



SEVENTH CIRCUIT REVERSES REMAND ORDER IN REMOVAL BASED ON FEDERAL OFFICER REMOVAL STATUTE

***HENRY RUPPEL V. CBS CORPORATION*, --- F.3D ---, 2012WL5971242
(7TH CIR., Nov. 30, 2012)**

On November 30, 2012, the United States Court of Appeals for the Seventh Circuit reversed an order of the United States District Court for the Southern District of Illinois remanding an asbestos suit to Illinois state court. The suit alleged CBS' predecessor-in-interest, Westinghouse Corporation, caused Plaintiff Henry Ruppel's mesothelioma. Westinghouse included asbestos in turbines it supplied to the United States Navy, and Plaintiff Ruppel was allegedly exposed to the asbestos in these turbines during his Naval service and later when he worked on an aircraft carrier as a civilian. CBS removed the suit to federal court under the federal removal statute, 28 U.S.C. § 1442(a)(1), which permits removal where a defendant acted under a federal officer and has a colorable federal defense. In its notice of removal, CBS asserted it was entitled to governmental contractor immunity, which is a federal defense, because (1) it supplied asbestos under the Navy's direction and in accordance with detailed Navy specifications, (2) the Navy closely controlled the process, and (3) the Navy was aware of the alleged health hazards associated with the use of asbestos. Plaintiff Ruppel filed a motion to remand, which the District Court granted without giving CBS a chance to oppose the motion. According to the District Court, Ruppel had sued CBS only for failing to warn him about the dangers of asbestos for which, according to the District Court, there is no federal defense available.

The 7th Circuit reversed, holding that, irrespective of whether the claim is couched in terms of failure to warn or some other theory, CBS's entire relationship with Plaintiff Ruppel arose solely out of its duties to the Navy. Further, the Court held CBS had a colorable argument for application of the government contractor defense, which immunizes government contractors when they supply products with specifications approved by the government. Thus, since CBS made a sufficient showing that it acted under a federal officer or agency and that it had a colorable federal defense, it was entitled to remove the action.

In coming to its conclusion, the 7th Circuit laid out, procedurally, a defendant's required showing when asserting federal officer removal. To satisfy removal under Section 1442, a defendant must show: (1) it was a "person" (2) "acting under" the United States, its agencies, or its officers (3) that has been sued "for or relating to any act under color of such office," and (4) has a colorable federal defense to the plaintiff's claim.

The first requirement is relatively straight-forward and easily satisfied since "person" includes corporations. The "acting under" requirement means the defendant must have been engaged in an effort to assist or help carry out the federal actor's duties or tasks. In this case, the Court found CBS had satisfied this prong by putting forth evidence that it worked hand-in-hand with the government, assisting it in building warships. "Acting under" specifically covers situations where the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete. The "under color of federal authority" prong is satisfied if the defendant's relationship with the plaintiff derived solely from its official duties for the federal officer or agency. The Court found CBS satisfied this prong with evidence showing it acted under the Navy by installing turbines containing asbestos. This duty, in turn, gave rise to Plaintiff Ruppel's Complaint. Thus, the gravamen of the Plaintiff's claim occurred while CBS acted under color of federal authority.



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Finally, the colorable federal defense prong in this context involves showing that defendant has a colorable argument for application of the government contractor defense. In this case, Plaintiff Ruppel alleged claims based on both failure to warn of the dangers of asbestos and claims based on the use of asbestos in Westinghouse products. As to the claim based on the use of asbestos in its products, the Court found it was enough for CBS to show the Navy not only approved reasonably precise specifications, but also explicitly required the use of asbestos, making it impossible for CBS to have complied with the Navy specifications without the use of asbestos. CBS also provided evidence showing the Navy knew of all the hazards associated with asbestos such that there were no dangers in the use of the equipment which were known to CBS but not to the Navy. In other words, CBS's evidence tended to show CBS did not have superior knowledge in terms of the dangers involved in using the products it supplied. As to Plaintiff's failure to warn claim, the Court held CBS provided sufficient evidence tending to show each of the three elements necessary to assert the government contractor defense on such a claim: (1) that the US exercised its discretion and approved certain warnings, which went beyond merely rubber-stamping CBS's choices; (2) that CBS provided the government-required warnings; and (3) that CBS warned the Navy about dangers in the equipment's use that were known to CBS but not to the government (of which the Court found there were none).

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