Contemporary Legal Notes

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

REMOVING LAWSUITS FROM STATE COURT: THE "FEDERAL OFFICER" OPTION

by
Katharine R. Latimer and Michael L. Junk
Spriggs & Hollingsworth

Washington Legal Foundation
CONTEMPORARY LEGAL NOTE Series
Number 54
December 2006

WLF'S LEGAL STUDIES DIVISION

The Washington Legal Foundation (WLF) established its Legal Studies Division to address cutting-edge legal issues by producing and distributing substantive, credible publications targeted at educating policy makers, the media, and other key legal policy outlets.

Washington is full of policy centers of one stripe or another. But WLF's Legal Studies Division has deliberately adopted a unique approach that sets it apart from other organizations.

First, the Division deals almost exclusively with legal policy questions as they relate to the principles of free enterprise, legal and judicial restraint, and America's economic and national security.

Second, its publications focus on a highly select legal policy-making audience. Legal Studies aggressively markets its publications to federal and state judges and their clerks; members of the United States Congress and their legal staffs; government attorneys; business leaders and corporate general counsel; law school professors and students; influential legal journalists; and major print and media commentators.

Third, Legal Studies possesses the flexibility and credibility to involve talented individuals from all walks of life - from law students and professors to sitting federal judges and senior partners in established law firms - in its work.

The key to WLF's Legal Studies publications is the timely production of a variety of readable and challenging commentaries with a distinctly common-sense viewpoint rarely reflected in academic law reviews or specialized legal trade journals. The publication formats include the provocative COUNSEL'S ADVISORY, topical LEGAL OPINION LETTERS, concise LEGAL BACKGROUNDERS on emerging issues, in-depth WORKING PAPERS, useful and practical CONTEMPORARY LEGAL NOTES, interactive CONVERSATIONS WITH, law review-length MONOGRAPHS, and occasional books.

WLF's LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "WLF" or by visiting the Washington Legal Foundation's website at www.wlf.org. All WLF publications are also available to Members of Congress and their staffs through the Library of Congress' SCORPIO system.

To receive information about previous WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, (202) 588-0302. Material concerning WLF's other legal activities may be obtained by contacting Daniel J. Popeo, Chairman.

ABOUT THE AUTHORS

Katharine R. Latimer is a partner with the Washington, D.C. law firm Spriggs & Hollingsworth. She has specialized in complex civil litigation, with an emphasis in toxic tort and pharmaceutical products liability defense, for 20 years. Ms. Latimer serves as national trial counsel, as regional trial counsel, and as MDL Defense Steering Committee member. Her major litigation wins include critical *Daubert* victories affirmed in federal courts of appeal and defense verdicts profiled in *The National Law Journal.* Her cases run the gamut of personal injury, from "impact" claims such as medical monitoring to serious latent disease and death, and they often involve novel "industry-wide" theories of recovery. Ms. Latimer is the Consulting Editor of BNA's *Expert Evidence Reporter* and is a member of LEXIS/Mealey's Toxic Torts Defense Advisory Council.

Michael L. Junk is an associate with Spriggs & Hollingsworth. Mr. Junk practices in the Firm's Toxic Torts & Products Liability and Pharmaceutical Products groups and specializes in the defense of complex serial and mass tort litigation. Working on behalf of the Firm's clients as part of their national trial and litigation teams, Mr. Junk has coordinated the defense of nationwide litigation with local counsel and other defense firms across the country.

REMOVING LAWSUITS FROM STATE COURT: THE "FEDERAL OFFICER" OPTION

by
Katharine R. Latimer
Michael L. Junk
Spriggs & Hollingsworth

Corporate defendants often perceive a state court venue as less favorable than its federal counterpart for myriad reasons that may include: differences in jury pools, a preference for appointed rather than elected judges, and variations in evidentiary or procedural rules. For these reasons and others, defense of corporate defendants haled before an unfavorable state-court venue often begins with an assessment of removal opportunities. One route to federal court that has become increasingly successful in recent years is removal based upon the "Federal Officer Removal Statute." Codified at 28 U.S.C. § 1442 under the heading "Federal Officers or Agencies Sued or Prosecuted," the Statute provides, in pertinent part:

> A civil action . . . 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.[1]

[1] 28 U.S.C. § 1442(a)-(a)(1).

Enacted in 1948, the Federal Officer Removal Statute is the most recent version of several such statutes historically designed "to protect federal officers from interference [in the performance of their official duties] by hostile state courts."[2] Early versions of the Statute allowed customs officers to remove civil and criminal proceedings brought against them in state court forums as an effort to thwart the federal officers' enforcement of unpopular trade embargoes with England. Later versions granted similar removal rights to federal tax collectors and officers of the IRS. In each instance, the Statute was intended to preserve federal supremacy and provide an unbiased, federal forum to hear the defenses of those federal officers who were brought before state courts and subjected to civil or criminal penalties simply for performing their duties at the behest of the federal government.

While some today might argue that the Statute is little more than an anachronism, modern courts clearly recognize the continuing vitality of the Statute and apply it in a number of contemporary settings. Modern courts interpreting the Statute have succinctly summarized the requirements for federal officer jurisdiction and removal as follows:

(1) The defendant must be a "person" within the meaning of the statute;

(2) The defendant must be either an officer of the United States or one of its agencies, or have been "acting under" the direction of such an officer;

---

[2] *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). *See also Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981) ("Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties. The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice. It also enables the defendant to have the validity of his immunity defense adjudicated, in a federal forum.") (citations omitted); *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 843 (S.D.N.Y. 1973) ("The purpose of § 1442(a)(1), whose ancestry is venerable, is to prevent federal officers or those acting at their direction from being held accountable in state courts for acts done within the scope of their federal duties.).

(3) The plaintiff's claims must have a causal nexus to the actions taken by the defendant under color of federal office or agency; and

(4) The defendant must have a colorable federal defense to the plaintiff's claims.[3]

Using these parameters, defendants have successfully invoked the Statute to obtain federal jurisdiction in asbestos, Agent Orange, tobacco, MTBE, and welding rod litigation – all situations where the defendants could assert that they were acting under, and that their products were manufactured and/or marketed according to the precise specifications of, a federal officer or agency.

Throughout each of these situations, however, federal courts have taken slightly different views on the scope and applicability of the Federal Officer Removal Statute. Careful analysis of the case law on federal officer removal, combined with careful factual analysis and preparation, is essential to successful removal under the Statute. What follows is a brief discussion of some of the salient features of this form of removal, along with a summary of how the federal courts have recently interpreted and applied the federal officer removal doctrine in the context of modern products liability actions.

* * * * * *

Notably, removal under the Federal Officer Removal Statute avoids some preliminary obstacles presented by various other removal scenarios. One immediate hurdle to removal is the fundamental maxim that removal statutes – and federal court

[3] *See, e.g., Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852, 855-56 (8th Cir. 2005); *In re Welding Rod Prods. Liab. Litig.*, No. 1:03-CV-17000, 2004 WL 1179454, at 8 (N.D. Ohio May 21, 2004); *Winters v. Diamond Shamrock Chem. Co.*, 901 F. Supp. 1195, 1197 (E.D. Tex. 1995); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1101 (D. Md. 1993); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 968 (D. Ariz. 1992).

jurisdiction, in general – must be strictly construed against removal. In the federal officer removal context, however, this principle is tempered by the Supreme Court's admonishment that "[t]he federal officer removal statute is not narrow or limited. Rather, the right of removal is absolute for conduct performed under color of federal office, and [the Supreme Court] has insisted that the policy favoring removal should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)."[4]

A "Liberal Interpretation" Often Affects Procedural Aspects of Removal under the Statute. The Supreme Court's liberal interpretation of the Statute affects several *procedural* aspects of removal, including the timeliness of removal under the Federal Officer Removal Statute.[5] Of course, 28 U.S.C. § 1446(b) sets a strict thirty-day timeline for removal, activated when the defendant receives the complaint or "other paper from which it may first be ascertained that the case is one which is or has become removable." The "other paper" trigger embedded in § 1446(b) is vital to federal officer removal, which, as noted above, is predicated upon a colorable federal *defense* to the plaintiff's claims and, thus, is not subject to the well-pleaded complaint rule.[6] As a result, a defendant contemplating removal based upon

---

[4]*In re Welding Rod Prods. Liab. Litig*., 2004 WL 1179454, at 7 (citations and quotations omitted). *See Durham v. Lockheed Martin Corp*., 445 F.3d 1247, 1252 (9th Cir.2006) ("We take from this history a clear command from both Congress and the Supreme Court that when federal officers and their agents are seeking a federal forum, we are to interpret section 1442 broadly in favor of removal.").

[5]*See Durham v. Lockheed Martin Corp*., 445 F.3d at 1253 ("[W]here the timeliness of a federal officer's removal is at issue, we extend section 1442's liberal interpretation to section 1446.").

[6]*See Jefferson Co., Alabama v. Acker*, 527 U.S. 423, 430-31 (1999) ("It is the general rule that an action may be removed from state court to federal court only if a federal district court would have original jurisdiction over the claim in suit. To remove a case as one falling within federal-question jurisdiction, the federal question ordinarily must appear on the face of a properly pleaded complaint; an anticipated or actual federal defense generally does not qualify a case for removal. Suits against federal officers are exceptional in this regard. Under the federal officer removal statute, suits against

the Federal Officer Removal Statute need not rush to remove a case within thirty days of merely receiving the plaintiff's complaint, when the grounds for federal officer jurisdiction and removal can be and generally are questionable. Instead, a defendant can – and arguably should – await disclosure of facts that clearly and unequivocally indicate a basis for federal officer removal and jurisdiction, and then remove the case within thirty days from the initial disclosure of those facts.[7] Sufficient facts providing a basis for removal often come from discovery of the plaintiff or from a co-defendant's responsive pleadings. Therefore, a defendant should remain vigilant in order to capitalize on the facts as they are disclosed.[8] A defendant should also remain

---

federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law.") (citations omitted); *Mesa v. California*, 489 U.S. 121, 136 (1989) ("The [Federal Officer] removal statute itself merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged."); *Durham v. Lockheed Martin Corp.*, 445 F.3d at 1253 ("Unlike other defendants, a federal officer can remove a case even if the plaintiff couldn't have filed the case in federal court in the first instance. And removals under section 1441 are subject to the well-pleaded complaint rule, while those under section 1442 are not.").

[7]*See Durham v. Lockheed Martin Corp.*, 445 F.3d at 1253 ("We therefore hold that a federal officer defendant's thirty days to remove commence when the plaintiff discloses sufficient facts for federal officer removal, even if the officer was previously aware of a different basis for removal."); *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) ("We disagree with cases from other jurisdictions which impose a duty to investigate and determine removability where the initial pleading indicates that the right to remove may exist. Rather, this court requires clear and unequivocal notice from the pleading itself, or a subsequent 'other paper' such as an answer to interrogatory."); *In re MTBE Prods. Liab. Litig.*, 399 F. Supp. 2d 356, 365 (S.D.N.Y. 2005) ("[B]ecause section 1446(b) requires that a defendant have notice of removability the trigger for removal occurs when the initial pleading or other paper contains unequivocal facts that alert the defendant to a claim of federal officer jurisdiction. Further, 'since removal statutes are construed in favor of remand, it [is] not unreasonable for defendants to refrain from filing a removal notice upon receipt of ... an ambiguous complaint.' Even a defendant who engages in extensive litigation in the state court cannot be barred from the right to remove in the absence of adequate notice.").

[8]Considering the timeliness of removal in *In re Welding Fume Products Liability Litigation*, for example, the court rejected the defendants' arguments that deposition discovery of the plaintiff first revealed a true basis for federal officer jurisdiction and removal. Instead, the court found that the affirmative defenses asserted within several co-defendants' pleadings provided adequate notice of a possible basis for federal officer jurisdiction and, thus, began 30-day timeline for removal. The court reasoned that "the defendants do not need to have *discovered facts* supporting their federal defense before removal is allowed or appropriate, they need merely have reasonable information or belief that the federal defense is available. Having included in their answers a colorable federal defense allowing

cognizant of the fact that federal officer removal can be effected even after other removal opportunities have been lost[9] and, at all times, without the consent of any co-defendants.[10]

Traditionally, Courts Are Less Inclined to Apply a "Liberal Interpretation" to the Substantive Scope of the Statute. Whether the same liberal interpretation of the Federal Officer Removal Statute endorsed by the Supreme Court impacts the *substantive* scope of the removal doctrine is a separate question altogether. Looking back to each of the requirements for federal officer removal enumerated above, a corporate defendant is clearly a "person" within the meaning of the statute.[11] Similarly, courts note that "the threshold is quite low" in terms of the defendant's ability to present a colorable federal defense to the plaintiff's claims,[12] because the defendant "need not win his case before he can have it removed."[13]

---

removal, the defendants cannot argue that removal was not proper until they later obtained 'another paper' providing clear factual support for that defense." *In re Welding Rod Prods. Liab. Litig.*, Case No. 1:03-CV-17000, Mem. & Order at 7 (N.D. Ohio Dec. 30, 2003) (O'Malley, J.) (emphasis in original).

[9]*See Durham v. Lockheed Martin Corp.*, 445 F.3d at 1253 ("We therefore hold that a federal officer defendant's thirty days to remove commence when the plaintiff discloses sufficient facts for federal officer removal, even if the officer was previously aware of a different basis for removal.").

[10]*See, e.g., id.* at 1253 ("Whereas all defendants must consent to removal under section 1441, a federal officer or agency defendant can unilaterally remove a case under section 1442."); *Akin v. Ashland Chem. Co.*, 156 F.3d at 1034 ("Federal officer removal constitutes an exception to the general removal rule under 28 U.S.C. § 1441 and § 1446 which require all defendants to join in the removal petition. . . . This statutory exception allows a federal officer independently to remove a case to federal court even though that officer is only one of several named defendants. The Congressional policy permitting federal officer removal could easily be frustrated by simply joining non-federal defendants unwilling to remove if consent of co-defendant(s) were required."); *Doe v. Kerwood*, 969 F.2d 165, 168 (5th Cir. 1992) (noting that "the ability of federal officers to remove without the consent of co-defendants is based on the language of the statute that gives them the right to remove").

[11]*See Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 945-47 (E.D.N.Y. 1992).

[12]*Watson v. Philip Morris Cos., Inc.*, 420 F.3d at 863. "Although the statute is silent, the Supreme Court has made clear that removal under section 1442(a) must be predicated on the averment of a colorable federal defense. . . . Because the purpose of the defense is to supply subject matter

Yet, "[n]otwithstanding its [otherwise] broad application, . . . the federal officer removal statute is predicated 'on the protection of federal activity and an anachronistic mistrust of state courts' ability to protect and enforce *federal* interests and immunities from suit, [and therefore] private actors seeking to benefit from its provisions bear a special burden in establishing the official nature of their activities.'"[14] This "special burden" borne by corporate defendants seeking to take advantage of the Federal Officer Removal Statute generally requires that the defendant muster evidence sufficient to support the second and third requirements for federal officer removal: namely, evidence that the defendant acted under a federal officer or agency, and evidence that the requisite causal nexus exists between that conduct and the plaintiff's claims. Ultimately, the question of whether a corporate defendant falls within the scope of the Federal Officer Removal Statute is often answered by the outcome of the court's analysis as to these two crucial factors.

In practice, courts often take a fairly restrictive view of the acting-under and causal-nexus factors. "[A] corporation attempting to avail itself of federal officer removal jurisdiction must show that, through its conduct giving rise to liability, it was so 'intimately involved with government functions as to occupy essentially the

---

jurisdiction, any federal defense will suffice. The Court set out the standard as 'colorable federal defense.' It did not-and has not-limited which federal defenses can be raised." *In re MTBE Prods. Liab. Litig*., 364 F. Supp. 2d 329, 334 (S.D.N.Y. 2004). "[N]othing in the statute itself or the case law supports . . . a narrow and grudging interpretation of the federal defense requirement. . . . when the party is an entity that has acted under the direction of a federal officer, it is logical to recognize other federal defenses because the situation may not fit the historical model. Accordingly, courts have recognized removable defenses other than immunity – for instance, the government contractor defense, self-defense, federal regulations under CERCLA, and preemption." *Id*. at 335-36.

[13] *Willingham v. Morgan*, 395 U.S. at 407.

[14] *Williams v. General Elec. Co.*, 418 F. Supp. 2d 610, 614 (D. Md. 2005) (quoting *Freiberg v. Swinerton & Walberg Property Svcs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Col. 2002)).

position of a [government] employee.' Put another way, a removing defendant must show that 'at all times' it was 'acting under express orders, control and directions of federal officers,' and that its 'involvement [in conduct giving rise to state-court liability] was 'strictly and solely at federal behest.'"[15] Thus, application of the federal officer removal doctrine is typically limited to situations where the defendant acted in conformance with precise specifications or regulations pursuant to a contract or a similarly formal agreement with or directive from a federal officer or agency. In such circumstances, defendants can establish the elements of governmental control and causal nexus necessary to invoke federal officer removal.

In the context of Agent Orange, for example, one court summarized the critical analysis as follows:

> We have previously noted the Supreme Court's admonishment that the statute's "color of federal office" requirement is neither "limited" nor "narrow," but should be afforded a broad reading so as not to frustrate the statute's underlying rationale. On the other hand, the Court has clarified that the right to removal is not unbounded, and only arises when "a federal interest in the matter" exists. The question we must determine is whether the government specified the composition of [the product at issue] so as to supply the causal nexus between the federal officer's directions and the plaintiff's [products liability] claims.[16]

From this starting point, the court ultimately found that the Statute justified removal of Agent Orange cases on the basis that the United States Department of Defense "had contracted with the chemical companies for a specific mixture of herbicides, which eventually became known as Agent Orange," and, further, "the government

---

[15] *Alsup v. 3-Day Blinds, Inc.*, Civ. No. 06-244-GPM, 2006 WL 1599842, at 5 (S.D. Ill. June 8, 2006) (citations omitted).

[16] *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d at 398.

maintained strict control over the development and subsequent production of Agent Orange."[17]

To some degree, the Agent Orange scenario has become the paradigm for modern-day federal officer removal (indeed, much the same type of analysis justified removal on federal officer grounds in the Welding Fume litigation[18]) and attempts to extend application of the Statute to situations beyond the formal federal contract/agreement context usually fail. Defendants attempting to employ the Statute to remove cases on the grounds that they operate under federal oversight within highly regulated industries – as is usually the case with prescription pharmaceuticals and medical devices – have received less than favorable results. The district court decision in *Parks v. Guidant Corporation* sets out the prevailing view on the courts' aversion to extension of the federal officer removal doctrine:

> To say the least, and for better or worse, we live in a highly regulated country. But mere participation in a regulated industry does not establish that a party is acting under the direction of a federal officer. Rather, a defendant seeking to remove pursuant to § 1442(a) must provide "candid, specific and positive" allegations that the conduct complained of was undertaken pursuant to the directions of a federal office or agency. In other words, the acts that form the basis of the state court suit must have been performed "pursuant to an officer's direct orders or to comprehensive and detailed regulations." Thus, absent a

---

[17] *Id.* at 398-99.

[18] "This is not a case where the federal shield that the defendants seek to raise is simply the presence of federal oversight. . . . In the instant case, the manufacturer defendants have adduced evidence that the welding rods they sold to the Navy, *pursuant to contract*, had to meet specifications promulgated by the Navy. . . . Nor is this a case where the federal specifications and contracts at issue are completely silent on the questions central to liability. . . . In this case, . . . the MIL specs provided by the defendants speak directly to the precise aspects of the welding rods that the plaintiffs allege caused their injury-the manganese content and warning labels. The factual basis for the defendants' military contractor defense is not so anemic that there is only a tenuous connection between the defendants' 'federally-colored' conduct and the plaintiffs' claims." *In re Welding Rod Prods. Liab. Litig.*, 2004 WL 1179454, at 12-13.

> showing that the complained of conduct is closely linked to detailed and specific regulations, a defendant will be unable to meet the first prong for private party removal - that the private party was acting under the direction of a federal officer.[19]

The court in *Parks* employed this rationale to deny removal of products liability claims involving a "Class III" medical device, finding that the defendant's proposed removal "analysis stretches the federal officer removal statute to its breaking point."[20] The court noted that if it were "to find this [medical device] case sufficient to invoke the federal officer removal statute, then there would be little to stop every medical device manufacturer – indeed, every drug manufacturer – sued in state court, and who cannot avail itself of diversity jurisdiction, from removing any garden-variety, products liability case to federal court. This would lead to an unprecedented expansion of federal jurisdiction. A plain reading of § 1442(a) does not support this construction, and we do not think this is what Congress had in mind when it enacted that statute."[21]

Despite the reservations expressed in the *Parks* decision, courts have increasingly recognized the applicability of the core principles of the federal officer removal doctrine to non-traditional scenarios. In *In re MTBE Products Liability Litigation*, for example, the action was removed to federal court on the defendants' allegations that Congress and the EPA, through amendments to and regulations issued in conjunction with the Clean Air Act, "effectively directed defendants to use,

---

[19]402 F. Supp. 2d 964, 967 (N.D. Ind. 2005) (citations omitted).

[20]*Parks v. Guidant Corp.*, 402 F. Supp. 2d at 968.

[21]*Id.*

manufacture and/or sell gasoline that contains MTBE."[22] The court noted that "[a]lthough there is no precise standard for the extent of control necessary to bring an individual within the 'acting under' clause, a cursory survey of the application of [section 1442(a)] reveals it has been construed broadly, and its 'persons acting under' provision particularly so."[23] In broadly construing the Statute, the court easily concluded that the "defendants ha[d] sufficiently alleged that they added MTBE to gasoline at the direction of the EPA, a federal agency," allowing for removal and federal court jurisdiction consistent with "the case law and the policies underlying the federal officer removal statute."[24] Interestingly, the court distinguished its decision from the "unprecedented expansion" scenario predicted by the *Parks* court, *supra*, as follows:

> Plaintiffs argue that a finding that defendants acted at the direction of a federal agency will "in effect, [ ] Federalize all tort litigation against manufacturers of products subject to Federal regulation-cigarettes, automobiles, pharmaceuticals, asbestos, and many other consumer and industrial products too numerous too mention." This argument is not persuasive. Defendants do not seek removal simply because gasoline is subject to regulation. Instead, defendants argue that the federal government required them to add MTBE to gasoline, the conduct upon which plaintiffs' claims are based. Thus, removal pursuant to section 1442(a)(1) is premised not on defendants' participation in a regulated industry, but rather the fact that defendants took actions at the express direction of the federal government, and those actions are the basis for the complaints. There is simply no reason to believe that this invocation of the federal officer removal statute will "[f]ederalize all tort litigation," because defendants in tort litigation do not typically assert that their actions were undertaken at the direction of the federal government.[25]

---

[22] *In re MTBE Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 151 (S.D.N.Y. 2004).

[23] *Id.* at 154-55 (citations and quotations omitted).

[24] *Id.* at 156.

[25] *Id.* at 156-57 (citations omitted).

Notwithstanding the court's explanation, the *MTBE* defendants could not show a contractual or other formalized relationship with Congress and the EPA, nor could they show a true directive issued by Congress or the EPA that specified the use of MTBE as a gasoline additive. Thus, the *MTBE* decision demonstrates the potential applicability of the federal officer removal doctrine beyond the typical Agent Orange paradigm.

More recently, the Eighth Circuit construed the Statute almost as broadly to uphold federal officer removal in a deceptive advertising case brought against Philip Morris.[26] There, the defendant tobacco company removed the case claiming that it acted under the direction of the Federal Trade Commission as a result of the FTC's extensive regulation and oversight in the marketing of "low tar" cigarettes. The Eighth Circuit affirmed the district court's decision denying remand, holding that the FTC's "comprehensive and detailed control" over the tobacco industry's marketing and promotion of "low tar" cigarettes rendered Philip Morris an agent acting under the direction of a federal officer within the meaning of the Statute.[27] Specifically, the court noted:

> [T]he FTC controls the delivery of tar and nicotine information to consumers. The FTC's ongoing monitoring of the cigarette industry far exceeds the monitoring in [the context of Agent Orange]. The government . . . monitored one small aspect of the Agent Orange creation and distribution process-the labeling of the containers. Here, the FTC itself conducted the entire testing process for twenty years and now requires the cigarette manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs,

---

[26]*See Watson v. Philip Morris Cos., Inc.*, 420 F.3d at 860 (giving the Federal Officer Removal Statute "a broad and liberal interpretation as we are required to do").

[27]*Id*. at 861.

> independently verify the results, and publish the ratings. In addition, part of the FTC's ongoing monitoring includes monitoring cigarette ads and occasionally bringing claims against companies for deceptive advertising.[28]

And, even though there was no formal contract compelling the tobacco company's compliance with the FTC labeling and testing specifications, the court was "convinced" that there was a "level of compulsion that establishes that [the defendant] was indeed 'acting under' the direction of a federal officer," in large part because "[t]he FTC effectively used its coercive power" to require the tobacco industry to agree to and comply with its specifications.[29] As with the *MTBE* decision, the court went to some lengths to limit the collateral effects of its holding, carefully explaining the uniqueness of the facts presented and noting that "every other district court confronted with tobacco companies alleging they were acting under a federal officer has remanded the case to state court."[30] A concurring opinion also "emphasize[d] that [the] decision . . . should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations," and that "in most instances, a contract, principal-agent relationship, or near-employee relationship with the government will be necessary to show the degree of direction by a federal officer necessary to invoke removal under 28 U.S.C. §

---

[28] *Id*. at 858.

[29] *Id*. at 859.

[30] *Id*. at 857.

1442(a)(1)."[31] Even so, the facts in *Philip Morris* are not so unlike the situation where FDA considers, negotiates, implements, compels, and ultimately monitors compliance with specific prescription drug labeling changes, for example – leaving open the argument that a plaintiff's failure to warn claims in an analogous scenario would be subject to removal under the Federal Officer Removal Statute.[32]

* * * * * *

While courts have historically limited application of the Federal Officer Removal Statute, recent decisions provide support for federal officer removal arguments in certain cases involving prescription pharmaceuticals, medical devices, pesticides, and other well-regulated industries. Corporate defendants should keep in mind that, because it is a removing defendant's burden to establish federal jurisdiction under the Federal Officer Removal Statute, courts will duly scrutinize a defendant's removal allegations. With federal officer removal in particular, a defendant must therefore be prepared to demonstrate the propriety of removal with substantial, affirmative evidence.[33] A defendant's burden is undoubtedly heavier in

---

[31]*Id*. at 863 (Gruender, J., concurring).

[32]*But see Alsup v. 3-Day Blinds, Inc.*, 2006 WL 1599842, at 9-11 (disagreeing with and distinguishing *Watson*, and remanding case removed on federal officer grounds by virtue of Consumer Product Safety Commission's involvement with window blinds industry); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig*., No. MDL05-1708, 2006 WL 1134766, at 3 (D. Minn. Apr. 27, 2006) (distinguishing *Watson* and remanding cases removed on federal officer grounds by virtue of FDA regulation of "Class III" medical devices); *Little v. Purdue Pharma, L.P.*, 227 F. Supp. 2d 838, 860-62 (S.D. Ohio 2002) (finding that pharmaceutical manufacturers are not acting under federal officers by virtue of their compliance with FDA regulation).

[33]*Compare Nesbiet v. General Elec. Co*., 399 F. Supp. 2d 205 (S.D.N.Y. 2005) (scrutinizing affidavits submitted in support of removal under Federal Officer Statute and allowing removal), *with Williams v. General Elec. Co.*, 418 F. Supp. 2d 610 (scrutinizing similar affidavits and ordering remand); *see Green v. A.W. Chesteron Co*., 366 F. Supp. 2d 149, 157 (D. Me. 2005) (noting that "the failure to incorporate as exhibits any of the actual . . . regulations or specifications that are referred to

situations that might be viewed as outside the traditional scope of the Federal Officer Removal Statute. In either case, careful analysis and preparation can help corporate defendants apply the Federal Officer Removal Statute to escape unfamiliar and often unfriendly state court venues.

in the affidavit [submitted in support of the defendant's notice of removal] and [which] are presently available to [the defendant] raises a real and significant concern").