BEWARE THE CONCEALED KEYS TO THE FEDERAL COURTHOUSE: SUPREME COURT PRECEDENT ALLOWS FOR FEDERAL QUESTION JURISDICTION EVEN WHEN A FEDERAL CAUSE OF ACTION HAS NOT BEEN ASSERTED

As lawyers representing the plaintiff in civil litigation, many of us avoid asserting a cause of action that arises under federal law in order to avoid federal question jurisdiction. This is not enough. We must also ensure we have not alleged a cause of action that presents necessary, disputed and substantial questions of federal law. Doing so can open the door of the federal courthouse just as well as alleging an outright violation of federal law.

Grable & Sons Metal Products v. Darue Engineering and Manufacturing[1] is the seminal Supreme Court decision regarding federal question jurisdiction for state law claims that pose necessary and substantial questions of federal law. In *Grable*, the Internal Revenue Service had seized property from the plaintiff and sold it to satisfy the plaintiff's federal tax delinquency.[2] Five years later, the plaintiff filed a state court quiet-title action against the third party that had purchased the property alleging the IRS had failed to comply with certain federally imposed notice requirements.[3] The defendant removed the case contending federal question jurisdiction existed.[4] On *certiorari*, the Supreme Court agreed because the IRS notice requirement was "an essential element of [the] quiet title claim"[5] and "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in federal court."[6]

In the post-*Grable* era, the Fifth Circuit has counseled that federal question jurisdiction exists in an action that asserts solely state law causes of action "where (1) resolving a federal issue is necessary to resolution of the state law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and, (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities."[7]

1. Resolving a federal issue is necessary.

In *Adventure Outdoors, Inc. v. Bloomberg*,[8] New York City officials held a press conference in which they accused a Georgia gun dealer of violating federal laws regulating gun sales.[9] The gun dealer sued the city and a collection of Georgia residents in Georgia state court for, among other things, defamation.[10] The defendants removed the action to federal court and the gun dealer moved to remand. The district court denied the motion to remand on the basis

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[1] 545 U.S. 308, 125 S. Ct. 2363, 162 L.Ed. 2d 257 (2005).
[2] *Id.* at 310-11.
[3] *Id.*
[4] *Id.* at 311.
[5] *Id.* at 315.
[6] *Id.*
[7] *Singh v. Duane Morris, LLP*, 538 F.3d 334, 338 (5th Cir. 2008).
[8] 552 F. 3d 1290 (11th Cir. 2008).
[9] *Id.* at 1293.
[10] *Id.* at 1294.

of *Grable*.[11] The Eleventh Circuit reversed and remanded, but found that the action clearly satisfied the first two prongs of the *Grable* test: "To recover for defamation, the plaintiffs must prove the falsity of the defendants' statements concerning federal law, an issue which the parties hotly contest. Thus, the plaintiffs' defamation claims 'necessarily raise a state federal issue, actually disputed' and satisfy the first two *Grable* requirements."[12]

Cnty. of Santa Clara v. Astra USA, Inc.[13] also illustrates the presence of a necessary federal issue. Federal law sets guidelines concerning the maximum prices at which common pharmaceuticals can be sold to public health-care institutions for use in outpatient treatment.[14] In California, state law requires counties to "pay[ ] the cost of drugs given to many indigent and other patients" at public hospitals and other clinics.[15] So when Santa Clara County discovered that Astra USA and related drug manufacturers were overcharging, it filed suit claiming the defendants "had bled the county's finances with overcharges for these medicines."[16] Although Santa Clara County's complaint explicitly limited its claims to state law causes of action,[17] the defendants removed the case.

In the district court's view, the County's claims concerning "violations of the federal statute ... raise[d] obvious[] federal issues."[18] As with the Hospital's complaint in this case, the County's complaint "provide[d] a rash of allegations that defendants trampled federal laws."[19] The Court therefore concluded that "[f]or this case to be resolved on its merits, at least one of the federal issues embedded in the complaint must be addressed. There is simply no other way."[20]

2. The federal issue is actually disputed.

In addition to the *Adventure Outdoors* case,[21] *Meyer v. Health Management Associates, Inc.*[22] illustrates the proper application of the "actually in dispute" factor. In that case, the plaintiff filed suit in Florida state court alleging "he was unlawfully discharged from his role as a compliance officer after he uncovered and internally reported widespread Medicare fraud at

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[11] *Id.*
[12] *Id.* at 1298-99.
[13] 401 F. Supp. 2d 1022 (N.D. Cal. 2005).
[14] *Id.* at 1024.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* (citing *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 100 ("[Section] 1331 jurisdiction will support claims ... of a statutory origin.").
[19] *Id.*
[20] *Id.*; see also, *Id.* at 1026 ("An allegation that [the defendants] acted fraudulently or unfairly also requires determination of a federal issue because it boils down to claims that defendants said they were providing the federally mandated discounts but did not.").
[21] 552 F. 3d 1290, 1298-99 (11th Cir. 2008).
[22] 841 F. Supp. 2d 1262 (S.D. Fla. 2012).

certain hospitals" operated by the defendants.[23] The defendants removed the suit contending the *Grable* factors were satisfied and the plaintiff moved the court to remand.[24] The district court found an actually disputed issue of federal law[25] and rationalized its decision as follows:

> Florida's Whistleblower Act requires the plaintiff to prove that he disclosed or threatened to disclose an actual violation of a law, rule, or regulation by his employer. Therefore, to prevail, Meyer will have to demonstrate that he was fired because he threatened to expose HMA's actual violations of Medicare law relating to improper inpatient admissions. Such a showing will require reference to federal statutes like *42 U.S.C. § 1320z-7b(a)(3)*, which mandates that hospitals disclose known errors and omissions in their claims for Medicare reimbursement. Because HMA disputes that it violated any Medicare laws, there is an "actually disputed" issue of federal law here.[26]

3. The federal issue is substantial.

A review of the case law reveals certain hallmarks of substantiality. Three factors stand out among these: (a) the federal interest in protecting federal money; (b) the existence of a pure issue of a federal law that may prove dispositive of the claim; and, (c) the likelihood that a decision on the federal issue will have far-reaching impacts.

a. The federal fiscal interest in Medicare funds is at stake in this case.

Gunn v. Minton[27] was a legal malpractice case brought against a law firm by its former client in a failed patent infringement suit. The former client argued his case would have been successful had his attorneys introduced certain evidence.[28] After a state court dismissed his claim, the former client argued on appeal that his case arose under federal patent law and belonged in federal court.[29]

On *certiorari*, the Supreme Court disagreed. Although the legal malpractice case undoubtedly implicated a necessary and disputed issue of federal patent law, the *Gunn* Court concluded the action did not present an issue of sufficient "importance ... to the federal system as a whole."[30] Of particular relevance to the Court was the "backward-looking nature of a legal

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[23] *Id.* at 1264.
[24] *Id.* at 1265.
[25] *Id.* at 1268.
[26] *Id.* (internal citation of Florida law omitted; citing, *Adventure Outdoors*, 552 F. 3d at 1295, in support of its finding that the "actually disputed" factor was satisfied).
[27] 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013).
[28] *Id.* at 1062-63.
[29] *Id.* at 1063. As the *Gunn* Court explained to readers unversed in patent law, federal law does not permit state courts to exercise jurisdiction "over any claim for relief arising under any Act of Congress relating to patents." *Id.* (citing *28 U.S.C. § 1338(a)*).
[30] *Id.* at 1066.

malpractice claim... No matter how the state courts resolve th[e] hypothetical 'case within a case,' it will not change the real-world result of the prior federal patent litigation."[31] Although the Court conceded that patent law was important to the case's litigants, it ultimately concluded that "something more, demonstrating that the question is significant to the federal system as a whole, is needed."[32]

The Court pointed to *Grable* as an example of a case in which that "something more" was present. The Court explained, "[i]n holding that the case arose under federal law, we primarily focused not on the interests of the litigants themselves, but rather on the broader significance of the notice question for the Federal Government. We emphasized the Government's 'strong interest' in being able to recover delinquent taxes through seizure and sale of property, which in turn 'require[d] clear terms of notice to allow buyers ... to satisfy themselves that the Service has touched the bases necessary for good title. The Government's 'direct interest in the availability of a federal forum to vindicate its own administrative action' made the question 'an important issue of federal law that sensibly belong[ed] in a federal court.'"[33] Thus, the lesson of *Gunn* is that substantiality is met when the court's decision will impact the federal government's fiscal interest.

Lower court decisions have likewise focused on whether federal money is at stake when addressing the substantiality issue. For example, *Prince v. Berg* is a California shareholder's derivative action in which the complaint made extensive reference to alleged violations of the False Claims Act that were pending against Oracle Corporation in a *qui tam* action previously filed in a Virginia federal district court.[34] The defendants, various officers and directors of Oracle, removed the action on federal question grounds and the plaintiff moved the court to remand. The district court denied the motion to remand "because the heart of the claims in this action go to the propriety of Oracle's billing practices with respect to the federal government, issues that are of paramount federal concern and therefore the subject of extensive federal regulation and legislation...."[35]

Similarly, in *Borden v. Allstate Insurance*,[36] a homeowner sued his flood insurance provider for wrongfully denying a claim. The insurer argued federal jurisdiction was lacking. The Fifth Circuit disagreed and concluded the homeowner's claim for relief arose from the National Flood Insurance Program, which "is a federal program effectuating federal policies and paid for by the federal fisc."[37] The court explained that the invocation of federal jurisdiction

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[31] *Id.* at 1067.
[32] *Id.* at 1068.
[33] *Id.* at 1066 (quoting, *Grable*, 545 U.S. at 315).
[34] 2011 U.S. Dist. LEXIS 1071, *3 (N.D. Cal. 2011).
[35] *Id.* at *8-9.
[36] 589 F.3d 168 (5th Cir. 2009).
[37] *Id.* at 172.

was important to promote "uniformity in the interpretation of policies backed" by federal money.[38]

b. This case contains a pure issue of law that will prove dispositive.

In *Adventure Outdoors*, the Eleventh Circuit emphasized that a "nearly pure issue of [federal] law," as opposed to a "fact-bound and situation-specific" issue, will weigh heavily in favor of a finding of substantiality.[39] Other federal courts have likewise hinged their decisions on whether the dispute turned on a case-dispositive interpretation of federal law versus a fact-specific application of it.[40]

A good example of this can be found in *In re: Pharmaceutical Industry Average Wholesale Price Litigation*.[41] In that case, the State of Arizona brought suit in state court alleging various pharmaceutical companies had fraudulently misrepresented prescription drug prices by utilizing a definition of "average wholesale price" that intentionally and wrongfully benefited the companies. The pharmaceutical companies removed the action on the basis of federal question jurisdiction arguing "that the plaintiff's theory of recovery necessarily raises the substantial federal issue of the meaning of AWP under the Medicare statute, which affects both liability and damages."[42] The court agreed and noted the "government has a strong national interest in prohibiting fraud upon Medicare beneficiaries because fraudulent acts threaten Medicare's integrity."[43]

c. A decision regarding reasonable costs will impact other claims.

New York City Health and Hospitals Corp. v. Wellcare of New York, Inc.[44] involved a dispute between a licensed health plan and a provider over the amount of Medicare reimbursement paid for emergency services. The provider submitted bills to the health plan

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[38] *Id.* (citing, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573, 575, 87 L. Ed. 838 (1943) ("when the duties or rights of the United States are at stake under a federal program, that federal interest requires the application ... of federal law").

[39] *Adventure Outdoors*, 552 F. 3d at 1299 (quoting, *Empire Healthchoice*, 547 U.S. at 700, 126 S. Ct. at 2137).

[40] *Meyer*, 841 F. Supp. 2d at 1264, 1269 (substantiality was found lacking because the plaintiff's claim did not hinge on a case-dispositive interpretation of federal law; instead, the law was clear and the predominant issue was whether the defendants engaged in "fraudulent Medicare billing at four HMA facilities" in its "admission of certain patients"); *Main & Assoc., Inc*, 776 F. Supp. 2d at 1281 (substantiality was found lacking because the predominant issue was whether Blue Cross was providing fewer days of skilled nursing care to Blue Advantage enrollees than it was to Medicare Part A or Part B enrollees, not an interpretation of a Medicare statute or regulation); *Singh v. Duane Morris LLP*, 538 F. 3d 334, 339 (5th Cir. 2008) (substantiality was lacking in an attorney malpractice case because the predominant issue was "whether the evidence [the attorney-defendant] failed to present to the trial court would have resulted in a finding of secondary meaning;" there was no dispute over the definition of "secondary meaning" that would have proven case dispositive).

[41] 457 F. Supp. 2d 77 (D. Mass. 2006).

[42] *Id.* at 79.

[43] *Id.* at 80.

[44] 769 F. Supp. 2d 250 (S.D. N.Y. 2011).

containing two sums: a lower amount the provider billed to uninsured patients and some out-of-network commercial plans, and a second charge for the amount the provider was owed under "Original Medicare."[45] The health plan paid the lower charge for years. The provider first demanded back payment and future correction when it discovered the discrepancy. It later filed suit in state court alleging breach of contract and unjust enrichment. The health plan removed the suit contending federal question jurisdiction existed and the district court agreed, largely because "the case implicate[d] the complex reimbursement schemes created by Medicare law. The eventual outcome of this litigation could potentially affect the hundreds of MA Organizations that have contracted with CMS... This is not a situation where a federal issue simply lingers in the background of a state law dominated complaint. Rather, virtually every paragraph in the complaint makes at least passing reference to some aspect of Medicare law."[46]

4. Federal jurisdiction will not disturb the balance of federal and state judicial responsibilities.

A common trap for the plaintiff's lawyer is the assertion of a common law cause of action that necessarily requires resolution of a federal issue that is exclusively reserved for the federal courts. This routinely happens in the context of Medicare benefits denials. Courts have found that such claims are "inextricably intertwined" with claims for benefits.[47] For instance, in *Biometric,* the plaintiff owner and operator of home health care agencies sought millions of dollars from the defendant Medicare fiscal intermediary under a variety of state common law theories including fraud, negligent misrepresentation and breach of contract.[48] The Seventh Circuit found that all of the plaintiff's claims arose under the Medicare Act, and in so holding, stated:

> A party cannot avoid the Medicare Act's jurisdictional bar simply by styling its attack as a claim for collateral damages instead of a challenge to the underlying denial of benefits. If litigants who have been denied benefits could routinely obtain judicial review of these decisions by recharacterizing their claims under

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[45] *Id.* at 253.

[46] *Id.* at 257.

[47] *Midland Psychiatric Assocs., Inc. v. United States*, 145 F. 3d 1000, 1004 (8th Cir. 1998) (finding plaintiff's state law tortious interference claim "inextricably intertwined" with a Medicare benefits determination); *Biometric Health Services, Inc. v. Aetna Life & Casualty*, 903 F. 2d 480, 487 (7th Cir.), cert. denied, 498 U.S. 1012, 111 S. Ct. 579, 112 L. Ed. 2d 584 (1990) (holding that plaintiff's state law claims arose under the Medicare Act); *Roberts v. Hay*, 1992 U.S. Dist. LEXIS 22720, *6 (N.D. Ala. 1992) (same); *Neurological Assocs. – H. Hooshmand, M.D., P.A. v. Blue Cross/Blue Shield of Florida, Inc.*, 632 F. Supp. 1078, 1080-81 (S.D. Fla. 1986 (same); *Wilson v. Chestnut Hill Healthcare*, 2000 U.S. Dist. LEXIS 1440, *5 (E.D. Pa. 2000) (dismissing with prejudice tortious interference and other state law claims "arising under" the Medicare Act); *Regional Medical Transport, Inc. v. Sklar*, 541 F. Supp. 2d 718 (E.D. Pa. 2008) (dismissing state law claims for tortious interference with contractual relations, misfeasance and negligent supervision).

[48] *Biometric*, 903 F. 2d at 483.

state and federal causes of action, the Medicare Act's goal of limited judicial review for a substantial number of claims would be severely undermined.[49]

CONCLUSION

When pursuing your claims, ask yourself whether your cause of action necessarily gives rise to a disputed and substantial issue of federal law. Only by a thorough examination will you know where your case will likely be litigated. More importantly, only then will you be able to best serve your client.

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[49] *Id.* at 487. Numerous courts have since cited this language in rejecting efforts by Medicare providers to avoid the limitation on judicial review in Section 405(h). See, e.g., *Allstar Care Inc. v. Blue Cross and Blue Shield of S. Carolina, Corp.*, 184 F. Supp. 2d 1295, 1300 (S.D. Fla. 2002); *Regional Medical Transport*, 541 F. Supp. 2d at 729; *Wilson*, 2000 U.S. Dist. LEXIS 1440 at *4; *Midland Psychiatric Assocs., Inc. v. United States*, 969 F. Supp. 543, 548 (W.D. Mo. 1997).