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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Recent Developments in Removal Jurisdiction

A number of recent U.S. District Court for the Southern District of New York decisions highlight the fine line straddled by the federal removal statutes between respect for the independence of state courts on the one hand, and protection of federal interests on the other. Generally, removal statutes are interpreted narrowly, with doubts resolved against removability out of recognition that removal implicates significant federalism concerns. Recent examples of this approach include Southern District Judge Sidney H. Stein's decision, sua sponte, to remand a case to state court because all defendants had not timely consented to removal, and a decision by Judge Louis L. Stanton remanding after finding that the value of the injunctive relief sought in a proposed consumer class action did not meet the $75,000 amount in controversy threshold. But, as the federal government increasingly directs the conduct of private entities through detailed regulation and close supervision, the federal officer removal statute, 28 USC §1442(a)(1), is gaining currency as a vehicle for defendants to remove cases to federal court that would not otherwise qualify for removal. In such cases, the courts take an expansive view of the statute, interpreting it broadly in order to give full effect to its protective purposes.

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The Federal Officer Removal Statute

A recent case in point is *In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*,[1] a consolidated multi-district litigation against manufacturers, distributors and sellers of gasoline containing the additive MTBE, alleging that MTBE had contaminated both private and public sources of drinking water. Plaintiffs in these actions asserted a number of claims, all arising under state law, including public nuisance, strict products liability, failure to warn, and violation of state environmental laws. Defendants removed to federal court, relying on, among other bases for removal, the federal officer removal statute, 28 USC §1442(a)(1). In finding that removal was proper in that case, Judge Shira A. Scheindlin placed §1442(a)(1) in the broader context of the overall removal scheme. She noted that the rules for removal are strictly construed, and that ordinarily, the determination of whether a claim arises under federal law must be made based on the "well-pleaded" allegations of the complaint, without consideration of potential federal defenses that might be raised by the defendant. The two exceptions to this general rule, she explained, are, first, the rare circumstance when a claim is so completely preempted by federal law that it can be said to "arise under" federal law for purposes of 28 USC §1441(b), and, second, when Congress has specifically provided for removal despite the absence of a federal claim.

The federal officer removal statute falls into the latter category. It provides for removal to federal court of an action commenced in state court against "any officer (or any person acting under that officer) of the United States or of any agency thereof, sued…for any act under color of such office…" The complaint in cases removed under this statute need not state a federal cause of action, but the action must still raise a question of federal law, and the federal question that provides the necessary Article III jurisdictional hook may be raised by the defense asserted in the removal petition.

Three Requirements for Removal

Judge Scheindlin listed the three requirements a private party must meet in order to remove a case under §1442(a)(1): (1) that it acted under the direction of a federal agency or officer; (2) that it has a colorable federal defense; and (3) that there is a causal nexus between the federal direction and the conduct in question. In contrast to the complete

preemption doctrine, which Judge Scheindlin recognized is to "be applied sparingly and with great restraint,"[2] she stressed that "[t]he Supreme Court has emphasized that the federal officer removal statute is neither narrow nor limited, and has rejected lower court interpretations that circumscribe its scope."[3]

In their notice of removal, defendants averred that they were required by the Clean Air Act and related regulations to use MTBE, because the Act requires that gasoline be blended with oxygenates that help fuel burn more efficiently, and MTBE was the only additive approved by the Environmental Protection Agency available in sufficient quantity to comply with those requirements. Judge Scheindlin held that this allegation, coupled with the allegation that Congress and the Agency were aware that the defendants would have to use MTBE, satisfied the requirement that defendants were acting at the direction of the Agency when they added MTBE to gasoline. She noted that her conclusion was supported by case law which broadly construes the circumstances under which a person is deemed to be acting under federal direction,[4] as well as by policy arguments based on the interference with the enforcement of federal law posed by a remand to state court. She stressed that this did not constitute the federalization of tort law because the exercise of jurisdiction in that litigation was not predicated on the fact that the defendants were subject to federal regulation, but rather that they took action at the express direction of the federal government which now forms the basis of these lawsuits.

The court went on to find that the defendants had asserted a colorable federal defense of "conflict preemption," which exists where it would be impossible to comply with both federal and state law, or where the state law at issue would obstruct the achievement of the full purposes and objectives of the federal law. Finally, the court found that the causal nexus between the plaintiffs' claims and the federal agency direction was clear, inasmuch as the defendants alleged that the federal government was intimately involved in their decision to add MTBE to gasoline.

In concluding that removal under the federal officer removal statute was appropriate, Judge Scheindlin declined to consider the other bases for removal advocated by defendants, including federal bankruptcy jurisdiction,[5] and jurisdiction based on a substantial federal question. She commented, however, that the defendants' argument based on the existence of a substantial federal question, predicated on the Supreme Court's decision in *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*,[6] was "troubling" in light of the Supreme Court's admonition against broad interpretations of that decision.

Rule of Unanimity

The expansive approach to federal jurisdiction under §1442(a)(1) taken by Judge Scheindlin in *MTBE Products Liability Litigation* stands in marked contrast to the more restrictive reading given other statutory bases for removal. For example, the requirement, known as the "rule of unanimity," that all defendants unambiguously consent, in writing, to removal has been strictly construed in favor of remand. Most recently, in a decision filed in *Smith v. Kinkead*,[7] Judge Robert W. Sweet remanded a motor vehicle accident case to state court after the corporate defendant filed a removal notice purporting to act on behalf of itself and the individual defendant.

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Judge Sweet noted that there are only three exceptions to the rule of unanimity: (1) when the non-consenting defendants have not been served with process at the time the removal petition is filed;[8] (2) when the non-consenting defendants are merely nominal or formal parties; or (3) when the removed claim is a separate and independent claim as defined by 28 USC §1441(c).

Here, because the individual defendant, who had been served with process, did not provide his own written consent to the removal, and was alleged to have been negligent in the ownership and operation of the vehicle during the incident which gave rise to the suit, the requirements of the rule of unanimity were not fulfilled and the case was remanded to state court.

Courts in the Southern District have gone even farther than courts in other jurisdictions in resolving doubts in favor of remand. Earlier this year, Judge Sidney H. Stein held in *Allstate Insurance Co. v. Zhigun*[9] that the court may raise the lack of unanimous consent to removal on its own motion pursuant to 28 USC §1447—the statute providing district courts with authority to remand cases that have been improperly removed. That provision provides that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under §1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Judge Stein recognized that both the U.S. Court of Appeals for the Sixth and Ninth Circuits have held that failure to comply with the rule of unanimity is a waivable defect that, in contrast to defects in subject matter jurisdiction, cannot be raised sua sponte under §1447.[10] He opted instead to follow prior decisions from the Southern District finding that the district court has the authority to order a remand within 30 days of the removal petition for procedural defects even absent a motion from another party.[11] He concluded that the statutory requirement in §1447 that remand for a procedural defect be made upon motion within 30 days of removal was satisfied in that case both by the court's order to show cause why the case should not be remanded for failure to comply with the rule of unanimity, as well as by the brief submitted by plaintiffs arguing in favor of remand.

Diversity Jurisdiction

Judge Louis L. Stanton's decision in *Dimich v. Med-Pro, Inc.*[12] addresses the question of how a court should calculate the value of injunctive relief sought when determining whether a case satisfies the $75,000 amount in controversy requirement for diversity jurisdiction under 28 USC §1332. The plaintiff in that putative class action filed suit in state court, asserting state law causes of action arising out of the defendants' alleged sale of counterfeit medication, seeking limited monetary damages and equitable relief in the form of a medical monitoring program. The defendants removed the action to federal court.

In granting the plaintiff's motion to remand, Judge Stanton stressed that the removing party bears the burden of establishing to a reasonable probability that the amount in controversy exceeds the jurisdictional limit, and that "[o]ut of respect for the independence of state courts, and in order to control the federal docket, federal courts construe the removal statute narrowly, resolving any doubts against removability."[13] He noted that the amount in controversy is measured by the value of the relief from the plaintiff's perspective rather than by the cost to the defendant, and that claims of multiple plaintiffs may only be aggregated when those plaintiffs unite to enforce a single right in which they have a common and undivided interest. Because the members of the putative class had used the allegedly counterfeit drug for differing periods of time, and would have different needs for medical monitoring and treatment, their interests in the proposed medical monitoring relief could not be aggregated. Turning to the determination of the value of the monitoring to the putative class members, Judge Stanton observed that the benefit of the proposed relief to any given member was too speculative to meet the removing parties' burden of establishing a reasonable probability that the claims exceed the statutory threshold. Accordingly, he granted the plaintiff's motion for remand.

28 USC §1446(b) provides that a notice of removal must be filed within 30 days after receipt by the defendant of a copy of "the initial pleading setting forth the claim for relief upon which such action or proceeding is based…" New York's CPLR §304, which provides that "[a]n action is commenced by filing a summons and complaint or summons with notice," has resulted in considerable litigation over when the 30-day period begins to run when an action is commenced by filing of a summons with notice. The U.S. Court of Appeals for the Second Circuit has held that a summons with notice may be considered an initial pleading for purposes of §1446 when it permits the defendant to "intelligently ascertain" removability, but when such document, on its face, does not allow the defendant to identify potential grounds for removal, the time to remove begins to run only upon service of the complaint.[14]

Applying this principle in *U.S.E. Productions, Ltd v. Marvel Enterprises, Inc.*,[15] Judge Victor Marrero determined that the notice of removal was premature because the basis for removability was not ascertainable from the face of the summons with notice. That document stated claims under state law only and identified one of the plaintiffs and defendants as residing in New York. The defendants' notice of removal asserted that the New York plaintiff had been fraudulently joined to defeat diversity jurisdiction, and that the only real party in interest was the London based plaintiff. Holding that removability is determined based solely on the face of the summons with notice, and not on what the defendants purport to know about the action, Judge Marrero concluded that removability could not be ascertained from the summons with notice, and remanded the action to state court.

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1. 2004 WL 515535 (SDNY March 16, 2004).

2. Id. quoting *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F3d 116, 123 n.5 (2d Cir 2003).

3. Id. citing *Willingham v. Morgan*, 395 US 402 (1969); *Arizona v. Manypenny*, 451 US 232 (1981). See also In re "Agent Orange" Product Liability Litig., 304 FSupp. 2d 442 (EDNY 2004).

4. Judge Scheindlin cited several cases that had surveyed the case law on this question, including *Bakalis v. Crossland Sav. Bank,* 781 FSupp 140 (EDNY 1991), which noted that the rule appears to be one of "regulation plus." *Quoting Ryan v. Dow Chemical Co.*, 781 FSupp. 934, 947 (EDNY 1992), she held that a defendant satisfies the requirement of acting under federal direction by showing that the acts complained of "were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations."

5. See Edward M. Spiro, "Worldcom: Jurisdiction, Case Management in Complex Litigation," New York Law Journal (Aug. 7, 2003). In that column, we discussed at length Southern District Judge Denise L. Cote's decision in *In re Worldcom, Inc. Securities Litigation*, 293 BR 308 (SDNY 2003), upholding removal pursuant to the bankruptcy removal statute, 28 USC §1452. She held that the state court plaintiffs' claims fell within the bankruptcy removal statute, and that the Securities Act of 1933's prohibition on removal must give way to the broader interests of bankruptcy removal jurisdiction. Recently, the Second Circuit affirmed Judge Cote's decision, ruling that claims brought under the Securities Act that are generally not removable, may be removed to federal court under the bankruptcy removal statute if they are related to a bankruptcy case. *California Public Employees' Retirement System v. Worldcom*, Inc., 2004 WL 1048203 (2d Cir May 11, 2004).

6. 463 US 1 (1983).

7. 2004 WL 728542 (SDNY April 5, 2004).

8. Southern District Judge Naomi Reice Buchwald recently issued a decision in *Edley v. Avis Rent A Car System, LLC*, 2004 WL 594917 (SDNYMarch 25, 2004), in which she declined to remand a case where one of the defendants had not consented to removal based on a finding that that defendant had not been properly served because the summons and complaint were mailed to the address where he had lived at the time of the accident, rather than to his current address, and had been returned to the plaintiff marked "unclaimed."

9. 2004 WL 187147 (SDNY Jan. 30, 2004).

10. Id. citing *Loftis v. United Parcel Service,* Inc., 342 F3d 509 (6th Cir 2003) and *Parrino v. FHP, Inc.*, 146 F3d 699 (9th Cir 1998). Additionally, he cited decisions from the Fifth, Seventh and Eleventh Circuits embracing the more general proposition that §1447 does not permit sua sponte remands for procedural failure during the removal process.

11. Id. citing *Soms v. Aranda,* 2001 WL 716945 (SDNY June 26, 1999); *Am. Home Assur. Co. v. RJR Nabisco Holdings Corp.*, 70 FSupp 2d 296 (SDNY 1999).

12. 304 FSupp. 2d 517 (SDNY 2004).

13. Id. quoting *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F2d 1043, 1045-46 (2d Cir 1991)(internal quotations omitted).

14. *Whitaker v. American Telecasting, Inc.*, 261 F3d 196 (2d Cir 2001).

15. 2004 WL 639616 (SDNY March 30, 2004).