Seeking COVID Immunities Under the PREP Act in Federal Court: A Primer on Complete Preemption

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Federal district courts' analysis of removal rights under the PREP Act provides a timely primer on the complete preemption doctrine.

Dozens of lawsuits recently filed in state courts against nursing homes and senior living facilities, in which plaintiffs allege state-law causes of action such as medical negligence, gross negligence, and wrongful death related to healthcare facilities' responses to COVID-19, have been removed to federal courts by defendants seeking immunity under the Public Readiness and Emergency Preparedness Act (the PREP Act, codified at 42 U.S.C. §§ 247d-6d and 247d-6e). Defendants have argued that federal-question jurisdiction exists because the PREP Act completely preempts state law.

Complete Preemption 101

State courts are courts of general jurisdiction, and as such they are presumed to have jurisdiction to decide both state and federal causes of action.

By contrast, federal courts are courts of limited jurisdiction. The Constitution defines the maximum extent of federal judicial power to include controversies between citizens of different states and all cases arising under the Constitution, laws, or treaties of the United States. Further, the Constitution grants Congress the power to determine the scope of jurisdiction of the lower federal courts. As a result, federal courts may only exercise jurisdiction that has been specifically authorized by federal statute.

Generally, a defendant may remove a civil action filed in state court to federal court if the federal court has original jurisdiction over at least one of the plaintiff's claims. However, the federal court must remand the case if the court lacks original subject-matter jurisdiction.

Unless the parties are completely diverse, removal is proper only if the complaint affirmatively alleges a federal claim, under the well-pleaded complaint rule. A federal defense is not enough to overcome the strictures of this rule. But there is an exception when there is a substantial, actually disputed federal issue embedded within the state-law cause of action. Under the *Grable* doctrine, a federal court may exercise jurisdiction to decide an embedded federal question without disturbing the balance of federal and state judicial responsibilities that Congress intended.

The well-pleaded complaint rule secures the plaintiff as the "master of his complaint" and should effectively secure the plaintiff's forum selection. A plaintiff who wants to keep a case in state court should succeed as long as the complaint only invokes state law.

However, an exception is made to the well-pleaded complaint rule when a federal statute wholly displaces—or "completely preempts"—a state-law cause of action. Under the complete preemption doctrine, if the plaintiff's claim is within the scope of the federal statute, then even a complaint that alleges only state-law claims "arises under" federal law. Unlike ordinary preemption, which is an affirmative defense, complete preemption is jurisdictional. Thus, when complete preemption applies, jurisdiction is proper only in federal court.

To completely preempt state substantive law, not only must the federal statute's force be so extraordinary that it completely replaces the relevant state substantive law, but the text of the statute must clearly show that Congress intended the federal cause of action to be the *exclusive* cause of action.

Application of the complete preemption doctrine is rare. The Supreme Court has approved complete preemption by statutory provisions in just three areas: section 502(a) of ERISA, sections 85 and 86 of the National Bank Act, and section 301 of the Labor-Management Relations Act. Indeed, the Fourth Circuit recognizes a rebuttable presumption against finding complete preemption, "because federalism concerns strongly counsel against imputing to Congress an intent to displace a whole panoply of state law in a certain area absent some clearly expressed direction." *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 701 (4th Cir. 2015).

Federal District Courts Consider Whether the PREP Act Completely Preempts State Law

The PREP Act provides absolute immunity from suit and liability under federal and state law to nursing homes and other healthcare providers for all claims of loss caused by and related to the administration or use of covered countermeasures against COVID-19. Covered countermeasures include qualified pandemic products; security countermeasures; and drugs, biological products, or devices approved, cleared, or licensed by the FDA. The PREP Act also provides for a Covered Countermeasure Process Fund to compensate eligible individuals for serious physical injuries or deaths directly caused by the administration or use of a covered countermeasure. The only statutory exception to this immunity is for actions or failures to act that constitute willful misconduct, and such cases should be transferred to a three-judge panel of the District Court for the District of Columbia.

The Office of the General Counsel of the Secretary of the Department of Health and Human Services issued Advisory Opinion 21-01 on January 8, 2021, in which it explained that the PREP Act is a complete preemption statute because it establishes a federal cause of action (albeit an administrative one). It opined that in cases where the PREP Act is triggered when the defendant's action or inaction falls within its scope, complete preemption attaches and "the district court is usually obligated to dismiss the case as pleaded, either because no federal cause of action is alleged or the exclusive initial venue is a federal administrative agency." Notably, the opinion also stated that it does not have the force and effect of law.

Some of the federal district courts to consider whether the PREP Act completely preempts state law have discussed the complete preemption doctrine in detail but have avoided answering the question directly, because they have determined that the PREP Act was not triggered when the defendants' alleged conduct did not fall squarely within the administration or use of covered countermeasures for COVID-19. *See, e.g.*, *Maltbia v. Big Blue Healthcare, Inc.*, No. 20-

2607-DDC-KGG, 2021 WL 1196445 (D. Kan. Mar. 30, 2021); *Sherod v. Comprehensive Healthcare Mgmt. Svcs., LLC*, No. 20-cv-1198, 2020 WL 6140474 (W.D. Pa. Oct. 16, 2020).

Of the federal district courts that have answered this preemption question, most have not been persuaded by Advisory Opinion 21-01 and have instead concluded that the PREP Act is not a complete preemption statute because it fails to create an exclusive federal cause of action that would allow a federal court to adjudicate plaintiffs' claims on the merits (except for allegations of willful misconduct). *See, e.g., Schuster v. Percheron Healthcare, Inc.*, No. 4:21-cv-00156-P (N.D. Tex. Apr. 1, 2021); *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, No. 20-cv-6605-KM-ESK, 2020 WL 4671091 (D.N.J. Aug. 12, 2020) (currently on appeal); *Dupervil v. All. Health Operations, LCC*, No. 20-cv-4042-PKC-PK, 2021 WL 355137 (E.D.N.Y. Feb. 2, 2021) (currently on appeal) (explaining that the PREP Act is essentially an immunity statute that does not create rights, duties, or obligations but instead confers jurisdiction on the Secretary via the Covered Countermeasure Process Fund, and rejecting the argument that the *Grable* doctrine creates federal-question jurisdiction in this context); *Estate of Winfred Cowan v. LP Columbia KY, LLC*, No. 1:20-CV-00118-GNS, 2021 WL 1225965 (W.D. Ky. Mar. 31, 2021) (remanding due to lack of federal subject-matter jurisdiction, noting that the proper interpretation of a federal statute is protected by the Supreme Court's power to review state court decisions involving such issues); *Wright v. Encompass Health Rehab. Hosp. of Columbia, Inc.*, No. 3:20-cv-02636-MGL, 2021 WL 1177440 (D.S.C. Mar. 29, 2021) (declining to apply *Chevron* deference to Advisory Opinion 21-01 because an agency's position on jurisdiction is not entitled to *Chevron* deference).

By contrast, a federal district court in California held that the PREP Act is a complete preemption statute.*Garcia v. Welltower OPCo Group LLC*, No. SACV 20-02250JVS, 2021 WL 492581 (C.D. Ca. Feb. 10, 2021). The court agreed with the administrative agency's interpretation of the PREP Act as explained in Advisory Opinion 21-01, citing *Chevron, Inc. v. NDRC, Inc.*, 467 U.S. 837, 843 (1984), *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001).

The federal circuit courts of appeal will soon examine this issue and decide for their own circuits whether the PREP Act completely preempts state law and thus grants subject-matter jurisdiction over these claims to the federal courts.[1]

[1] The Fourth Circuit and North Carolina's federal courts have not addressed this issue yet.

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