurisdiction pursuant to 28 U.S.C. §1446(b)(2)(B). With respect to federal question jurisdiction, it is basic hornbook law that if a complaint does not specifically allege a cause of action subject to federal law, then the defendant has the burden of showing that one or more of the causes of action are subject to federal court jurisdiction. However, that task of removal—and thereafter defeating a motion to remand to keep the action in federal court—is becoming increasingly difficult and, at times, prejudicial to defendants. Because the difference between federal and state court litigation can often mean different applicable or persuasive law, lengthier discovery, and/or longer and costlier litigation, some skilled plaintiffs’ counsel have taken to drafting their complaints to blatantly avoid pleading grounds for federal court jurisdiction. In so doing, plaintiffs’ counsel is effectively forum-shopping to avoid potentially

unfavorable federal circuit case law (and/or statutes) and the typically shorter time between filing and trial found in federal courts.

As the “master of their complaints,” plaintiffs are given immense flexibility in presenting their claims as they see fit. However, in attempting to circumvent federal question jurisdiction, some plaintiffs are increasingly and deliberately pleading federal law claims as arising solely under state law. Consequently, plaintiffs are requiring defendants who routinely remove state law actions to federal court to establish that a given plaintiff’s state law claims, in fact, arise under federal law, such that federal question jurisdiction exists, so as to prevent the inevitable motion to remand. This imbalance has been furthered by recent appellate and district-court decisions putting additional emphasis on the “well-pleaded complaint rule,” which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987). The “well-pleaded complaint rule” “makes the plaintiff the master of the claim” and generally permits the plaintiff to “avoid federal jurisdiction by exclusive reliance on state law.” Id.

While difficult, there are methods for defendants facing a motion to remand to utilize to persuade federal judges that plaintiffs’ claims are more properly litigated in federal court: the artful pleading doctrine and/or proving that one or more of the causes of action asserted fall in the narrow exceptions to the “well-pleaded complaint rule.” The artful pleading doctrine, “a corollary to the well-pleaded-complaint rule, rests on the principle that a plaintiff may not defeat federal subject-matter jurisdiction by ‘artfully pleading’ his complaint as if it arises under state law where the plaintiff’s suit is, in essence, based on federal law.” *Sullivan v. Am. Airlines*, 424 F.3d 267, 271 (2d Cir. 2005) (citing *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475-76 (1998); see also *NASDAQ OMX Grp. v. UBS Sec.*, 770 F.3d 1010, 1019 (2d Cir. 2014). Designed to prevent plaintiffs from avoiding federal jurisdiction, the artful pleading doctrine allows courts to “read into a complaint elements that the plaintiff omitted,” and

"construe the complaint as if it raised the federal claim that actually underlies the plaintiff's suit." *Sullivan,* 424 F.3d at 271-72 (citing *Rivet*, 522 U.S. at 475). More specifically, the artful pleading doctrine can be invoked when Congress has either (1) so completely preempted (or entirely substituted) a state law cause of action for a federal one that a plaintiff cannot avoid removal by declining to plead, or (2) expressly provided for the removal of particular actions asserting state law causes of action. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003); *Rivet*, 522 U.S. at 475-76. Even then, however, the burden on defendants to successfully invoke the artful pleading doctrine or prove that plaintiffs' claims fall in a recognized exception to the "well-pleaded complaint rule" is an uphill and often losing battle.

Furthermore, the narrow exception to the well-pleaded complaint rule includes situations where a state law claim necessarily incorporates federal law, see *Bracey v. Bd. of Educ. of Bridgeport*, 368 F.3d 108, 115-16 (2d Cir. 2004), or where a state law claim is completely displaced and/or preempted by federal law, see *McCulloch Orthopaedic Surgical Servs. v. Aetna*, 857 F.3d 141, 145 (2d Cir. 2017). While it should be easy for defendants to ask courts to pierce the allegations in plaintiffs' complaints because the relief sought will ultimately be subject to federal laws, rules, or regulations, courts are still required to balance the artful pleading doctrine against the "well-pleaded complaint rule." As of late and post-*McCulloch*, it appears the scales are starting to tip in favor of the "well-pleaded complaint rule." See, e.g., *Najmiev v. Special Touch Home Care Servs.*, No. 17-cv-01386 (VEC), 2017 U.S. Dist. LEXIS 108634, at *3 (S.D.N.Y. July 12, 2017).

Another of the narrow exceptions to the well-pleaded complaint rule is preemption. However, if the artful pleading doctrine is a narrow exception to the well-pleaded complaint rule, then complete preemption is even more constricted as illustrated by cases involving issues under the Employee Retirement Income Security Act of 1974 (ERISA). In *McCulloch*, the Second

Circuit set out to decide “whether [ERISA] completely preempts an ‘out-of-network’ health care provider’s promissory-estoppel claim against a health insurer where the provider (1) did not receive a valid assignment for payment under the health care plan and (2) received an independent promise from the insurer that he would be paid for certain medical services provided to the insured.” *McCulloch*, 857 F.3d at 143. Defendant Aetna timely removed plaintiff McCulloch’s complaint to federal court. In response to McCulloch’s motion to remand, Aetna argued that McCulloch’s promissory estoppel claim was, in fact, an ERISA claim for medical benefits and, accordingly, any duty to reimburse McCulloch necessarily required interpreting the controlling ERISA-governed health benefits plan. Thus, defendant Aetna claimed, plaintiff McCulloch’s promissory estoppel claim was preempted. The district court agreed, and denied the motion to remand and directed McCulloch to amend his complaint to assert ERISA claims. Following McCulloch’s failure to amend the complaint, the district court dismissed the complaint.

Plaintiff McCulloch then appealed to the Second Circuit. As part of its de novo review, the Second Circuit opined that under the *Aetna Health v. Davila*, 542 U.S. 200, 207 (2004) two-part test, the “well-pleaded complaint rule” is excepted by federal ERISA preemption if (1) the plaintiff is the type of party that can bring a claim pursuant to §502(a)(1)(B) of ERISA, and (2) whether the actual claim that plaintiff asserts can be construed as a colorable ERISA claim for benefits. In addition to denying that McCulloch met the first prong of the *Davila* two-part test—because the controlling health benefits plan contained an anti-assignment provision and therefore he lacked standing—the Second Circuit agreed with McCulloch that the complaint was well-pleaded and his alleged state law claim asserted a duty independent of ERISA. Accordingly, the second prong of the *Davila* test was defeated. The Second Circuit therefore

allowed McCulloch to avoid the preemption exception to the “well-pleaded complaint rule” and remanded the case to the district court with instructions to remand the case back to state court.

On initial glance, *McCulloch* can be read narrowly, impacting only a subset of potential ERISA cases. However, *McCulloch* is emblematic of the growing difficulties defendants face in attempting to remove cases to federal court. At a basic level, the facts of *McCulloch* suggest, as found by the district court, clear complete preemption: An out-of-network provider is suing the health benefits plan administrator for additional medical benefits subject to a health plan governed by ERISA. Yet, the Second Circuit’s decision demonstrates the increasing emphasis that courts are placing on purported “well-pleaded complaints,” despite what substance and common sense might otherwise suggest. While not intended, *McCulloch* and its brethren ultimately represent a new era of condoned forum-shopping, incentivizing creative plaintiffs’ counsel while leaving defendants to grapple with litigating a case in an improper venue and/or defending claims that should be pre-empted by federal law.

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