Westlaw Journal
ASBESTOS
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 39, ISSUE 10 / MARCH 3, 2017

EXPERT ANALYSIS

Fifth Circuit Rejects Rigid Interpretation of Removal Statute in Asbestos-Liability Case

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When attempting to remove civil lawsuits from state to federal court, business defendants often must contend with not one, but two opponents.

One opponent, of course, is the plaintiff, who prefers the home cooking of a local judge and jury. The second opponent is the federal district court judge, who may be loath to inflate the size of his docket.

The US Court of Appeals for the Fifth Circuit late last month reversed one district court judge's crabbed interpretation of a removal statute which consigned an asbestos-liability defendant to the notoriously pro-plaintiff[1] Louisiana state courts.

The lawsuit underlying the Fifth Circuit's *Zeringue v. Crane Company*[2] decision is part of the "elephantine mass of asbestos cases"[3] that have plagued thousands of businesses for decades.

Zeringue claims that Crane and 20 other companies unlawfully exposed him to asbestos 65 years ago when he was serving in the Navy.

As is all too common in such suits, Zeringue fails to specify which of the 21 companies produced the asbestos that harmed him, or when the exposure actually occurred.

Crane Company removed the suit to federal district court under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1). Zeringue moved to remand back to state court.

Even though Crane had arguably met all of § 1442(a)(1)'s requirements, the trial court applied the statute narrowly and granted the plaintiff's motion. Crane appealed.

The federal-officer removal provision is available to government contractors such as Crane which, by manufacturing a product (in this case, asbestos-lined industrial valves) to a government client's precise specifications, constitutes a "person acting under [an officer] of the United States."

The Fifth Circuit agreed that Crane offered evidence sufficient to establish that it was acting under the Navy's direction.

Contractors also must show that they have a "colorable" federal defense in opposition to the plaintiff's state-law claims. Crane intended to invoke the "government contractor defense," which the court explained was "an extension of the immunity afforded to the federal government for the performance of discretionary actions."[4]

Contractors are immune from suit if the US provided precise design specifications, the product conformed to those specs, and the contractor warned the US about the product's dangers.[5]

Zeringue argued that in order to benefit from the federal-officer removal statute, Crane had to prove that it met each factor of the government-contractor defense.

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The Fifth Circuit responded that a defendant need not "win his case before he can have it removed,"[6] and held that Crane had provided sufficient information supporting a "colorable" government-contractor defense.

Finally, § 1442(a)(1) only allows for the removal of a state suit "for or relating to any act under color of such office." Courts have interpreted this to mean that government contractors must establish "a nexus, a 'causal connection' between the charged conduct and asserted official authority."[7]

On this question, the lower court accepted Zeringue's argument that Crane must show that it was acting under "precise federal direction," a standard the court concluded Crane could not meet.[8]

The Fifth Circuit held that Zeringue's construction was inconsistent with the plain language of § 1442(a)(1).

The term "relating to," the court explained, reflects that Congress intended the causal connection requirement to be construed broadly. Crane's relationship with the plaintiff "derives solely"[9] from the company's contract to provide valves to the Navy.

The court added "that official authority *relates to* Crane's allegedly improper actions, namely its use of asbestos in those parts."[10]

The federal-officer removal statute and the government-contractor defense share common purposes. Both protect the federal government and American taxpayers from the collateral costs of litigation against contractors.

If contractors could be hailed into state court and sued for damages related to products manufactured to government specifications, those contractors would either pass liability costs onto the governmental client or recede from contracting altogether.

In the latter case, government would then have to produce its own products, an outcome no taxpayer should welcome.

Zeringue should prove very useful not only to targets of asbestos litigation that are engaged in defense contracting, but also to other government contractors sued under state product-liability theories such as defective design.

It also is a further reflection that the Fifth Circuit respects the purpose of and need for federal removal. The decision comes a little less than a year after an *en banc* panel of the court decided in *Flagg v. Stryker Corp.*[11] that plaintiffs cannot defeat removal by fraudulently joining extraneous parties for the purpose of eliminating federal jurisdiction.

NOTES

1 *See* http://www.judicialhellholes.org/2016-2017/louisiana/.

2 846 F.3d 785 (5th Cir. 2017).

3 *Oritz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

4 *Zeringue,* 846 F.3d at 790.

5 For more on the government-contractor defense *see* Thomas J. LoSavio, *California Appeals Court Breaks with Ninth Circuit, Accepts Government-Contractor Defense in Asbestos Liability Suit*, WLF Legal Opinion Letter, Feb. 10, 2017 available at http://www.wlf.org/publishing/publication_detail.asp?id=2624.

6 *Zeringue,* 846 F.3d at 791.

7 *Id.* at 793 (citation omitted).

8 *Ibid.*

9 *Ibid.*

10 *Id.* at 794.

11 819 F.3d 132 (5th Cir. 2016).