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DRI 2021 Toxic Torts and Environmental Law Virtual Seminar

Personal Jurisdiction and Removal – A Year (or so) in Review

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Personal Jurisdiction – general or specific?

- General jurisdiction
  - *Daimler v. Bauman,* 571 U.S. 117 (2014)
    - Principal place of business
    - State of incorporation

- Specific jurisdiction
  - Sufficient minimum contacts
  - "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.'" *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017).
  - **Outstanding issue: What level of contacts between a defendant and the forum state is needed for specific jurisdiction?**

The Ford Cases

- *Ford v. Montana Eighth Jud. Dist. Ct.*, 395 Mont. 478 (Mont. 2019)
  - Ford assembled car in Kentucky, then sold to dealership in Washington State. The dealership then sold car to Oregon resident, who later sold car to a purchaser who brought it to Montana
  - Ford moved to dismiss for lack of personal jurisdiction, arguing that there was no link between Ford's Montana contacts and plaintiff's claims
  - Trial court denied Ford's Motion to Dismiss, holding that Ford's general business in the state provided a sufficient connection between its conduct and the lawsuit

- *Ford v. Bandemer*, 931 N.W.2d 744 (Minn. 2019)
  - Ford car manufactured in Ontario, sold in North Dakota, and ultimately ended up in Minnesota after 17 years and several transactions on the used-car market
  - Ford moved to dismiss, arguing that the allegedly defective car was not designed, manufactured, or originally sold in Minnesota
  - Trial court denied Ford's Motion to Dismiss, using the "stream of commerce" theory

Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021)

HOLDING: Montana and Minnesota had personal jurisdiction over Ford

- "Minimum contacts" require that the claims "arise out of ***or relate to*** the defendant's contacts with the forum."
- Even though the Plaintiff's claims did not arise from (i.e., were not caused by) Ford's in-state activities, the claims were related to Ford's activities of advertising, selling, and servicing its cars in Montana and Minnesota
- SCOTUS found "a strong 'relationship among the defendant, the forum, and the litigation' – the 'essential foundation' of specific jurisdiction"

Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021)

TAKEAWAY: *Ford*'s "related to" standard unquestionably broadens the jurisdictional test. If considering a personal jurisdiction challenge, must consider both: (1) client's contacts with the forum state related to the transaction giving rise to the injury, and (2) but 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.

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Removal to Federal Court – 2020/2021 Updates

(1) Federal Officer Removal – 28 U.S.C. § 1442

(2) Federal Question Removal – 28 U.S.C. § 1331

(3) “Snap” Diversity Removal – 28 U.S.C. § 1441

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

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

2011 Removal Clarification Act

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

What does “for or relating to” mean?

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286 (5th Cir. 2020)

- Naval ship laborer with mesothelioma filed state court action against shipyard owner that built and refurbished naval vessels under contracts with the Navy, contracts which generally required it to use asbestos for thermal insulation, seeking to recover for shipyard owner's alleged negligence in failing to warn him about asbestos hazards and in failing to provide adequate safety equipment. Action was removed to federal court under the federal officer removal statute, and plaintiff moved to remand.
- **PROCEDURAL POSTURE**:
  - Shipyard owner removed to federal court under federal officer removal statute
  - District court remanded matter to state court, finding that the defendant filed to satisfy the "causal nexus" requirement
  - Shipyard owner appealed to 5th Circuit
  - 5th Circuit affirmed remand. However, the panel highlighted the tension between the amended statute and the 5th Circuit precedent, noting that **the "causal nexus" requirement "should be reconsidered *en banc* in order to align our precedent with the statute's evolution."** 918 F.3d 406, 412.
  - Shipyard owner applies for and the 5th Circuit grants rehearing *en banc.* 923 F.3d 427 (5th Cir. 2019).

Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286 (5th Cir. 2020)

HOLDING (*en banc*): In order to remove under the federal officer removal statute, defendants need only show that the "charged conduct is connected or associated with an act pursuant to a federal officer's directions.

- Overruled all precedent to the extent that the cases erroneously relied on "causal nexus" test after 2011 Amendment

"Henceforth, to remove under section 1442(a), a defendant must 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."** *Id.,* at 296.

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What does it mean to “act under” a federal officer?

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co., 990 F.3d 447 (5th Cir. 2021)

- Hospital sued an insurance company alleging that the insurer failed to pay reasonable amounts for medical services. After (apparently inadvertent) document production revealed that some of the disputed claims involved patients insured under the Federal Employees Health Benefits Act (FEHBA), the insurer removed the case under federal question jurisdiction and federal officer removal statute
  - In its petition, Hospital expressly waived "…and claims involving a federal officer," and any damages arising "from FEHBA-governed health benefit plans," and argued that its disclaimers meant that insurer could not have been "acting under a federal officer"
  - District court remanded the case, finding that the insurer was not "acting under" the federal government when allegedly misrepresenting the reimbursement amounts to the hospital
- Issues for the 5th Circuit:
  - (1) Is federal officer jurisdiction even implicated when a party expressly disclaims relief for claims involving federal officers/federal health benefit plans?
  - (2) If so, did district court err by concluding that the insurer was not "acting under" the federal government when it failed to pay certain amounts for medical services?

St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co., 990 F.3d 447 (5th Cir. 2021)

- 5th Circuit vacated the order and remanded back to the district court to determine on remand whether hospital's waivers defeated federal officer jurisdiction.
- 5th Circuit also held that the district court should revisit the post-*Latiolais* element of "connection," which may separately bear on the ultimate question of whether removal was proper
- Finally, the 5th Circuit held that the district court erred when it held that the insurer was not "acting under" the federal government when allegedly misrepresenting the reimbursement amounts to the hospital
  - The Court reasoned that 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"
  - 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 "acting under" requirement was satisfied

FOSSIL FUEL CASES - What does it mean to “act under” a federal officer?

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***Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020)**

- 10th Circuit adopts 9th Circuit's reasoning from *San Mateo*, and 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.'"

FOSSIL FUEL CASES – PLOT TWIST

- In both cases, the energy companies removed to federal court under several legal theories, including federal officer removal
- The 9th and 10th Circuits reviewed only those portions of the district court's remand order that dealt with federal officer removal
- SCOTUS vacated and remanded both matters back to the 9th and 10th Circuits for further consideration in light of *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S.Ct. 1532 (2021)

Appellate Review of Federal Officer Removals

- **GENERAL RULE**: 28 U.S.C. § 1447 bars appellate review of remand orders
- **EXCEPTION**: Orders remanding cases that were removed pursuant to 28 U.S.C. §§ 1442 (federal officer removal) and 1443 (civil rights statute), are reviewable on appeal
- **ISSUE**: Does 28 U.S.C. § 1447(d) authorize the appellate court to review the correctness of the **entire** remand order, or only the district court's ruling on the federal officer issue?
- **CIRCUIT SPLIT**:
  - U.S. 7th Cir.: § 1447(d) authorizes appellate review of the entire remand order, including the merits of *all* theories for removal that a district court has rejected (*Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015))
  - U.S. 8th Cir.: § 1447(d) authorizes appellate review of only the part of the remand order that rejects removal pursuant to § 1442 (*Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012))

BP P.L.C. v. Mayor & City Council of Baltimore, 141 S.Ct. 1532 (2021) – DRI AMICUS BRIEF

- § 1447's plain language (i.e., Congress's use of the word "order" in § 1447) calls for ***plenary review*** of orders remanding cases state court
- Other federal statutes using similar "order" language have been interpreted by the SCOTUS to authorize review of the *entire order*
- If Congress wanted to limit the scope of appellate review to only arguments for removal under §§ 1442 and 1443, it would have done so explicitly
- Appellate review of all grounds at issue in remand order is compatible with the public policy behind § 1447(d)
- The threat of sanctions under FRCP 11, FRCP 38, and § 1447(c) will prevent a flood of frivolous assertions of civil-rights or federal-officer removal statutes

BP P.L.C. v. Mayor & City Council of Baltimore, 141 S.Ct. 1532 (2021)

HOLDING: § 1447(d) authorizes appellate review of the **entire** remand order

- Plain language of statute authorizes appellate review of the *order* remanding the case
- Thus, 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

Federal Question Removal - 28 U.S.C. § 1331

***Cty. of Oakland v. BP PLC,* 969 F.3d 895 (9th Cir. 2020)**

- State law nuisance claim against energy companies, alleging that the companies' production and promotion of fossil fuels caused or contributed to global warming that induced sea-level rise
- Defendants removed to federal court under different several grounds, including that the public nuisance claim was governed by federal common law because it implicates "uniquely federal interests"
- District court denied remand, concluding that it had federal question jurisdiction under 28 U.S.C. § 1331 because the Plaintiffs' claim was "necessarily governed by federal common law"
- 9th Circuit reversed the district court's judgment and remanded the case to allow the district court to consider the defendants' other bases for jurisdiction
  - Plaintiff's state law nuisance claims "failed 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"

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"Snap" Diversity Removal - 28 U.S.C. § 1441

- Forum-Defendant Rule (28 U.S.C. § 1441(b)(2)) – prohibits diversity removal 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."
- Based on the plain language of the statute, defendants have successfully removed cases to federal court before the plaintiff can serve the forum-defendant
- "Snap removals" have been approved by the 2nd (*Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019)), 3rd (*Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 154 (3d Cir. 2018)), and 6th Circuits (*McCall v. Scott*, 239 F.3d 808, 813 n. 2 (6th Cir. 2001))

Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc., 955 F.3d 482 (5th Cir. 2020)

- Party to arbitration (Texas LLC) sued one out-of-state arbitration association, and two in-state arbitrators, alleging that they engaged in intentional and wrongful fraudulent conduct in connection with the arbitration proceedings. OOS defendant served with process and immediately removed the case to federal court under § 1331 before IS defendants were served
- **ISSUE**: Whether the forum defendant rule prohibits a non-forum defendant from removing a case when a not-yet-served defendant is a citizen of the forum state
  - District court denied remand, holding that removal prior to service on the nondiverse defendants was proper
- **HOLDING**: "Snap" removals are permissible
  - Plain language of § 1441 only prohibits removals when the forum defendant had been served
  - "Snap" removals are not "absurd" enough to ignore plain language of the statute

Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc., 955 F.3d 482 (5th Cir. 2020)

TAKEAWAY: "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


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