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Rare Grable Removal Sighted In Missouri

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Law360, New York (May 10, 2017, 11:37 AM EDT) -- Establishing federal jurisdiction over state-law claims through the Grable doctrine is rare, but a Missouri federal court recently reminded us that it is not impossible.

In Bader Farms Inc. v. Monsanto Co., No. 1:16-CV-299 SNLJ, 2017 WL 633815 (E.D. Mo. Feb. 16, 2017), the court found that, even though federal jurisdiction did not appear on the face of the complaint, it existed under Grable because the plaintiffs' state-law claims required examination of the actual practices of and regulations guiding a federal agency, thus raising a significant federal issue. Companies subject to federal regulation may find this case useful when seeking to invoke removal jurisdiction.

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The Bader Farms plaintiffs, a group of farmers, originally sued Monsanto in Missouri state court, asserting a number of state-law claims. They alleged that Monsanto fraudulently concealed information from the Animal and Plant Health Inspection Service (APHIS), the federal agency that regulates genetically engineered seeds, when it petitioned to deregulate genetically engineered soybean and cotton seeds.

APHIS ultimately approved the petition, and the seeds were released to the public. According to the plaintiffs, Monsanto intentionally withheld from APHIS that a corresponding herbicide had yet to be approved by the EPA.

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Rather than wait for the new compatible herbicide, farmers who bought the new seeds treated their crops with an old, illegal herbicide that drifted onto nearby farms and killed non-genetically-engineered crops. The Bader Farms plaintiffs are farmers whose crops were allegedly damaged by this drifting herbicide.

Monsanto removed the case to federal court. The complaint had only state-law claims against a non-diverse defendant, which almost always defeats federal jurisdiction. Yet Monsanto defeated the farmers' motion to remand. How?

The answer lies in the "Grable doctrine," a rarely successful basis for establishing federal question jurisdiction. Under the well-pleaded complaint rule, federal

question jurisdiction must appear on the face of the complaint and cannot be created by a federal defense. This typically means that state-law claims cannot create federal question jurisdiction.

In Grable & Sons Metal Prod. Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005), however, the Supreme Court established a narrow doctrine under which federal question jurisdiction exists if a state-law claim "raise[s] a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state responsibilities." Id. at 314.

The Bader Farms court relied on Grable in finding that federal jurisdiction existed. According to the court, the farmers' allegations directly questioned the actual practices of and regulations governing APHIS — for example, whether APHIS would have deregulated the genetically engineered seeds had Monsanto not allegedly concealed the truth.

The case ultimately posed a "collateral attack on the validity of APHIS's decision to deregulate the new seed." Bader Farms Inc., 2017 WL 633815, at *3. Thus, the court concluded that the question raised a substantial federal issue under Grable.

This outcome might seem straightforward, but it actually marks a significant victory for defendants. Efforts to establish federal jurisdiction through Grable have rarely succeeded. Indeed, courts routinely reject Grable arguments even where state-law claims clearly implicate federal issues and regulations. (One such case is discussed here.)

A complicating wrinkle facing those seeking to apply Bader Farms is whether the decision comports with the well-known "fraud-on-the-FDA" Buckman precedent. In 2001, the U.S. Supreme Court held that state-law claims for fraud against the U.S. Food and Drug Administration (FDA) were preempted by the Federal Food, Drug, and Cosmetic Act (FDCA). Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).

The Buckman plaintiffs asserted that had the FDA known that the medical device manufacturer intended for its bone screw devices to be used in spines, rather than in arms and legs for which it received 510(k) clearance, then the FDA would not have granted the manufacturer's 510(k) application. The Supreme Court found those claims were preempted by federal law. Why?

First, the court found that there was no applicable presumption against preemption because "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.'" Id. at 347 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

Second, permitting state-law claims for fraud would have unhinged the "delicate balance of statutory objectives" that the FDA maintains through its own investigatory and enforcement efforts. Buckman, 531 U.S. at 348.

Based on those circumstances — an inherently federal issue that was meant to be balanced by the agency and not private citizens — the Supreme Court held that the plaintiffs' fraud claims implicitly conflicted with the objectives of the FDCA. Id. at 350 (noting that state-law fraud claims would compromise the "FDA's responsibility to police fraud consistently with the Administration's judgment and objectives.").

So how does Bader Farms stack up to Buckman?

The first parallel is that the plaintiffs' claims in both cases relied on a relationship between an entity and a federal agency — a federal issue. In fact, the Bader Farms Court cited Buckman as support for this conclusion: "Further, as the Supreme Court, itself, has explained, whether federal regulatory bodies fulfilled their duties with respect to the entities they regulate is 'inherently federal in character.'" Id. at *3 (quoting Buckman, 531 U.S. at 347).

The second parallel is that the plaintiffs in both cases alleged that the defendants' actions were but-for causes of the federal agencies' decisions. If each defendant had not acted fraudulently (as alleged), the plaintiffs argued that each agency would not have approved the relevant product. Bader Farms, 2017 WL 633815, at *3 (stating that the plaintiffs "can only succeed on [the fraud] count if they establish that the agency decision was incorrect due to defendant's fraudulent concealment.").

Given these strong parallels, we caution future defendants from relying on Bader Farms without considering the impact of Buckman.[1] It will certainly be an issue to look out for in future cases.[2]

The Buckman issue aside, Bader Farms might give some defendants a leg up in trying to establish federal jurisdiction under Grable.

Under Bader Farms, if a plaintiff alleges that (1) a defendant concealed from a federal agency information that it had a duty to disclose, (2) the information was material, and (3) the concealment prevented the agency from performing its regulatory duties, the defendant may be able to remove based on a significant federal issue. This precedent could be useful for companies in regulated industries that wish to litigate in federal court.

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[1] The only briefing on Buckman before the Bader Farms Court was found in the defendant's response to the motion to remand. In that response, the defendant cited Buckman for the proposition that the plaintiffs' fraud claim was inherently federal in character. Further, the Bader Farms Court did not analyze the possibility of preemption.

[2] Our research shows that only one other federal court has addressed the application of Buckman to claims against entities interacting with APHIS, but found that Buckman was inapposite because no fraud claim was specifically pled. Behrens v. United Vaccines Inc., a div. of Harlan Sprague Dawley Inc., 189 F. Supp. 2d 945, 955 (D. Minn. 2002).
