



SEVENTH CIRCUIT APPROVES REMOVAL TO FEDERAL COURT OF ASBESTOS EXPOSURE SUIT AGAINST FEDERAL GOVERNMENT CONTRACTOR

The Seventh Circuit Court of Appeals has held that removal to federal court of an asbestos suit for liabilities based on products delivered to an agency of the United States government is appropriate. Companies that contracted with the military or other government entities should be cognizant of the opportunity to move their cases to federal court, where procedural protections may be more favorable than those provided in state court. Moreover, if a government contractor in a multi-defendant action successfully removes the case on the basis of federal-officer removal, the entire case is removed as to all defendants.

On November 30, 2012, the United States Court of Appeals for the Seventh Circuit decided *Henry Ruppel v. CBS Corporation*, No.12-2236. Jones Day briefed and argued the appeal on behalf of CBS. This decision marked the first federal appellate precedent on a question that had deeply divided federal district courts across the country for more than 20 years:

whether asbestos suits may be removed to federal court by government contractors who used asbestos in manufacturing products for the government. The court unanimously agreed with CBS that removal was proper under the federal-officer removal statute, 28 U.S.C. § 1442(a).

The *Ruppel* case began when the plaintiff filed, in Illinois state court, a state-law tort suit against CBS and a series of other defendants. The plaintiff alleged that he had developed mesothelioma as a result of exposure to asbestos, and that the defendants were liable for that exposure under various product liability theories. CBS was named in the suit as the successor to Westinghouse Electric Corporation, which manufactured equipment for the United States Navy many decades ago. Some of that equipment, including turbines for Navy vessels, incorporated asbestos. The plaintiff had served in the Navy and later worked in the shipbuilding industry; he alleged exposure to the asbestos in that equipment.

CBS removed the case to the federal district court for the Southern District of Illinois and invoked as its basis for removal the so-called federal-officer removal statute, found at § 1442(a) of Title 28 of the U.S. Code. That provision authorizes any “agency” or “officer” of the United States—and “any person acting under that officer”—to remove to federal court any suit against them that is “for or relating to any act under color of such office.” CBS contended that, as a contractor for the U.S. Navy, it was “acting under” a federal officer when it designed and supplied the relevant products to the Navy, and that the suit was premised on acts taken within the scope of its federal duties. Indeed, CBS intended to assert the federal-law defense of government-contractor immunity.

The district court rejected CBS’s arguments and remanded the case to state court. That decision was consistent with the approach taken by many district courts, which construed the removal provision narrowly when invoked by private parties. But, under a statutory amendment enacted in 2011, CBS was entitled to appeal that order. With representation from Jones Day, CBS filed an appeal, and the Seventh Circuit unanimously reversed the remand order, concluding that the case belonged in federal court.

The appellate panel held that CBS satisfied each element of the test for federal-officer removal. First, CBS counts as a “person” within the meaning of the statute. Second, CBS was “acting under” the Navy when it provided equipment to the Navy under government contracts. Third, the plaintiff’s suit arose from acts “under color” of federal office, because the design and supply of the asbestos-containing equipment was pursuant to government contracts. Fourth, CBS stated a colorable federal-law defense to the claims. In particular, CBS could plausibly assert government-contractor immunity with respect to the plaintiff’s “design-defect” theory of liability, as well as with respect to his “failure-to-warn theory” of liability. The court noted that the use of asbestos was mandated by military specifications, and that the Navy controlled the “content and placement” of any warnings affixed to the equipment. Even if the Navy did not specifically *prohibit* warnings about the health risks of asbestos, CBS could still invoke government contractor immunity to defend against claims that it should have provided those warnings unilaterally.

The *Ruppel* decision has important implications for government contractors and for defendants who are sued alongside government contractors (since successful removal by a government contractor removes the entire case as to all defendants). The court’s broad construction of the federal-officer removal statute implies that many tort suits against federal contractors can be removed to federal court, where more favorable procedural rules may apply. This precedent should cause district courts—even those outside the Seventh Circuit—to reconsider some of their decisions giving the removal provision a narrower and more grudging interpretation when invoked by private parties. Indeed, the Seventh Circuit expressly rejected these courts’ presumption against removal under such circumstances.

Moreover, the court’s discussion of federal government-contractor immunity offers a broad and helpful clarification as to the application of that immunity to failure-to-warn claims. Again, many district courts had imposed a high bar to such immunity in the failure-to-warn context, requiring that the federal government specifically and expressly prohibited the type of warning that would have satisfied state law. The Seventh Circuit expressly rejected that demanding test, and its ruling will therefore help to prevent plaintiffs from circumventing government-contractor immunity through creative pleading.

Given the number of asbestos suits being filed against military contractors and other companies whose business dealings with the federal government have resulted in asbestos personal injury claims, companies should explore with their defense counsel at the earliest possible opportunity whether removal papers should be filed. There are strict time limits to filing removal papers, so a prompt evaluation of the basis for removal is necessary.

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