IN DEFENSE OF COMPLETE PREEMPTION

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In response to Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537 (2007), and Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. PENNUMBRA 186 (2007), http://www.pennumbra.com/issues/articles/155-3/Morrison.pdf.

Recent pieces by Professors Gil Seinfeld[1] and Trevor Morrison[2] criticize the Supreme Court's complete preemption doctrine as misguided and unconstitutional, respectively.[3] Professor Seinfeld suggests reforming the doctrine around field preemption,[4] and Professor Morrison rejects complete preemption as inconsistent with separation of powers.[5] This response defends the Supreme Court's doctrine as it currently stands: A state law claim arises under federal law (and so may be removed to federal court) when a federal statute both preempts the claim and supplies an exclusive federal remedy.[6] This doctrine is a sensible application of the well-pleaded complaint rule that prevents improper circumvention of federal question jurisdiction.

My disagreement with Professors Seinfeld and Morrison stems from their characterization of the complete preemption doctrine. Both argue that the doctrine creates an *exception* to the well-pleaded

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[1] Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537 (2007).

[2] Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. PENNUMBRA 186 (2007), http://www.pennumbra.com/issues/articles/155-3/Morrison.pdf.

[3] The following discussion assumes familiarity with the main arguments in Professors Seinfeld and Morrison's pieces, as well as the background of the complete preemption doctrine.

[4] *See* Seinfeld, *supra* note 1, at 574-79 (suggesting that the Supreme Court's complete preemption jurisprudence could be clarified by linking the availability of federal defense removal to the "breadth of the preemptive statute relied upon by the defendant").

[5] *See* Morrison, *supra* note 2, at 193-94 (contending that Congress, not the courts, should determine the extent to which federal law preempts state law).

[6] *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) (describing complete preemption as a circumstance in which a state claim can be removed to federal court).

complaint rule that allows courts to consider federal law defenses in deciding federal question jurisdiction.[7] Conversely, defenders of the doctrine have called it (properly, I believe) a "corollary" to the well-pleaded complaint rule that simply recharacterizes preempted state law claims according to their true federal nature.[8] While the difference between exception and corollary may seem semantic, it goes to the heart of the Seinfeld and Morrison arguments. For Professor Seinfeld, the distinction exposes an unexplained gap in the Court's logic: Why make an exception to the well-pleaded complaint rule for the defense of complete preemption but not for other federal law defenses?[9] For Professor Morrison, the judicially created exception violates separation of powers: Congress, not the federal courts, is authorized to expand federal court jurisdiction.[10]

This response counters by asking a question that neither Professor Seinfeld nor Professor Morrison addresses: What does it mean for a complaint to be "well-pleaded"? I argue that a well-pleaded complaint is one that a reasonable lawyer would draft under the circumstances. Professors Seinfeld and Morrison look at only part of this picture—what a reasonable lawyer would *leave out* of the complaint, such as anticipated defenses—and ignore the mirror image case, what a reasonable lawyer would *include* in a complaint, such as an exclusive federal cause of action.[11] Seen from this vantage point, the complete preemption doctrine and the bar on pleading anticipated defenses are simply

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[7] To see the similarities between the two, compare Morrison, *supra* note 2, at 193-94, and Seinfeld, *supra* note 1, at 538-39.

[8] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 4, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (No. 02-306), *available at* http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0306.mer.ami.pdf ("This Court has also recognized, as a corollary to the well-pleaded complaint rule, that a plaintiff may not defeat federal jurisdiction by the simple expedient of omitting to plead *necessary* federal questions.").

[9] Seinfeld, *supra* note 1, at 539.

[10] Morrison, *supra* note 2, at 193-94.

[11] During oral argument in *Beneficial National Bank*, a Justice hinted at this reading of well-pleaded:

> The problem with it is your complaint isn't well-pleaded if the only source of law is Federal, which you conceded on your brief and again here. There is no well-pleaded Alabama claim because the Alabama claim or the State law claim doesn't exist. The only claim that exists against a national bank for usury is a Federal claim.

Transcript of Oral Argument at 35, *Beneficial Nat'l Bank*, 539 U.S. 1 (No. 02-306); *see also id.* at 35-36 ("[T]here's a difference between preemption as a defense to a claim that is well pleaded and here where you have badly pleaded a complaint that can arise only under Federal law that simply can't arise under State law.").

two sides of the well-pleaded complaint coin.

Conceived this way, the complete preemption doctrine has two main advantages. In Part I, I argue that the doctrine creates symmetry within the well-pleaded complaint rule. The bar on pleading anticipated defenses prevents plaintiffs from improperly forcing cases *into* federal court, while the complete preemption doctrine prevents plaintiffs from improperly keeping cases *out of* federal court. In Part II, I argue that this approach is consistent with the early application of the well-pleaded complaint rule. The complete preemption doctrine, then, is hardly a recent innovation that impermissibly expands federal question jurisdiction in violation of the separation of powers.

I. PLEADING FOR ERROR: THE STATE COURT PLAINTIFF'S ARTFUL DODGE

Beneficial National Bank v. Anderson,[12] in which the Court clarified the complete preemption doctrine, illustrates how a plaintiff can use artful pleading to stay out of federal court. The plaintiffs were taxpayers who alleged that a tax preparation company had misled them regarding tax refund advances and that a national bank had then charged them excessive interest on those advances.[13] The plaintiffs' complaint named five state law claims: fraud, suppression of material facts, breach of fiduciary duty, common law usury, and statutory usury.[14] The defendants removed the case to federal court on the ground that the two usury claims were completely preempted by the National Bank Act,[15] and the federal district court then denied the plaintiffs' subsequent motion to remand.[16]

At oral argument before the Supreme Court, plaintiffs' counsel conceded that the National Bank Act preempted the plaintiffs' usury claims.[17] This is not surprising given that a long line of Supreme

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[12] 539 U.S. 1 (2003).

[13] *Id.* at 4.

[14] Complaint at 7-12, Anderson v. H&R Block, Inc., No. CV-2000-088 (Cir. Ct. Ala. Sept. 19, 2000).

[15] Notice of Removal at 3-5, Anderson v. H&R Block, Inc., 132 F. Supp. 2d 948 (M.D. Ala. 2000) (Civ. Act. No. 00-C-1457-N); *see* 12 U.S.C. §§ 85, 86 (2000) (mandating the federal rates of interest on loans, discounts, and purchases; and defining usurious interest and penalties for taking such interest).

[16] *Anderson*, 132 F. Supp. 2d at 952, *rev'd*, 287 F.3d 1038 (11th Cir. 2002), *rev'd sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

[17] The following exchange took place between the Court and plaintiffs' counsel:

> QUESTION: Is it the case that this Federal cause of action is intended by Congress as the exclusive vehicle excluding your State cause of action under the Supremacy Clause of the Constitution?

Court cases had so held,[18] and that the plaintiffs did not urge overruling those cases.[19] So the question arises: Why file a complaint that alleges claims that any reasonable lawyer would know are preempted?[20] This is an especially curious question because omitting the usury claims would have made it clear the case was *not* removable.[21] Given that pleading the usury claims and then defending them against dismissal would be costly, the plaintiffs' lawyers must have seen some value in asserting those claims. While counsel never explained why they asserted the usury claims, the following inferences are reasonable under the circumstances.

First, the plaintiffs' lawyers wanted to be in state court. The plaintiffs' complaint lists only state law claims,[22] and while the parties were completely diverse,[23] each plaintiff alleged $74,900 in damages.[24]

Second, as noted above, a reasonable lawyer would know that the state usury claims were preempted by federal law, and that the only valid usury claim was under the National Bank Act.[25] An unbroken

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MR. CLARK: Under Supremacy Clause—
QUESTION: Is the answer to my question yes or no?
MR. CLARK: That is—yes, that is what those cases hold.
Transcript of Oral Argument, *supra* note 11, at 33-34.

[18] *See Beneficial Nat'l Bank*, 539 U.S. at 10-11 (describing the Court's "longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action for usury against national banks").

[19] *See generally* Brief for Respondents, *Beneficial Nat'l Bank*, 539 U.S. 1 (No. 02-306).

[20] Plaintiffs' counsel was asked a very similar question at oral argument and offered the following evasive response: "Well, and—plaintiffs have different reasons for pleading the things they do. Under the well-pleaded complaint rule, of course, it's their prerogative to rise and fall on the causes of action that they choose to plead." Transcript of Oral Argument, *supra* note 11, at 46-47.

[21] *See id.* at 19-21 (acknowledging that the plaintiffs' non-usury state law claims, standing alone, would not have been removable).

[22] *See* Complaint, *supra* note 14, at 7-12 (asserting state law claims for intentional misrepresentation, suppression of material facts, breach of fiduciary duty, and statutory and common law usury).

[23] *Id.* at 2-5 (asserting that the defendants were all "foreign corporations," and the plaintiffs were all citizens of Alabama).

[24] *Id.* at 6 ("Each Plaintiff individually seeks judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff."); *see* 28 U.S.C. § 1332(a) (2000) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . .").

[25] 12 U.S.C. §§ 85-86 (2000). I leave aside the question of how complete preemption applies when the plaintiff's pleadings would not state a claim under the exclusive federal law; however, Justice Antonin Scalia did raise the question during oral argument in *Beneficial National Bank*. *See* Transcript of Oral Argument, *supra* note 11, at 6-8.

line of Supreme Court cases had reached this conclusion,[26] and plaintiffs' counsel conceded the point at oral argument.

Third, a violation of the state usury laws would have been easier to prove than the plaintiffs' other claims. The usury claims relied on a straightforward review of objective evidence: Did the loan documents reveal interest charges in excess of the legal rate?[27] The plaintiffs' remaining claims, however, all required difficult factual or legal determinations. The fraud claims entailed proof of the defendants' intent, the materiality of the misrepresentation (if any), and the plaintiffs' reliance on the misrepresentation. The suppression of material facts claim required a showing of a "confidential relationship" as well as the materiality of the misrepresentation. And the breach of fiduciary duty claims required proof of a fiduciary relationship between the plaintiffs and defendants.

Fourth, plaintiffs consistently argued that the decision whether to dismiss the usury claims as preempted must be left to the state trial court judge.[28]

Fifth, the *only* way for the plaintiffs to benefit from their state usury claims would be for the state trial court to *incorrectly* conclude that those claims were *not preempted*.

The preceding inferences and observations leave one conclusion: the plaintiffs alleged state usury claims with the strategic hope that the state trial court would incorrectly fail to dismiss those claims, either by

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To understand the issue, consider a case where state law imposes strict liability, but that law is preempted by a federal law that requires a showing of intentional wrongdoing. Assume that the plaintiff fails to allege intent, relying on the strict liability standard of state law. In that case, the state law claim is preempted, but the plaintiff's allegations would not support a federal claim. *See id.* Because *Beneficial National Bank* did not present such a case, the Court did not address this question.

While this response does not develop the point, I note that the approach proposed above would ask whether the reasonably competent lawyer could have pleaded such a claim. If the plaintiff's allegations are ambiguous, meaning that there is no indication whether there was intent, the case should be removable on the ground that it prevents circumvention of federal jurisdiction. Otherwise, the artful plaintiff could avoid complete preemption by making vague allegations that meet state law but not federal law. Further, this would give the plaintiff whose claim would *not* satisfy the federal law standard reason to make that clear in her state court pleading.

[26] *See* Evans v. Nat'l Bank of Savannah, 251 U.S. 108, 114 (1919); Haseltine v. Cent. Bank of Springfield, 183 U.S. 132, 134 (1901); Barnet v. Nat'l Bank, 98 U.S. 555, 557-58 (1878); Farmers' & Mechs.' Nat'l Bank v. Dearing, 91 U.S. 29, 32-34 (1875).

[27] *See* Ala. Code § 8-8-1 (1975) (mandating maximum rates of interest on loans).

[28] Transcript of Oral Argument, *supra* note 11, at 38 ("[T]he fact that it may be ordinary—ordinarily preempted is something that—that the defendants can raise and the State courts can decide. And the State courts have often—often decided matters of Federal preemption.").

mistake or because of an anti-federal (or local) bias. The circumstances surrounding the state court lawsuit perhaps encouraged that hope. To start, Alabama elects its judges,[29] creating an incentive for judges to favor donors and local voters.[30] The preemption issue in *Beneficial National Bank* played into that incentive—the presiding state judge would know that by interpreting federal law in a certain (incorrect) way, he could provide a benefit to all twenty-six plaintiffs, each of whom resided in the county where the judge stood for election.[31] Taking the defendants' view, the decision to remove was easy—success of the plaintiffs' strongest claim depended on judicial error or bias, and the apparent incentives were aligned toward that result.

The above analysis highlights a difference in emphasis from Professor Seinfeld's article. His analysis and proposed reform focus mainly on the federal interest in uniform interpretation and application of federal law. However, as Professor Morrison notes, the complete preemption doctrine does not track this federal interest very well, because the importance of uniformity in any single case is unrelated to whether federal law provides an exclusive federal remedy. Rather, the federal interest in uniformity is related to a host of other factors, many of which are historically contingent.[32]

This response shifts the focus to the plaintiff's behavior. Complete preemption poses the curious situation of a plaintiff who pleads a claim that is doomed on the merits. The plaintiff so pleads because the preempted state law claim is more favorable than the plaintiff's remaining claims; his strategy, in essence, is to hope that the state court will err in deciding the preemption question. When a plaintiff behaves this way, federal courts *necessarily* have an interest in hearing the case—both to avoid the desired legal error and to discourage other plaintiffs from pursuing the same strategy. And while this inter-

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[29] *See* ALA. CONST. art. VI, § 152 (amended 1973) ("All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts.").

[30] *See* Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring) ("Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.").

[31] *See* Complaint, *supra* note 14, at 2-4. State campaign finance disclosure documents indicate that the judge to whom the *Beneficial National Bank* case was first assigned reported receiving over $225,000 in campaign contributions the year before the litigation was filed. *See* L. Bernard, Smithart, Ala. Fair Campaign Practices Act, Candidate or Elected Official Annual Report (Form 1A) (Jan. 29, 1999), *available at* http://arc-sos.state.al.us/CGI/SOSELc12.mbr/output?P01=001599619990131C.

[32] *See* Morrison, *supra* note 2, at 190-93 (elaborating on other factors that color federal interests).

est arguably applies to both complete preemption and ordinary preemption, federal question jurisdiction should be limited to the former because, as discussed next, only complete preemption is consistent with a proper understanding of the well-pleaded complaint rule.[33]

II. RECONSTRUCTING THE WELL-PLEADED COMPLAINT

Both Professor Seinfeld's article and Professor Morrison's response apply the well-pleaded complaint rule without explaining precisely what makes a complaint "well-pleaded." A well-pleaded complaint ought to be viewed as the complaint that a reasonable lawyer would have drafted. This standard has three related applications relevant to the current discussion. First, the well-pleaded complaint includes only those allegations required to state a claim under the relevant pleading rules. Because pleading rules do not require the plaintiff to anticipate defenses,[34] such matters are not within a well-pleaded complaint. Second, a reasonable lawyer may decide which meritorious claims to include in the plaintiff's complaint. For example, a lawyer may strategically omit meritorious federal claims, and rely exclusively on state law claims, in order to prevent removal from state court. And third, the legal characterization of the plaintiff's allegations should be that which a reasonable lawyer would give to the facts alleged. Just as a frivolous assertion of a federal claim does not support federal question jurisdiction, so too a federal claim disguised in state-law clothing does not defeat federal jurisdiction. Because I read Professors Seinfeld and Morrison to agree with the first two propositions, I focus on the third.

While the well-pleaded complaint rule is most closely associated with the case *Louisville & Nashville Railroad Co. v. Mottley*,[35] the earlier case *Boston & Montana Consolidated Copper & Silver Mining Co. v. Montana Ore Purchasing Co.*[36] is most instructive for present purposes. In

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[33] In addition, the Supreme Court has held that implicit in the creation of a federal cause of action is the recognition that federal question jurisdiction is critical to the vindication of the federal interest underlying the federal statute. *See* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 812 (1986) ("The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute.").

[34] *See* FED. R. CIV. P. 8(a) (requiring mainly "a short and plain statement of the claim showing that the pleader is entitled to relief").

[35] 211 U.S. 149 (1908).

[36] 188 U.S. 632 (1903).

Montana Ore, the plaintiff sued to enjoin the defendants from mining ore from the plaintiff's property without permission. The Court treated these allegations as asserting a state law claim for conversion. The plaintiff's pleading further alleged that the defendants would likely justify their mining as legal under federal law. The plaintiff relied in part on the anticipated federal defense to support federal jurisdiction.[37]

In rejecting federal jurisdiction, *Montana Ore* linked the well-pleaded complaint rule to competent pleading under the rules of procedure:

> It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the Circuit Court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore . . . . To make out a *prima facie* case on the part of complainant, so far as its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it . . . . It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up, and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence *is inconsistent with any known rule of pleading so far as we are aware*, and is improper.[38]

Montana Ore, then, linked the well-pleaded complaint rule to the pleading that the reasonably competent lawyer would file.

Montana Ore also discussed how to analyze the plaintiff's legal characterization of his claims. The plaintiff had argued that his allegations were best read as asserting a claim to quiet title—by mining on the plaintiff's land, the defendants effectively denied the plaintiff's ownership. On this view, the case raised the validity and scope of the United States land patent under which the plaintiff held title. In rejecting this argument, the Court looked beyond the plaintiff's characterization of his claim to decide whether the alleged facts truly asserted a quiet title action. The Court found that no such claim existed because the plaintiff had failed to make necessary allegations,[39] and held that the complaint was best read as stating only a state law claim

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[37] *Id.* at 634-35.

[38] *Id.* at 638-39 (emphasis added).

[39] Specifically, the Court found that the plaintiff had failed to allege either that a court had previously decided title in his favor, or that he was in possession of the property. *Id.* at 641-42.

for conversion:

> [I]t is plain that the suit is *not in truth a suit to quiet title*. There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendants' title or to anticipate their defence to the cause of action alleged by the complainant.[40]

Since the only valid claim rested on state law, the case could not be brought in federal court.[41]

Montana Ore shows that the plaintiff's legal characterization of her allegations does not define the well-pleaded complaint. Rather, the well-pleaded complaint is read to assert the claims a reasonable lawyer would conclude are within the allegations. So, in *Montana Ore*, the complaint is read to include the valid conversion claim but not the invalid quiet title claim. This prevented the plaintiff from asserting federal question jurisdiction, because a reasonably competent lawyer would not draft a complaint alleging invalid claims. Similarly, in *Beneficial National Bank*, the complaint was read to include the valid National Bank Act claim but not the preempted state usury claims. In both cases, the plaintiffs were precluded from manipulating federal jurisdiction through artful pleading that served no valid purpose. Indeed, the jurisdictional argument in each case succeeds only if a court makes an inadvertent or intentional error. The well-pleaded complaint rule should be read to discourage claims whose success depends on such judicial errors.

One might argue, as did Justice Scalia in *Beneficial National Bank*, that the well-pleaded complaint should be read to state no claim rather than an exclusive federal claim.[42] But this approach abandons the reasonable lawyer view of the well-pleaded complaint. In addition to assuming competence, we ought to assume the reasonable lawyer behaves ethically, pursuing only legitimate strategies.[43] To read the plaintiff's complaint as only stating a preempted state law claim that must be dismissed imputes an illicit motive to our reasonable lawyer—pleading a frivolous claim in the strategic hope of judicial error. Instead, we ought to read the complaint as drafted by a reasonable law-

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[40] *Id.* at 640 (emphasis added).

[41] *Id.* at 642.

[42] *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 20 (2003) (Scalia, J., dissenting) ("Federal jurisdiction is ordinarily determined . . . on the basis of what claim is pleaded, rather than on the basis of what claim can prevail.").

[43] *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (2003) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.").

yer "who truly seeks recovery"[44]—i.e., a lawyer with a proper motive. This is done by reading the plaintiff's *own allegations* to state the exclusive federal claim, which is precisely what the complete preemption version of the well-pleaded complaint rule does.

CONCLUSION

The above defense of the complete preemption doctrine is straightforward. When federal law provides an exclusive remedy, the *only* reason to allege a preempted state law claim is the hope that a state court will err. While the plaintiff is ordinarily the master of her complaint, the well-pleaded complaint rule should not encourage such hopes. Because the Court's current complete preemption doctrine eliminates that perverse incentive, and is consistent with earlier case law, it ought to be retained.

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[44] *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 8, at 17-18 ("Absent removal, the state court would have only two legitimate options—to recharacterize the claim in federal-law terms or to dismiss the claim altogether. Any plaintiff who truly seeks recovery on that claim would prefer the first option, which would make the propriety of removal crystal clear.").