Product Liability - USA

Applying the 'federal officer' removal statute

Contributed by **Arnold & Porter LLP**

September 06 2012

Authors

William H Voth

Joanna Hess

Introduction

The forum - federal or state court - can often be decisive in product liability cases. As the scope of government regulation and control of the economy increases, the possibility that a corporate defendant may be deemed to be acting under a federal agency in making or selling a product may provide a means to remove the entire litigation to federal court. This update reviews the main arguments and authorities for and against the application of this highly technical removal statute in particular situations, and offers some practical guidance. It also discusses certain clarifications in removal procedures that became effective on February 1 2012 as a result of congressional action.

Title 28, Section 1442(a)(1) of the United States Code provides the statutory basis for removal. In order to remove an action under this provision, a defendant must adequately allege, in a "short and plain statement" in its notice of removal, facts establishing that:

- it was "acting under" a federal officer or agency;
- a "causal connection" existed between the conduct that the plaintiff challenges and the official authority under which the party was acting; and
- a "colourable" federal defence exists.(1)

The US Supreme Court has made clear that:

> "*the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of [Section 1442(a)(1)]*'."(2)

'Acting under' requirement

The first of these elements, the 'acting under' requirement, has received the most judicial attention and is usually decisive in determining whether a removal will succeed. The typical case where a private defendant has been allowed to remove under the 'federal officer' statute has involved a government contractor - at least when the relationship between the contractor and the government is unusually close, involving detailed regulation, monitoring or supervision.(3) The rationale in such cases is that the private defendant is assisting a federal superior in carrying out its governmental tasks (eg, by producing a product that the government needs). However, even a government contractor will be unable to remove without sufficient showing of specific government direction and control with respect to the particular activity at issue.(4)

Where the private defendant is not a government contractor, allegations that its activities are subject to government regulation - without more - may not satisfy the 'acting under' requirement. For example, the requisite degree of government control was found to be lacking on the facts in *In re MTBE Products Liability Litigation*,(5) a case involving governmental regulation rather than provision of a product to the government pursuant to a contract. The Second Circuit assumed, for the purposes of its analysis, that removal would have been proper if the defendants had been compelled, by market forces of which the government was aware, to use a particular additive - methyl tert-butyl ether (MTBE) - in gasoline in order to comply with requirements of the Clean Air Act and its implementing regulations.(6) The Second Circuit noted that after oral argument in the appeal of the district court decision upholding removal, the district court, in a different

decision denying the defendants' summary judgment on the issue of pre-emption, held that the government did not require the use of MTBE.(7) The appellate court reviewed the specific allegations of the notices of removal and the materials submitted in support of the defendants' market compulsion theory, and concluded that the defendants had not satisfied the 'acting under' standard.(8)

Thus, in evaluating and litigating a removal under the 'federal officer' statute, a defendant should not base its argument exclusively on the fact that it is regulated by a federal agency or agencies, even if the regulation is highly detailed and the defendants are highly supervised and monitored. Rather, the defendant should seek to show facts which demonstrate that the government actually directed and controlled the specific conduct that is the alleged basis of liability in the lawsuit. This is most likely to occur where the defendant is providing a product to the government, or to a customer at the government's direction. It will be critical in such a case to indicate, in as much detail as possible, relevant specifications or other directives as to:

- how the product was to be made or packaged;
- what warnings, disclosures or other information was to be provided; and
- how the product was to be marketed, promoted or sold.

In the more difficult case where the defendant is not a government contractor, it should seek to show that it was acting under the federal government's direction and control in producing and selling a product in unique circumstances. An admittedly extreme example is the *de facto* federal command economy that existed during World War II and, to a lesser extent, has existed during other wars or emergencies.(9) The defendant should emphasise any authority that a federal agency has to impose penalties if its directives are not followed.

Causal connection

The second element of the removal statute is the requirement that the defendant show a "nexus" - that is, a "causal connection" - between the charged conduct and asserted official authority.(10) In assessing whether this element is satisfied, the courts "credit the [removing defendant's] theory of the case".(11) The "hurdle" presented by this requirement is "quite low".(12) Applied to non-governmental corporate defendants, it requires that "such entities must demonstrate that the acts for which they are being sued... occurred *because of* what they were asked to do by the Government".(13)

Federal defence

Finally, a defendant must raise a colourable federal defence, crediting the removing defendant's theory of the case.(14) The courts have imposed "few limitations" on what qualifies;(15) this element requires only that the defendant raise a claim that is "defensive" and "based in federal law".(16) The Second Circuit has held that the government contractor defence meets these requirements.(17) Similarly, the Sixth Circuit has held that the availability of the government contractor defence based on the performance of a non-military service contract - an issue of first impression in the circuit - was plausible, and accordingly the defendant had sufficiently alleged a colourable federal defence.(18)

Defendants that raise federal defences other than official immunity or the government contractor defence should be able to satisfy this prong of the removal statute under the *Mesa* and *Acker* standard, although these other defences appear not to have been tested in court.

Recent clarifications

Defendants that seek to remove under the federal officer removal statute should be aware of two procedural clarifications, which came into effect on February 1 2012, in the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (Public Law 112-63).

First, Congress has clarified the deadline for removal in multiple defendant cases. Previously, Title 28, Section 1446(b)(2)(A) of the code specified a 30-day period for "the defendant" to remove, but did not address multiple-defendant situations where defendants were served over an extended period. The courts were split on whether each defendant should be given 30 days to remove or whether the 30 days would begin running with the first-served defendant. The new removal statute - Section 1446(b)(2)(B) - resolves this circuit split by allowing each defendant 30 days from its own date of service to seek removal. Furthermore, the new Section 1446(b)(2)(C) allows earlier-served defendants to join or consent to removal by a later-served defendant, even if their 30-day period has expired.

Second, Congress has clarified that even where a claim is properly removed, unrelated state law claims will not be heard by federal courts. Before the amendment, some courts expressed concern about the constitutionality of Section 1441(c) because it could be read to allow the district court to exercise jurisdiction beyond that granted in Article III of the Constitution.(19) The new law requires that such unrelated state law

matters be remanded to state court:

> "*Upon removal of an action... the district court shall sever from the action all [claims not within the original or supplemental jurisdiction of the district court or which has been made nonremovable by statute] and shall remand the severed claims to the State court from which the action was removed.*"(20)

For further information on this topic please contact William H Voth or Joanna Hess at Arnold Porter LLP by telephone (+1 212 715 1000), fax (+1 212 715 1399) or email (william.voth@aporter.com or joanna.hess@aporter.com).

Endnotes

(1) See, for example, *Jefferson County, Alabama v Acker*, 527 US 423, 431 (1999) and *Mesa v California*, 489 US 121, 129 (1989).

(2) *Arizona v Manypenny*, 451 US 232, 242 (1981) (quoting *Willingham v Morgan*, 395 US 402, 407 (1969)).

(3) See, for example, *Bennett v MIS Corp*, 607 F3d 1076, 1086-88 (6th Cir 2010) (remediation of mould in airport control tower by Federal Aviation Authority contractors); *Isaacson v Dow Chemical Co*, 517 F3d 129, 136-37 (2d Cir 2008) (manufacture of herbicide Agent Orange); *Winters v Diamond Shamrock Chemical Co*, 149 F3d 387, 398-400 (5th Cir) (same), cert denied, 526 US 1034 (1998); *Ferguson v Lorillard Tobacco Co,* 475 F Supp 2d 725, 729 (ND Ohio 2007) (manufacture of evaporators used on Navy ships during World War II).

(4) See, for example*, Joseph v Fluor Corp*, 513 F Supp 2d 664, 672 (ED La 2007) (remand granted where procurement specifications showed Federal Emergency Management Agency "does not exercise any significant degree of control over the manufacturing of travel trailers" used as temporary housing after Hurricane Katrina).

(5) 488 F3d 112 (2d Cir 2007).

(6) *Id*, at 126-27.

(7) *Id*, at 126.

(8) *Id*, at 127-30.

(9) See *In re Nat'l Sec Agency Telecomms Records Litig*, 483 F Supp 2d 934, 943 (ND Cal 2007) (denying motion to remand state law privacy suits against telephone companies for alleged disclosure of California residential customers' calling records to National Security Agency (NSA) to create a database; based on facts as alleged in complaints, defendants voluntarily acted as agents for the NSA's purposes).

(10) See *Acker*, 423, 431; and *Willingham*, 402, 409.

(11) *Acker*, at 432.

(12) *Isaacson*, 129, 137.

(13) *Id*.

(14) *Acker*, 423, 431-32; *Mesa,* 121, 129.

(15) *Isaacson,* 129, 138 (rejecting argument that only "official immunity defences" qualify).

(16) *Id*, (quoting *Mesa*, 121, 129-30).

(17) *Isaacson*, 129, 139.

(18) *Bennett*, 1076, 1089-91.

(19) See *Salei v Boardwalk Regency Corp*, 913 F Supp 993, 1005, 1007 (ED Mich 1996).

(20) Section 1441(c)(2).

Online Media Partners