

Rejecting Federal Officer Removal, Federal Court Remands Contamination Case to State Court

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On December 15, 2009, the U.S. District Court for the Southern District of Illinois remanded the case of *Custer v. Cerro Flow Products, Inc.*, No. 09-514-DRH, to State court, rejecting the defendants' purported removal to Federal court based on the Federal Officer Removal Statute.

The Plaintiffs filed a lawsuit in State court alleging that they suffered serious life-threatening illnesses, including cancer, or that they have suffered property damage, as a result of exposure to hazardous substances, including polychlorinated biphenyls ("PCBs"). The Plaintiffs alleged that those substances were wrongfully disposed at three sites near Sauget, Illinois and released into the environment.

The Defendants attempted to remove the lawsuit to Federal court (*i.e.*, the U.S. District Court for the Southern District of Illinois) based on the Federal Officer Removal Statute, 28 U.S.C. 1442(a)(1), which provides:

"A civil action or criminal prosecution 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 or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

The Defendants alleged that the PCBs produced at their facilities were part of a contract with the federal government to produce chemicals for the war effort. However, the Court found that federal officer removal did not apply

here and that the case should be remanded back to State Court. Specifically, the Court held that Defendants did not act under the direction of a federal officer:

"[N]one of the evidence submitted by Defendants shows the federal government ordered the Defendants to continue production of PCBs or that the government directed the Defendants in how to handle or dispose of the PCBs that they produced. Once again, the production of PCBs is not at issue in this case, it is the mishandling of PCBs which is the basis of Plaintiffs' complaint. Therefore, the Defendants have not demonstrated that the government directed Defendants in the handling of PCBs nor have they demonstrated that the production of PCBs forms the basis of the liability alleged in this action."

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