

A Practitioner's Guide To Federal Officer Removal

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Federal officer removal is a doctrine for removing certain cases from state to federal court. It is available to federal officers or persons acting under them, including corporations. This article addresses the key issues involved in removing cases on federal officer grounds and discusses how to correct recurrent problems with defendants' removal pleadings on this significant removal ground.



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Background of the Federal Officer Removal Statute

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), permits removal by “any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office.” Removal is appropriate where a defendant can demonstrate that (a) it is a “person” within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a “colorable federal defense.”[1]

“[T]he Supreme Court has mandated a generous interpretation of the federal officer removal statute.”[2] In *Willingham v. Morgan*, the Supreme Court explained that “[t]he federal officer removal statute is not ‘narrow’ or ‘limited,’” but is instead “broad enough to cover all cases where federal officers can raise a colorable federal defense arising out of their duty to enforce federal law.”[3] The *Willingham* court found that “[o]ne of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts.”[4]

Congress amended § 1442(a)(1) in 2011 “to broaden the universe of acts that enable Federal officers to remove to Federal court,”[5] — providing that a suit can be removed to federal court not only if it is “for,” but also if it is “in relation to,” acts under color of office. Congress also created a new right to appellate review over remand orders based upon § 1442.[6]

Benefits of Federal Officer Removal

The purpose of the federal officer removal statute, Section 1442(a)(1), is to allow certain federal defendants to remove a case from state court to a less biased federal court. The doctrine also enables cases to be heard by federal judges, who typically have more experience with the types of key defenses

in such cases, including for example the government contractor defense, derivative sovereign immunity, and the political question doctrine. It also previews these key defenses for the court early on in the litigation. Unlike diversity and federal question removal, under federal officer removal, the removing defendant is not required to obtain the consent of the other defendants to remove the case.

Process of Removing Under Federal Officer Removal

The notice of removal must be filed within thirty days after service of the initial pleading, or if the case stated by the initial pleading is not removable, within 30 days after receipt of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable.[7]

Federal officer removal grounds are not always evident on the face of the complaint. Instead, particularly in military asbestos cases, the basis for removal will become evident upon receipt of interrogatory responses, deposition testimony, or “other papers” from the state court proceeding.

The Three Prongs of the Federal Officer Removal Test

Under the first prong of the test, a defendant must show that it is a “person” under the federal officer removal statute. It is settled law that corporations are considered “persons” within the meaning of the statute.[8]

The second prong of the test requires that a defendant demonstrate a “causal nexus” between the defendant’s actions, taken pursuant to a federal officer’s directions, and the plaintiff’s claims. This prong involves an analysis of “acting under” and the “causal nexus.” In *Watson v. Philip Morris Cos.*,[9] the Supreme Court found that “precedent and statutory purpose make clear that the private person’s ‘acting under’ must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior.”[10] The court explained that this will often involve the “delegation” of authority to act on the government’s behalf, and, further, a government contract is evidence of such delegation.[11] In *Isaacson*, the Second Circuit observed that the hurdle created by the “causal nexus” requirement “is quite low” and that “non-governmental corporate defendants ... must demonstrate that the acts for which they are being sued ... occurred because of what they were asked to do by the Government.”[12]

To satisfy the third prong, the defendant seeking removal must assert a “colorable federal defense.” “To be ‘colorable,’ the defense need not be ‘clearly sustainable,’ as the purpose of the statute is to secure that the validity of the defense will be tried in federal court.”[13] For example, in *Bennett*, the Sixth Circuit held that the government contractor defense was still “colorable” and “plausible” even though there was no circuit precedent extending the defense to nonmilitary performance contracts.[14]

Remedying Recurrent Problems in Federal Officer Removal Pleadings

The case law on the federal officer removal doctrine has been growing during the past 20 years. During this time, the purposes and application of this significant and unique removal ground have been misunderstood by both practitioners and courts. To remedy recurrent problems in federal officer removal pleadings, defendants should consider the following recommendations:

1. When removing on federal officer grounds, defendants often get lost in the technical issues surrounding the removal of a state case to federal court, and the need to ensure that the statutory prerequisites are satisfied. While those requirements are important, the key to federal officer removal

lies in the substance of the doctrine.

2. Defendants and courts focus far too much on the “colorable federal defense.” This requirement is meant and explicitly stated to be “colorable.” The focus on this prong of the defense is entirely misplaced. If a defendant can assert a plausible federal defense — particularly if there is support throughout the country for a defense in similar situations — that should be more than sufficient under the statute. Defendants should emphasize the “colorable” nature of this requirement and the history and purpose of federal officer removal.

3. Defendants are almost always able to connect the claims brought against them to the activities they performed at the direction of a federal officer, and as such the “causal nexus” per se is not the key to federal officer removal. Much of the case law makes clear that the “causal nexus” itself is not difficult to satisfy. Within the “causal nexus” prong, however, is the critical analysis of whether the defendant was “acting under” a federal officer. The “acting under” analysis is the key to federal officer removal. Defendants should focus on this “acting under” element, which requires showing that they were acting at the direction of a federal officer when they allegedly performed negligently or recklessly.

4. Defendants too often fail to support their removal pleadings with documentary and testimonial evidence. Such support is critical to showing the “acting under” connection between the defendant and the federal government, and it also helps demonstrate that the defendant has a colorable federal defense, such as the government contractor defense. This evidence is also very important for purposes of any later appeal.

In sum, federal officer removal is a significant removal ground with a strong history and purpose. By drafting removal pleadings with these recommendations in mind, defendants can assist courts in properly applying this important removal doctrine.

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[1] *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)).

[2] *Id.* at 1252.

[3] 395 U.S. 402, 406-07 (1969) (citation omitted).

[4] *Id.* at 407.

[5] H.R. Rep. No. 112-17, pt. 1, at 6 (2011).

[6] See 28 U.S.C. § 1447(d), amended by Pub. L. No. 112-51, 125 Stat. 545.

[7] 28 U.S.C. § 1446(b).

[8] See, e.g., *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (“We have previously held that corporate entities qualify as ‘persons’ under § 1442(a)(1).”); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008) (“the term ‘person’ [in § 1442(a)(1)] includes corporate persons”); *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010) (same).

[9] 551 U.S. 142 (2007).

[10] *Id.* at 152 (emphasis in original).

[11] See *id.* at 156.

[12] *Id.* at 137 (emphasis in original); *Bennett*, 607 F.3d at 1088.

[13] See *Isaacson*, 517 F.3d at 139) (citing *Willingham*, 395 U.S. at 406-07).

[14] 607 F.3d at 1090 (“it is at least plausible that the government contractor defense could apply outside the military procurement contract context because the Supreme Court noted that the origins of the defense, at least in part, were based upon a case that immunized a private contractor from liability arising out of its performance of a public works project”).