BATTLING FEDERAL QUESTION REMOVAL

by

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to the

Journal of the Association of Trial Lawyers of America

April 2006

The law is often in a state of flux and just when an attorney thinks there is no need to worry about a particular matter it comes up again. Generally it is understood that a railroad personal injury case filed in state court will not be removed based on a federal question. Recently, some railroad counsel have tried to use *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, ___ U.S. ___, 125 S.Ct. 2363, 2366-68, 162 L.Ed.2d 257 (2005) as the backbone to removal based on federal question. Therefore a basic review of the law on this issue is appropriate so attorneys can be prepared to fight removal based on federal question.

A. Strong Presumption Against Removal

There is a strong presumption against removal, and such statutes should be strictly interpreted. *Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992) *Emrich v. Touch Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) *In re Business Men's*, 992 F.2d 183 (8th Cir. 1993).. "Federal courts are courts of limited jurisdiction. . . It is to be presumed that a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 14 S.Ct. 1673 (1994), *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002).

"[R]emoval statutes should be construed narrowly in favor of remand to protect the jurisdiction of state courts." *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir.

2005). Any doubts over the propriety of removal are resolved in favor of state court jurisdiction and remand. *In re Business Men's*, 992 F.2d 183 (8th Cir. 1993).

B. The Federal Issue Must be Substantial

In order to permit removal to federal court under 28 U.S.C. § 1441, the federal issue must be "substantial." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, ___ U.S. ___, 125 S.Ct. 2363, 2367 (2005). References to federal statutes in a petition or complaint should not trigger federal question jurisdiction.

Where a complaint merely references federal regulations, federal question jurisdiction does not arise. *Coil v. Recovery Management Corp.*, 2005 WL 1182366 (W.D. Mo. 2005); *Sarantino v. American Airlines, Inc.*, 2005 WL 2406024 (E.D. Mo. 2005).

In determining whether federal question jurisdiction is present, courts are directed to determine whether the federal questions are "'basic' and 'necessary' as opposed to 'collateral' and 'merely possible.'" *Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1045 (9th Cir. 2003). In addition, courts must consider whether "the federal question is 'pivotal' as opposed to merely 'incidental.'" Id., at 1045. "Is the federal question 'direct and essential' as opposed to 'attenuated?'" Id., at 1045.

In view of these standards, the brief mention of federal regulations in the Complaint does not give rise to federal question jurisdiction because they do not raise a substantial issue in the case. The United States Supreme Court recognizes that the breach of federal statutes may support a negligence per se claim as a matter of state law. *Grable*, at 2370. In *Grable*, the Court addressed numerous situations where federal laws are implicated within the context of state common law claims yet there is no resulting federal question jurisdiction. *Grable*, at 2370-2371.

The United States Supreme Court's decision in *Grable* did not override the Supreme Court's earlier decision in *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), wherein the Court held that the violation of a federal statute as an element of a state cause of action, when Congress has provided no private cause of action, does not state a claim arising under federal law. As such, *Merrill Dow* should still be read as the general rule regarding federal question jurisdiction, and *Grable* applied as a narrow exception.

"Even where, as here, a federal regulation may constitute an element of the state law claim it must be 'pivotal,' or 'substantial,' as opposed to merely 'incidental,' and the resolution of the federal question must play a significant role in the proceedings. *Berg v. Leason*, 32 F.3d 422, 424 (9th Cir. 1994)." *Nippon Yusen Kaisha v. Union Pacific Railroad Co.*, 205 WL 1241866 (C.D. Cal. 2005). "Federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable*, at 2367.

C. The Federal Issue Must be a Necessary and "Essential Element" of the Claim

To permit removal under 28 U.S.C.§ 1441, the federal issue must involve a necessary and "essential element" of a claim. See *Grable*. In *Grable*, the underlying controversy depended on the meaning of one federal notice statute. See, *Grable*, at 2368 ("it (the federal statute) appears to be the only legal or factual issue contested in the case"). Because the entire case depended on (i.e. turned on) the interpretation of the federal statute in *Grable*, the interpretation of federal law was "essential" to the case.

Federal District Courts have examined a number of federal question jurisdiction cases subsequent to the United States Supreme Court decision in *Grable*. Those post-*Grable* courts have uniformly taken a very narrow view of *Grable*, and held that where a cause of action filed

in state court is based on both state and federal theories, there is no federal question jurisdiction. In other words, if a claim of negligence is based on violation of state common law duties as well as federal regulations, the theory based on federal regulations is not "necessary" or "essential." In *In re Circular Thermostat*, 2005 WL 2043022 (N.D.Cal. August 24, 2005), *Armitage v. Deutsche Bank AG*, 2005 WL 3095909 (N.D.Cal. November 14, 2005), *Coil v. Recovery Management Corp.*, 2005 WL 1182366 (W.D. Mo. 2005); *Sarantino v. American Airlines, Inc.*, 2005 WL 2406024 (E.D. Mo. 2005).

As summarized by the United States Supreme Court, the Well Pleaded Complaint rule "focuses on claims, not theories, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim 'arises under' patent law." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 811-13, 108 S.Ct. 2166, 100 L.Ed.2d 811, 1 (1988).

By adhering to these rules, federal courts are prevented "from becoming entangled in state law controversies." *Patrickson v. Dole Food Company*, 251 F.3d 795, 799 (9th Cir. 2001).

As a final note, some courts have analyzed federal question jurisdiction under 28 U.S.C. §1331 in terms of whether or not the federal question is a "dispositive issue." Thus, in *First Hawaiian Bank v. Alexander*, 558 F.Supp. 1128 (D.C. Hawaii 1983), the court noted that "[o]nly where dispositive issues require the application of federal common law will §1331(a) be invoked." Id., at 1131. This same rule concerning "dispositive issues" was mentioned in *Heichman v. American Tel. & Tel. Co.*, 943 F.Supp. 1212 (C.D. Cal. 1995).

The same approach was approved by the court in *Republic of Philippines v. Marcos*, 806 F.2d 344 (2nd Cir. 1986), wherein the court noted that the presence of "dispositive issues" should be used to interpret the extent and meaning of 28 U.S.C.§ 1331. Id., at 353.

Because the federal regulations mentioned in a complaint are usually not "dispositive issues," there can be no argument that the issues are "essential" or "necessary" or "substantial."

D. Removal must not Disturb Congressionally Approved (or Assumed) Balance of Federal and State Judicial Responsibilities

The *Grable* Court noted that even though there might be a substantial and essential federal issue, removal might still be inappropriate if the exercise of federal jurisdiction were to disturb "any congressionally approved balance of federal and state judicial responsibilities." *Grable*, at 2368.

Tort law and railroad law are traditionally areas of law within the jurisdiction of state courts. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), *Nicodemus v. Union Pacific*, 318 F.3d 1231, 1238 (10th Cir. 2003) ("[w]e hesitate to exercise jurisdiction where the 'cause of action is a subject traditionally relegated to state law'"); see also, *Wagner v. Chevron Oil Co.*, 321 F.Supp.2d 1195 (D.Nev. 2004) ("principles of federalism favor resolution of traditional state law causes of action arising under areas traditionally reserved to state law (such as tort, contract, and property law) in state court despite potentially significant federal interest in the resolution of railroad right-of-way grants").

In *Grable*, the Court noted that "it will be the rare state title case that raises a contested matter of federal law," and as a result, concluded that allowing such cases in federal court would "portent only a microscopic effect on the federal-state division of labor." *Grable*, at 2368. Unlike federal issues that rarely control state title cases, railroad cases are predominately controlled by state law and frequently include federal issues. A shift of all railroad cases to federal court would seriously disrupt the federal-state division of labor in railroad litigation nationwide.

The FRSA and associated railroad tort litigation clearly show a history of litigation of railroad tort claims at the state court level. Congress would have been mindful of this division of labor when it enacted the FRSA. This is the type of balance that would have been "drawn (or at least assumed) by Congress," as noted by the court in *In re Circular Thermostat*, 2005 WL 2043022 (N.D.Cal. August 24, 2005).

E. Unavailability of Federal Remedy Supports Remand

The unavailability of a federal remedy for claims based on federal statutes or rules, mitigates against removal to federal court. The Court in *Grable* refers to the unavailability of a federal cause of action as being a "missing welcome mat" to any attempts at removal. *Grable*, at 2370. "Ordinarily, of course, federal jurisdiction does not lie under 28 U.S.C. § 1331 where there is no right of action conferred by federal statute." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 841 (9th Cir. 2004). Remand is the general rule where there is no federal cause of action. Neither the Federal Railroad Safety Act nor the Locomotive Inspection Act provides a federal remedy. *Nippon Yusen Kaisha v. Union Pacific Railroad Co.*, 2005 WL 1241866, 1 (C.D. Cal. 2005)(holding that the FRSA does not provide a federal remedy), *Abate v. Southern Pacific Transportation Co.*, 928 F.2d 167 (5th Cir. 1991) and see *Debiasio v. Illinois Central Railroad*, 1992 WL 297396 (N.D. Ill. 1992).; *Matson v. Burlington Northern Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001)(holding that the LIA does not provide a federal remedy); *Engvall v. Soo Line Railroad Co.*, 632 N.W.2d 560, 565 (Minn.2001)(holding that the LIA does not provide a federal remedy), *Southern Pacific Transportation Co. v. United States*, 462 F.S. 1193, 1220-21 (E.D. Cal. 1978), *Tipton v. Atchinson, Topeka & Santa Fe Railway Co.*, 298 U.S. 141, 146 (1936). Further, neither of those regulations displaces all state-law remedies. *Smallwood v. Illinois Cent. R.R. Co.*, 342 F.3d 400, 408 (5th Cir. 2003)(holding that the FRSA

does not displace all state-law remedies); *Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828, 835 (7th Cir. 2003)(holding that the LIA does not displace all state-law remedies). As such, it can be concluded that Congress did not intend for federal jurisdiction to arise from a state tort claim based on the mere reference to those regulations.

F. Jurisdiction Limited to "Extraordinary" Situations Where There is "Complete Preemption"

Railroad defendants base some arguments on the alleged "complete" preemption they claim is provided by the FRSA. However, federal question jurisdiction based on preemption is limited to those "extraordinary" situations where there has been "complete" preemption. *Ansley v. Ameriquest Mortgage Company*, 340 F.3d 858, 862 (9th Cir. 2003).

The *Ansley* court went on to note that the "United States Supreme Court has identified only three federal statutes that satisfy the test (of complete preemption)": (1) § 301 of the Labor-Management Relations Act, 29 U.S.C. §185, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 559-60 (1968); (2) § 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); and (3) the usury provisions of the National Bank Act, 12 U.S.C. § 85, 86, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003)" *Ansley*, 340 F.3d 858, 862 (9th Cir. 2003). By direct implication, the *Ansley* court held that other federal laws such as the FRSA do not provide "Complete" preemption.

While the courts have made rare exceptions for statutes falling under the doctrine of "complete preemption," neither the Federal Railroad Safety Act nor the Locomotive Inspection Act are among them. *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004), *Smallwood*, *supra*, at 408; *Adkins*, *supra*, at 835; *see also*, Smith, O'Connor's Federal Rules, 89 (2005). Because the

FRSA does not provide complete preemption, arguments for federal question jurisdiction based on preemption are without merit.

G. Constitutional Defenses and Other Federal Law Raised by Defendants Do Not Provide for Federal Question Jurisdiction

Railroad Defendants have argued that constitutional defenses provide federal question jurisdiction. That is not correct. The doctrine of federal preemption standing alone does not create a federal right. *Agen v. Teamsters Joint Council No. 2*, 617 F.S. 81, 83 (D. Montana 1985). "It is well settled that a defense that raises a federal question is inadequate to confer federal jurisdiction. Federal-question jurisdiction is not present even if the [federal] 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. . . . As we have noted, however, the potential for such a constitutional defense, even if central to the issues at stake in the action, does not itself create federal question jurisdiction." *New Mexico ex rel. Stein v. Western Estate Services, Inc.*, 139 Fed.Appx. 37 (10th Cir. 2005). "Simply raising a constitutional argument in defense of an action that is brought in state court does not open the federal forum." *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001), *Merrell Dow*, *supra*, at 808; *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-54 (1908). Therefore, where a defendant raises preemption as a defense to a plaintiff's complaint, federal question jurisdiction does not arise. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 11-12, n.12 (1983).

Defenses do not confer federal question jurisdiction and are not considered in determining subject matter jurisdiction. *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). "To be sure, preemption requires a state court to *dismiss* a particular claim that is filed under state law, but it

does not, as a general matter, provide grounds for *removal*." *Beneficial National Bank v. Anderson*, 539 U.S. 1, 13 (2003)(emphasis in original).

CONCLUSION

Federal Court decisions support the conclusion that there is no federal question jurisdiction for railroad tort claims. Therefore arguments based on *Grable* or other cases should be defeatable.