A Year (or So) in Review: Jurisdiction and Removability

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Plaintiffs in toxic tort and environmental litigation have an inherent advantage over the defendants. They can select the forum where the lawsuit will be filed. Often, this leads to plaintiffs filing lawsuits in state courts known for "litigation tourism," leaving defendants at a disadvantage. *See, e.g.*, U.S. Chamber of Commerce Institute for Legal Reform, *2015 Lawsuit Climate Survey, Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems* (September 2015).

Defendants are not without recourse. Two of the most common ways to respond to unfavorable state court venues are (1) to challenge the state court's jurisdiction over the defendant, and (2) to remove the case from state court to federal court. These preliminary procedural issues have the power to change the complexion of a lawsuit, or even end it entirely.

Due to the importance of these issues, defense practitioners need to stay up to date with the case law developing in these areas. This presentation is meant to aid in that task by providing an update on developments occurring within the last year (or so) in personal jurisdiction and removal jurisdiction.

I. Personal Jurisdiction

A state court's exercise of personal jurisdiction over a defendant must comport with the Fourteenth Amendment's due process clause. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011). This due process inquiry primarily focuses on the defendant's relationship with the forum state. *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1779 (2017). In specific personal jurisdiction cases, "'the *suit*' must 'arise out of or relate to the defendant's contacts with the *forum*.'" *Id.* at 1780 (emphasis in original). cleaned up). "There must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Id.* Although the Supreme Court has often repeated this formulation of the test for specific personal jurisdiction, it had "yet to address exactly how a defendant's activities must be tied to the forum for a court to properly exercise specific personal jurisdiction over a defendant." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018).

In *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021), the Supreme Court provided additional guidance on what level of contact between a defendant and the forum state is needed for specific jurisdiction. Two plaintiffs brought product liability actions in Montana and Minnesota, respectively, against Ford alleging Ford's cars were defective. *Id.* at 1023. The cars involved were manufactured and originally sold by Ford in states other than Montana and Minnesota. *Id.* Instead, resales and relocations brought the cars into those

jurisdictions. *Id.* Therefore, although Ford had extensive contacts with both Montana and Minnesota, it moved to dismiss the lawsuits based on a lack of personal jurisdiction because the plaintiffs' claims did not themselves "arise out of" Ford's contacts. *Id.* Ford claimed that a claim could only "arise out of" its forum contacts if those contacts themselves caused the plaintiffs' damages. *Id.* at 1026.

A unanimous Supreme Court, in an opinion authored by Justice Kagan, rejected Ford's approach and held that Montana and Minnesota had personal jurisdiction. The Court emphasized that minimum contacts require that the claims "arise out of *or relate to* the defendant's contacts with the forum." *Ford Motor Co.*, 141 S. Ct. at 1026 (emphasis in original). Therefore, even though the plaintiffs' claims did not arise from (i.e., were not caused by) Ford's in-forum activities, the Supreme Court found that they were related to Ford's activities of advertising, selling, and servicing its cars in Montana and Minnesota. *Id.* at 1028. Therefore, the Court found "a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Id.*

Ford's rejection of a causation-type standard for specific personal jurisdiction in favor of a "related to" standard unquestionably broadens the jurisdictional test. As Justice Alito noted in his concurrence: "Applying that phrase 'according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.'" *Id.* at 1033 (Alito, J., concurring). Therefore, after *Ford*, defense counsel considering a personal jurisdiction challenge must not only analyze their client's contacts with the forum state related to the transaction giving rise to the injury, but must consider their client's universe of activities in the forum in order to determine whether the plaintiff's claims are sufficiently "related to" the in-forum activity.

II. Removal Jurisdiction

A. Federal Officer Removal – 28 U.S.C. § 1442

A removal under 28 U.S.C. § 1442 requires a defendant to show: "(1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.*, 990 F.3d 447, 454 (5th Cir. 2021). There have been several recent decisions on federal officer removals that are relevant to defense practitioners.

1. Appellate Review of Federal Officer Removals

On May 17, 2021, the Supreme Court issued its opinion in *BP P.L.C. v. Mayor & City Council of Baltimore*, 2021 WL 1951777 (U.S. May 17, 2021). The Court resolved a circuit split over the scope of appellate review of remand orders involving 28 U.S.C. § 1442, the federal officer removal statute.

Normally, 28 U.S.C. § 1447(d) bars appellate review of remand orders. However, the statute makes an exception for removals pursuant to 28 U.S. C. §§ 1442 and 1443, stating that such "order[s] remanding a case to the State court . . . shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). In cases where a defendant removes asserting several different bases for jurisdiction, one of which is the federal officer statute, there was a circuit split on the scope of appellate review under § 1447(d). Did the statute authorize the appellate court to review the correctness of the entire remand order, *see, e.g., Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015), or only the district court's ruling on the federal officer issue? *See, e.g., Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012).

The Supreme Court, adopting the position advocated by DRI in its *amicus* brief,[1] held that § 1447(d) authorizes appellate review of the *entire* remand order. *BP P.L.C.*, 2021 WL 1951777, at *4. The Court based its reading on the plain language of the statute, which authorizes appellate review of the *order* remanding the case. *Id.* Congress' use of this language, the Court held, meant that appellate courts were required the review the entire remand ruling as long as the defendant invoked § 1442 as one of the bases for removal jurisdiction. *Id.* The Court responded to the dissent's concerns about the frivolous invocation of § 1442 as a way to avoid the appellate review bar by pointing out that the district court and appellate courts could sanction litigants for such conduct. *Id.* at *8. The Court also noted that, even if this were a valid concern, it could not override the plain language Congress chose to use. *Id.*

2. "Related To" Actions Taken Under Color of Federal Office

In 2011, Congress passed the Removal Clarification Act, which modified the language of § 1442. Prior to the amendment, the statute allowed defendants to remove proceedings "for" acts under federal office. The amendment broadened the scope of the statute by allowing the removal of proceedings "for *or relating to*" acts under color of federal office. Pub. L. No. 112-51, § 2(b)(1), 125 Stat. 545, 545 (emphasis added).

Prior to the amendment, defendants seeking to remove pursuant to § 1442 had to show "that the acts for which they were being sued occurred at least in part 'because of what they were asked to do by the Government.'" *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015). After the amendment, several appellate courts recognized that the 2011 amendment broadened the scope of removal and permitted defendants to remove so long as the acts had some

[1] Available at https://www.dri.org/advocacy/center-for-law-and-public-policy/amicus/amicus-briefs/docs/default-source/amicus-briefs/2020/bp-p-l-c-et-al-petitioners-v-mayor-and-city-council-of-baltimore.

connection or association with the defendant's action taken under color of federal office. *Id.*; *Caver v. Cent. Alabama Elec. Coop.*, 845 F.3d 1135, 1144 (11th Cir. 2017); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017).

However, the Fifth Circuit continued to require defendants to show a causal nexus to remove under § 1442, despite several panels recognizing that this approach was inconsistent with the amended statute. *Legendre v. Huntington Ingalls, Inc.*, 885 F.3d 398, 403 (5th Cir. 2018) ("Although we are bound by our precedents, we note that other circuits have read the 2011 amendments to eliminate the old "causal nexus" requirement."). In *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020), the Fifth Circuit convened *en banc* to consider its precedents in this area. After analyzing the history of the § 1442 and the 2011 amendments, the Fifth Circuit discarded its "causal nexus" standard in favor of the broader standard enunciated by the Third, Fourth, and Eleventh Circuits. *Id.* at 296. Now, after *Latiolais*, defendants in the Fifth Circuit need only show that "the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Id.*

3. "Acting Under" a Federal Officer

Although a majority of appellate courts have reached the same results regarding the meaning of Congress' addition to § 1442 of the phrase "relating to," there is less certainty on what it means to "act under" a federal officer.

In *St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.*, 990 F.3d 447 (5th Cir. 2021), a hospital sued an insurance company alleging that the insurer failed to pay reasonable amounts for medical services. After discovery showed that some of the disputed claims involved patients insured under the Federal Employees Health Benefits Act (FEHBA), the insurer removed the case pursuant to § 1442. *Id.* at 450. The district court remanded the case after finding that the insurer was not "acting under" the federal government when allegedly misrepresenting the reimbursement amounts to the hospital. *Id.* at 453. The Fifth Circuit reversed. The Court explained that the "acting under" and connection inquiries are distinct and must be analyzed separately. *Id.* at 454. The acting under inquiry focuses on the "relationship between the removing party and the relevant federal officer, requiring courts to determine whether the federal officer 'exert[s] a sufficient level of subjection, guidance, or control' over the private actor." *Id.* at 455. Further, the "removing defendant need not show that its alleged conduct was precisely dictated by a federal officer's directive" to meet the acting under inquiry. *Id.* at 454. Based on the relationship between the insurer and federal office of personnel management, which subjected the insurer to OPM oversight, OPM regulatory requirements, the insurer's use of funds from the Treasury, and its ultimate responsibility to answer to federal government officials, the Fifth Circuit found that the district court erred in its ruling that the "acting under" requirement was not satisfied. *Id.* at 455.

Defendants have had less success in the Ninth and Tenth Circuits on this issue. As practitioners are no doubt aware, counties and municipalities across the country have filed a raft of lawsuits against energy companies asserting state-law nuisance claims based on their production of fossil fuels. In *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), the defendants removed one such lawsuit to federal court under § 1442. They asserted they were "acting under" the government because (1) one of the defendants, CITGO, had a contract with the Navy to supply fuel to naval bases for sale at service stations, (2) Chevron, another defendant, had a unit agreement with the Navy relating to oil exploration in the Elk Hills, and (3) the defendants all explored and produced oil and gas resources on the Outer Continental Shelf pursuant to lease agreements with the federal government. *Id.* at 600-02. The Ninth Circuit rejected each argument. First, it held CITGO's contract was an arm's-length commercial transaction that did not subject CITGO to the government's control. *Id.* at 601. For this same reason, the Ninth Circuit rejected the oil exploration agreement between Chevron and the government as a basis for removal. *Id.* at 602. Finally, the Court rejected the leases as a basis for finding the defendants were acting under the government because the "leases do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties." *Id.* at 602-03. The Court said "'the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more' cannot be 'characterized as the type of assistance that is required' to show that the private entity is "acting under" a federal officer." *Id.* at 603.

The Tenth Circuit also rejected defendant's argument that it was acting under the government based on lease agreements for oil exploration on the Outer Continental Shelf in *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020). In addition to adopting the Ninth Circuit's reasoning from *San Mateo*, the Tenth Circuit also held that "the OCS leases do not meet the "acting under" parameters because they do not call for production specially conformed to government use—the type of contract that 'involve[s] an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" *Id.* at 825.

From these three cases, it appears that a defendant seeking to show it "acted under" the government for a federal officer must show that it has a contractual relationship with the government. However, simple commercial transactions are not enough. The contract must require the defendant to produce something for the government or provide a service to the government that the government needs. Only then can a defendant be "acting under" the government for the purposes of removal.

B. Federal Question Removal – 28 U.S.C. § 1331

In response to another nuisance lawsuit based on greenhouse gas emissions by the City of Oakland and the City and County of San Francisco, the defendants removed to federal court alleging numerous bases for jurisdiction. *City of Oakland*

v. BP PLC, 969 F.3d 895, 902 (9th Cir. 2020). The district court denied remand, finding that it had jurisdiction under 28 U.S.C. § 1331 because the plaintiffs' state-law claims necessarily raised substantial issues governed by federal common law. *Id.* The district court then dismissed the case after finding that it lacked personal jurisdiction over some defendants, and the plaintiffs' complaint failed to state a valid claim for relief as to the others. *Id.* at 902-03.

On appeal, the Ninth Circuit reversed, holding that the well-pleaded-complaint rule prevented federal question jurisdiction. *Id.* at 906-08. First, the Ninth Circuit held that the plaintiffs' state-law nuisance claims "fail[ed] to raise a substantial federal question" because adjudicating the nuisance claims did not require the interpretation of a federal statute or the constitutionality of a federal statute. *Id.* at 906. Second, it found that the state-law claims were not completely preempted by the Clean Air Act. *Id.* at 907-08. Therefore, the Ninth Circuit reversed the district court's judgment and remanded the case to allow the district court to consider the defendants' other bases for jurisdiction.

C. "Snap" Diversity Removals – 28 U.S.C. § 1332

Section 1441(b)(2) prohibits diversity removals if "any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Relying on the plain meaning, which only prohibits removal if the forum defendant is properly joined *and served*, defendants have successfully removed cases to federal court before plaintiffs can serve the forum defendant. These "snap" removals have been approved by the Second, Third, and Sixth Circuits. *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 154 (3d Cir. 2018); *McCall v. Scott*, 239 F.3d 808, 813 n. 2 (6th Cir. 2001).

This year, the Fifth Circuit joined these circuits and held that "snap" removals are permissible. *Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc.*, 955 F.3d 482 (5th Cir. 2020). The Court recognized that the plain language of § 1441 only prohibited removals when the forum defendant had been served. *Id.* at 486. Further, it held that snap removals were not absurd, and thus this plain language controlled the outcome of the case. *Id.* "In statutory interpretation, an absurdity is not mere oddity. The absurdity bar is high, as it should be. The result must be preposterous, one that 'no reasonable person could intend.'" *Id.*

Given the current unanimity of the circuits and the language of the statute, it appears snap removals are now a well-established counterweight to toxic tort plaintiffs' attempts to avoid removal by suing a single forum defendant along with numerous out-of-state companies. Defense counsel should vigilantly monitor new filings so as to not miss an opportunity to take advantage of potential snap removals.