by Andrew E. Shipley and John F. Henault

Federal Officer Removal: The Misunderstood Removal Statute

Under the Federal Officer Removal statute, set forth in 28 U.S.C§ 1442(a)(1), a federal court has jurisdiction over a civil action that is directed at "[t]he 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."[1]

Government contractors have long used the "any person acting under" language of the statute to remove product liability claims from state to federal court, arguing that they manufactured the allegedly defective products pursuant to detailed specifications furnished by the U.S. government. The U.S. Supreme Court validated this use of the Federal Officer Removal statute in the seminal case *Boyle v. United Technologies Corp.*[2] The underlying rationale in *Boyle* is that the contractor, in manufacturing products pursuant to government direction, steps into the shoes of the sovereign and therefore enjoys sovereign immunity.

But government contractors seemingly have been loath to invoke the Federal Officer Removal statute in other contexts, perhaps because a small scattering of U.S. district courts have misinterpreted *Boyle* to mean that the statute should be narrowly construed when the underlying case does not implicate the government contractor defense or other examples of sovereign immunity. But the statute is not so narrow, and as this article demonstrates, applies with equal force to breach of contract claims that arise from governmental direction. Indeed, unlike the typical rule requiring federal courts to strictly construe removal statutes and "resolve all doubts about the propriety of removal in favor of retained state court jurisdiction,"[3] the Federal Officer Removal statute is broadly construed.[4] Moreover, unlike with other federal removal statutes, the removing party may seek an interlocutory appeal from an order granting plaintiff's motion to remand.[5]

But perhaps the most palpable benefit of invoking the Federal Officer Removal statute, as opposed to simply arguing that the case involves a federal question, is that the well-pled complaint rule does not apply. Under the well-pled complaint rule, a plaintiff enjoys the freedom to frame its claims as it sees fit; consequently, a complaint that alleges only state-law claims will not typically be removable on federal question grounds.[6] As the Supreme Court noted in *Caterpillar, Inc. v. Williams*, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[7] Thus, a "case may not be removed to federal court on the basis of a federal defense even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense at issue is the only question truly at issue in the case."[8]

In contrast, even if a state court complaint asserts only state-law claims, a defendant may be able to remove under the Federal Officer Removal statute if a colorable federal defense exists as to those claims.[9] As the Supreme Court observed in *Jefferson County, Alabama v. Acker*, the Federal Officer Removal statute is an exception to the well-pled complaint rule. Assuming the other elements of the statute are met, the federal question element is met if the defense to the state-law claim depends upon federal law.[10]

To successfully remove a state lawsuit under the Federal Officer Removal statute, a defendant must meet each of four elements: (1) that the defendant is a person; (2) that the federal government or federal officer directed the defendant to take action; (3) that the action was the causal nexus of the plaintiff's claim; and (4) that a colorable federal defense exists as to the claim.[11]

As to the first element, corporations are deemed persons for purposes of the statute.[12] To establish the second element, the defendant must establish that the federal government exercised "direct and detailed control" over the defendant's action.[13] This test is met by establishing "strong government intervention" and the threat that a defendant will be sued in state court "based upon actions taken pursuant to federal direction."[14] A specific instruction from a federal officer, or even detailed regulations or detailed specifications that compel specific and certain conduct, can satisfy this requirement.[15] But mere compliance with the "general auspices of federal direction" is not enough; otherwise, simply following statutory or regulatory requirements such as paying one's income taxes could be deemed sufficient.[16] The defendant satisfies the third element—causal nexus—by establishing that the allegations in the complaint arose from actions taken by the defendant pursuant to a federal officer's direction.[17] The fourth element—establishing a colorable federal defense—is the one that seems to give defendants the most pause.

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This pause seems to flow from unnecessarily equating the phrase "colorable federal defense" with the government contractor defense. The latter is but one—not the only—example of the former. As the U.S. Court of Appeals for the Second Circuit explained in *Isaacson v. Dow Chemical Co.*: "Courts have imposed few limitations on what qualifies as a colorable federal defense."[18] A colorable federal defense is one that is defensive, based in federal law, and arises out of the removing party's compliance with the demands of a federal officer.[19] The removing party need not prove that it will prevail on the defense, or even that it is meritorious—only that it is colorable.[20] "In construing the colorable federal defense requirement, [the Supreme Court has] rejected a 'narrow, grudging interpretation' of the statute."[21] Defenses including sovereign immunity, official justification, and reliance on regulatory prohibitions have been deemed sufficient to support federal officer removal.[22]

Despite the Supreme Court's clear and consistent instruction that the Federal Officer Removal statute must be broadly construed, a small handful of district courts have narrowly interpreted the statute when invoked by private parties. For example, in *Taylor v. Comsat Corp.*, the court held that the statute "must be strictly construed for the reason that the limited jurisdiction of federal courts 'is not to be expanded by judicial decree' since federal courts 'possess only that power authorized by [the] Constitution and statute.'"[23] The *Taylor* court cited with approval two other district court cases holding the statute "should be construed broadly only when the immunity of federal officers is at issue."[24]

Taylor and the few other cases that have imposed a heightened standard on private parties seeking to invoke the Federal Officer Removal statute found their justification in the Supreme Court case of *Willingham v. Morgan*.[25] In *Willingham*, the U.S. Court of Appeals for the Tenth Circuit ordered that a lawsuit brought by prisoners against a prison warden be remanded to state court. Although the warden asserted that he acted under color of office and thus enjoyed sovereign immunity, the Tenth Circuit held that his defense failed to meet the "colorable federal defense" standard. The Supreme Court reversed, stating that "[i]n fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court."[26] This quote seems to have taken on a life of its own and has been used out of context to argue that absent an immunity defense, the Federal Officer Removal statute should not be broadly construed. But this is not what the *Willingham* case says, nor has the Supreme Court ever endorsed such an interpretation.

In *Watson v. Philip Morris*, decided nearly 40 years after *Willingham*, the Supreme Court reaffirmed that the statute is to be read broadly and confirmed that it applies to private parties.[27] Nevertheless, some have argued that despite *Watson's* specific direction that the statute be liberally construed, the case supports a narrow interpretation of the statute. The *Watson* Court, however, simply noted that a broad reading of the statute is not the same as a limitless one. In *Watson*, plaintiffs sued Philip Morris in state court for fraudulently manipulating cigarette tests to obtain a low tar and nicotine result that could be used to market the cigarettes as "lite." Philip Morris argued in support of removal that the testing had been developed pursuant to U.S. Food and Drug Administration (FDA) regulations and, moreover, that the FDA had delegated to it the authority to test cigarettes on the government's behalf. As to the first argument, the Supreme Court found no evidence that the government had directed Philip Morris to test the cigarettes in the way that it did and went on to say that mere compliance with general government regulations does not rise to the level of government direction. As to the second argument, the Supreme Court noted that

it searched in vain for any evidence in the record of such delegation. It specifically noted that it did not even find a contract between the FDA and Philip Morris for such testing.[28] Thus, the Court found that Philip Morris could not satisfy the colorable federal defense prong of the statute. The Court never held, however, that only immunity defenses could meet this prong.

As the Second Circuit noted one year after *Watson*, "we find no support for the proposition that only 'official immunity defenses' satisfy the 'colorable federal defense' requirement."[29] In *Hagen v. Benjamin Foster*, the court extensively analyzed the "colorable defense requirement" with a particular look at cases that applied a heightened standard to private parties.[30] The *Hagen* court rejected such a two-class system for applying the Federal Officer Removal statute:

> [T]hough it is perhaps true that the defendants in this and similar cases are not "the paradigmatic federal officer" protected by Section 1442(a)(1), it is axiomatic that these defendants are nevertheless protected by the statute. After all, "[i]f the federal government can't guarantee its agents access to a federal forum if they are sued or prosecuted, it may have difficulty finding anyone willing to act on its behalf."[31]

"Critically, the Court's inquiry on this issue is not whether the defense will ultimately prevail, but only whether the defense is a 'colorable' one."[33] The court then found that Northrop Grumman had asserted:

> a colorable federal defense of official justification because Northrop Grumman avers it cannot be liable to CRGT if the Army Contracting Officer properly terminated the CRGT licenses. Northrop Grumman sets forth facts that its contract with the Army is subject to a clause provided within the Federal Acquisition Regulation which permits the government to terminate a contract for convenience, and additionally that its subcontract with CRGT incorporates that provision by reference. Whether Northrop Grumman's assertions about the subcontract are eventually declared meritorious is irrelevant at this stage, what matters is whether Northrop Grumman has set forth plausible facts that advance a colorable defense of official justification. Because Northrop Grumman's plausible assertions, if true, would render it an innocent intermediary and preclude CRGT's action for breach, Northrop Grumman has advanced a colorable federal defense.[34]

The court agreed with Northrup Grumman that all four prongs of the Federal Officer Removal statute had been met, identifying the colorable federal defense.

As the above demonstrates, the Federal Officer Removal statute is to be broadly construed when invoked by private parties, even where the colorable federal defense is something other than an immunity defense. Thus, the common perception that private parties may invoke the statute only when asserting the government contractor immunity defense is entirely misplaced. A defendant that can satisfy the four prongs of the statute may remove a case even when the claims sound only in contract.

In *CRGT, Inc. v. Northrop Grumman Systems Corp.*,[32] for example, Northrop Grumman successfully removed a breach of contract claim on the ground that it had been directed by the government to take the action that gave rise to the plaintiff's claim. CRGT, as a subcontractor to Northrop Grumman, provided licenses enabling the government to use certain software. After the government concluded that it had its own licenses for that software, it directed Northrop Grumman to terminate that part of the contract relating to software usage fees. In its motion to remand, CRGT argued that its allegations were directed only at Northrop Grumman, not the government; that its claims sounded only in state law; that Northrop Grumman had not identified a colorable federal defense; and that the removal statute was to be narrowly construed when invoked by private parties.

The court agreed with Northrop Grumman that all four prongs of the Federal Officer Removal statute had been met: (1) Northrop Grumman was a person under the statute; (2) it terminated the contract at the specific direction of a federal officer; (3) the termination gave rise to CRGT's claim; and (4) Northrop Grumman asserted a "colorable federal defense."

In identifying the colorable federal defense, the court stated:

As the court recognized in *CRGT*, the Federal Officer Removal statute is a different creature entirely than other removal statutes. It requires neither that a complaint allege federal questions of law nor that the court resolve doubts in favor of state court jurisdiction. As such, it offers a powerful tool for government contractors who prefer to litigate state-law claims in federal court when those claims arise from actions taken at the direction of the federal government. ⊙

Endnotes

[1]28 U.S.C. § 1442(a)(1) (emphasis added)

[2]487 U.S. 500 (1988).

[3]*Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)

[4]*Watson v. Phillip Morris Co.*, 551 U.S. 142 (2007).

[5]28 U.S.C. § 1447(d). The normal rule is that once a district court grants a motion to remand, it divests itself of jurisdiction over the case; therefore, there can be no appeal from that order. *Id.*

[6]Federal question jurisdiction is defined in 28 U.S.C. § 1331; removal is effected under 28 U.S.C. § 1441(a).

[7]482 U.S. 386, 392 (1987).

[8]*Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983)).

[9]527 U.S. 423 (1999). It is worth noting that cracks have started to appear in the seemingly absolute bar to federal question jurisdiction over complaints that plead only state-law claims. In *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005), the Supreme Court held that federal courts may entertain state-law claims that "turn on substantial questions of federal law,

and thus justify resorting to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."

[10]527 U.S. 423, 431 (1999).

[11]*Mesa v. California*, 489 U.S. 121, 124-25, 129-31, 134-35 (1989).

[12]*Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998).

[13]*U.S. Department of Envtl. Protection v. ExxonMobil Corp.*, 381 F. Supp. 2d 398, 404 (D.N.J. 2005).

[14]*Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *see also Winters*, 149 F.3d at 389.

[15]*Winters*, 149 F.3d at 399. In *Winters*, for example, the government required that Shamrock manufacture Agent Orange to the specifications set forth in the contracts and documents referenced therein. *Id.*

[16]*Pittsburgh Inst. of Aeronautics v. Allegheny County Airport Auth.*, 2008 WL 2456491, at *1-*2 (W.D. Pa. June 16, 2008).

[17]*Winters*, 149 F.3d at 398 (citing *Willingham v. Morgan*, 395 U.S. 409 (1969)); *Fung*, 816 F. Supp. at 572; *Mitchell v. AC&S, Inc.*, No. 04CV2713, 2004 WL 3831228, at *5 (E.D. Va. Dec. 15, 2004).

[18]517 F.3d 129, 138 (2d Cir. 2008).

[19]*Mesa v. California*, 489 U.S. 121, 129-30 (1989); *Arizona v. Maypenny*, 451 U.S. 232, 241 (1981).

[20]*Mesa*, 489 U.S. at 129.

[21]*Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan*, 395 U.S. 402 (1969)).

[22]*CRGT, Inc. v. Northrop Grumman Sys. Corp.*, No. 12-554, 2012 WL 3776369, at *2 (E.D. Va. Aug. 28, 2012) (citing *Willingham*, 395 U.S. at 406-07). Note: The authors of this article represented Northrop Grumman Systems Corporation in this matter.

[23]No. 05-0920, 2006 WL 3246508 (S.D. W. Va. Nov. 8, 2006) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)).

[24]*Id.* (citing *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 943 (E.D.N.Y 1992) & *Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1155 (D. Colo. 2002)).

[25]395 U.S. 402 (1969).

[26]*Id.* at 407.

[27]551 U.S. 142, 151 (2007).

[28]*Id.* at 156.

[29]*Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 139 (2d Cir. 2008).

[30]739 F. Supp. 2d 770 (E.D. Pa. 2010).

[31]*Id.* at 782 (quoting *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006)) (internal citations omitted).

[32]No. 12-554, 2012 WL 3776369, at *2 (E.D. Va. Aug. 28, 2012).

[33]*Id.*

[34]*Id.* at *3 (internal citations omitted).

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28 Attorneys General Reach Settlement With Caremark for Drug Switching Practices (Feb. 14, 2008), *available at* www.illinoisattorneygeneral.gov/pressroom/2008_02/20080214.html; Press Release, Attorney General McKenna Announces Caremark to Pay $41 Million, *supra* note 29.

[32]Consent Decree at 41, *State v. Caremark Rx, LLC*, No. 08-2-06098-5 (Wash. Super. Ct. Feb. 14, 2008), *available at* www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2008/CaremarkConsentDecree.pdf; Order Approving Entry of Assurance of Discontinuance, *In re Express Scripts, Inc.*, *supra* note 26.

[33]In the interests of full disclosure, Dan Gustafson, a founding partner of our firm, gave written and oral testimony to Congress concerning the antitrust implications of the merger of two leading PBMs—Express Scripts and Medco. In his role as an advisory board member of the American Antitrust Institute, he also co-authored a letter to the FTC with Albert Foer, AAI's president, urging the FTC to seek to enjoin the merger. The authors of this article helped Gustafson research these issues.

[34]Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 111-0210 (Apr. 2, 2012), *available at* ftc.gov/os/2012/04/120402expressmedcostatement.pdf.

[35]*National Ass'n of Chain Drug Stores v. Express Scripts, Inc.*, No. 12-cv-395 (W.D. Pa. filed Mar. 29, 2012), ECF Nos. 1 (Compl.), 60 (Order), 62 (Am. Compl.).

[36]For example, although whistleblower litigation involving the country's largest public pension fund, California Public Employees' Retirement System (Calpers), recently settled allegations that CVS Caremark engaged in fraud in contracts with Calpers, Calpers nonetheless signed a new three-year contract with CVS Caremark for $575 million per year. Marc Lifsher, *CalPERS Signs Pharmacy Benefits Deal With CVS Caremark*, L.A. Times, June 21, 2011, *available at* articles.latimes.com/2011/jun/21/business/la-fi-calpers-caremark-20110621. This evidence strongly suggests the ability of the large national PBMs to withstand potential competition from the second tier PBMs because large employers and unions are dependent on the full range of services that national full-service PBMs provide.

[37]Dissenting Statement of Commissioner Julie Brill Concerning the Proposed Acquisition of Medco Health Solutions Inc. (Medco) by Express Scripts, Inc. (ESI), FTC File No. 111-0210 (Apr. 2, 2012), *available at* ftc.gov/speeches/brill/120402medcobrillstatement.pdf.

[38]Andrew Ross Sorkin & Michael J. de la Merced, *Drug Benefit Unit in $4.7 Billion Deal*, N.Y. Times, Apr. 13, 2009, *available at* www.nytimes.com/2009/04/14/business/14deal.html.

[39]Kaiser Family Foundation, *Follow the Pill*, *supra* note 19, at 16.

[40]Jon Kamp, *Drug Plan Manager SXC to Buy Catalyst*, Wall St. J., Apr. 18, 2012, *available at* online.wsj.com/article/SB10001424052702303425504577351370169730892.html?mod=ITP_marketplace_1; *see also* Catamaran, *About Catamaran*, www.catamaranrx.com/about/; *Catalyst Health Stockholders Approves Merger With SXC Health*, RTT News, July 2, 2012, *available at* www.rttnews.com/1915840/catalyst-health-stockholders-approves-merger-with-sxc-health.aspx?type=qf.

[41]PPACA, H.R. 3590, § 6005, enacted as 42 U.S.C. § 1320B-23.