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## A Primer on Removal to Federal Court Based on Federal Question Jurisdiction

Ask a litigator if a case can be removed to federal court and he/she will likely examine whether there is diversity jurisdiction, meaning are the parties to the case from different states and is the amount in controversy greater than \$75,000? But there is another way to get a case removed to federal court, irrespective of diversity between the parties — if the plaintiff's claims raise a federal question. A recent decision by the Hon. Cathy Seibel of the Southern District of New York provides a helpful primer on when a party can remove a case based on federal question jurisdiction.

### **The Case: *Gondolfo et al. v. Town of Carmel***

*Gondolfo et al. v. Town of Carmel*, No. 20-CV-9060 (CS), 2021 WL 431148 (S.D.N.Y. Feb. 08, 2021) involved a long-running dispute over the construction of wireless telecommunication facilities in the town of Carmel. In 2018, certain wireless companies sued the town under the federal Telecommunications Act after it denied their applications to build their facilities. The dispute ultimately settled with the town agreeing to issue the permits. Carmel residents then brought a proceeding in state court against the town, the wireless companies, and others, arguing the town did not have the authority to issue the permits, and the town's approval of the project violated numerous state and local laws. The defendants removed the action based on federal question of jurisdiction, and the plaintiffs moved to remand.

Under 28 U.S.C. § 1441, defendants can remove a civil action from state to federal court if the federal district court will have either diversity jurisdiction or federal question jurisdiction. Removal is “strictly construed” and the removing party bears the burden of establishing removal is proper. Federal question jurisdiction exists when the complaint raises claims under federal law. Ordinarily, federal question jurisdiction turns on the “well-pleaded complaint” rule, i.e., whether the complaint alleges a federal cause of action. Importantly, this means a defendant's assertion of a federal defense is insufficient to create federal question jurisdiction. The flip side of the “well-pleaded complaint” rule is the “artful pleading” rule, which holds the plaintiff cannot avoid removal by intentionally declining to plead necessary federal questions. The artful pleading rule arises in three situations: 1) Congress provides for removal of state law claims by statute; 2) state law claims are preempted by federal law, and 3) state law rights “necessarily” turn on a question of federal law. To satisfy the third category, the removing party must show that the federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court.

Applying these principles, Judge Seibel concluded there was no federal question jurisdiction and remanded the case back to state court. At the core of the parties' dispute was whether the federal Telecommunications Act preempted local laws. Because preemption is a defense and not an affirmative claim, it could not serve as the basis for removal. In addition, Judge Seibel rejected the defendants' argument that removal was necessary to protect the settlement order from the prior federal litigation

because the Supreme Court “explicitly disavowed” removal on that ground in *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002).

**Takeaway**

Removal to federal court can be a powerful defense tactic. Practitioners should be mindful that removal has two prongs – diversity and federal question jurisdiction. While diversity is often the starting point to determine if a case can be removed to federal court, it is not the only route. A careful review of the complaint may reveal a federal question basis to remove the case as well.