If diversity jurisdiction does not exist and the complaint does not state a federal claim, the plaintiff can only bring an action in state court, and the defendant cannot remove it to federal court. See 28 U.S.C. §§ 1331-32, 1441-42. However, sometimes the defendant’s contribution gives one or both parties grounds to claim that a federal court should hear the matter—for example, if the defendant will (or has) claimed that a federal statute prohibits or limits the plaintiff’s recovery on its state law claim (and the plaintiff may even reply that the application of the statute violates the Constitution). See, e.g., Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983); Duke Power v. Carolina Envtl. Study Grp., 438 U.S. 59 (1978); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). Given the interest of federal courts in resolving controversies requiring construction of federal law, it may seem incredible that they most often lack jurisdiction, that the defect is often first uncovered only years into the litigation on appeal, and that key cases continue to appear. This little-discussed peril is highlighted below.

The Well-Pleaded Complaint Rule

The well-pleaded complaint rule limits a court’s consideration to the necessary elements of a plaintiff’s claim. Thus, if the contention is that a contract was breached—a quintessential state law issue—federal jurisdiction does not rest even if the subject of the contract touches on federal law—who owns intellectual property rights, for example. See Beghin-Say, Int’l v. Ole-Bendt Rasmussen, 733 F.2d 1568, 1570-71 (Fed. Cir. 1984) (finding no jurisdiction although contracts were recorded with the patent and trademark office and involved patents). A court would similarly be obligated to disregard superfluous bootstrapping assertions, such as that the plaintiff must establish the validity of a patent under federal law to prevail on that claim. Speedco, Inc. v. Estes, 853 F.2d 909, 912-913 (Fed. Cir. 1988). And, pleading standards require courts to disregard legal assertions that subject matter exists, that federal law governs the dispute, or that the claim is created by federal law.

Most significantly, the well-pleaded complaint rule does not permit the court to consider defenses or counterclaims. The U.S. Supreme Court has made clear that this is settled law, even if both parties favor a federal forum, even if the defense is actually raised, and even if it in fact presents a federal issue (even the only disputed issue). Franchise Tax Bd., 463 U.S. at 14. For example, if a plaintiff sues for violation of a gambling operations management agreement, the defendant can obtain dismissal of the action at any time, even after contending that the contract was void because its execution did not conform to federal law. Iowa Mgmt. Consultants, Inc. v. Sac & Fox Tribe of Miss. in Iowa, 207 F.3d 488 (8th Cir. 2000). Courts look only to those elements that the plaintiff must prove to establish his claim, not affirmative defenses the defendant must prove.

The Exceptions

If a proper reading of the complaint reveals that it does not state a federal cause of action, jurisdiction may nevertheless exist in two continuously evolving circumstances.

First, it may exist if the plaintiff’s claim is essentially a federal claim because it is completely preempted by, and exists only under, federal law. This is not the same standard used in constitutional discussions—whether federal law occupies a field, barring supplemental state regulation—but whether the claims “are in truth only actionable under federal law due to Congress’s clear intent to completely pre-empt a particular area of law.” Metro. Edison Co. v. Pa. Public Utility Comm’n, 767 F.3d 335, 363-64 (3d Cir. 2014) (quotation omitted). It is a rare and limited exception, depends on analysis of federal statutes, and must be invoked by the defendant. See Retail Prop. Trust v. United Bros. of Carpenters and Joiners of Am., 768 F.3d 938, 947-48 & n.5 (9th Cir. 2014) (providing up-to-date list of instances where preemption has occurred).

Second, if federal law does not provide the plaintiff’s remedy, an equally “special and small” exception exists for claims that turn on issues of federal law. Gunn v. Minton, 133 S.Ct. 1059, 1064 (2013). To qualify, the federal issue must be (1) “necessarily raise[d],” (2) “actually disputed,” (3) “substantial,” and (4) can be resolved “without disturbing any congressionally approved balance of federal and state judicial responsibilities.” Grable & Sons Metal Prods. v. Darue Eng’g & Mfg., 545 U.S. 308, 314 (2005). To date, there have been

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only several instances of this. **NASDAQ OMX Grp. v. UBS Secs., LLC, 770 F.3d 1010, 1019** (2d Cir. 2014). The classic example is a shareholder's action claiming that a corporation wrongly purchased bonds whose issuance was unconstitutional. **Grable, 454 U.S. at 312.**

But there are no hard-and-fast rules. The Supreme Court has cautioned against focusing on the nature of the federal interest. **Merrell Dow Pharms v. Thompson, 478 U.S. 804, 815 n.12** (1986). Indeed, **Gunn** compared the precedential landscape to a Jackson Pollock painting, 133 S.Ct. at 1065. Nevertheless, jurisdiction can never exist if the defense is merely anticipated at the time of the challenge. **Sullivan v. Am. Airlines, 424 F.3d 267, 271** (2d Cir. 2005) (citation omitted). If the federal defense is one of many, it is likewise not necessarily raised. **Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 810** (1988). And situation-specific challenges—for example, whether a defendant that exclusively licensed its patented technology violated the agreement by producing an infringing device—are unlikely ever to create federal court jurisdiction. **MDS (Canada) v. Rad Source Techs, 720 F.3d 833, 842** (11th Cir. 2013).

Since the Supreme Court last took up the issue two years ago, circuits continue to debate the limits of the rule and its exceptions. For example, the Third Circuit recently disagreed with the Fifth and Ninth circuits as to whether a defendant can remove a securities action where the complaint does not mention federal law but a federal securities statute provides for exclusive federal jurisdiction of “all suits in equity and actions brought to enforce any liability or duty created by” the law. **Manning v. Merrill Lynch Pierce Fenner & Smith, 772 F.3d 158, 165-68 & n.10** (3d Cir. 2014) (holding that “cases otherwise falling outside the scope of the district court’s original jurisdiction are not brought within it by virtue of an exclusive jurisdiction provision”). And the Federal Circuit recently tried to retain jurisdiction where patent issues such as infringement or validity are raised. **Jang v. Boston Scientific Corp., 767 F.3d 1334, 1337-38** (Fed. Cir. 2014); **compare MDS, 720 F.3d at 842** (finding patent issues insubstantial even if a state court would be required to decide issues of federal patent law, such as infringement).

**Conclusion**

Several things should be obvious from this discussion. First, not every reference to federal law in a complaint will confer federal jurisdiction; courts generally permit all but the most significant federal issues to be decided by state courts, and even then, only when other factors are met. Second, most cases fall in between these antipodes and, unfortunately, vague standards make it difficult to tell whether jurisdiction exists until it is challenged, which can be at any stage of review. And third, these criteria permit a certain degree of federal-state forum shopping or wasteful concurrent federal-state litigation. This is a federal practice issue important to any party with a strong forum preference. ☀

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