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# An Inventive Way To Remove Pure State Court Claims

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There is widespread belief among private defense counsel that federal courts can provide a favorable forum for corporate defendants. Federal courts may afford defendants an escape from plaintiffs' strategically chosen forums and the related risk of excessive jury awards in many state courts, and, in many cases, can save defendants time and money through stricter, more cost-effective discovery rules and more efficient dispute resolution. As a result, when initially presented with state court actions, defense counsel's initial reaction is often, "How do we get into federal court?"

At the same time, plaintiffs generally seek to avoid federal courts, and tend to plead facts and claims against certain defendants with the goal of eliminating the possibility of federal jurisdiction. And if defendants nevertheless seek removal to federal court, plaintiffs often request remand of the action to their chosen state court forums, thereby triggering critical battles as to where the disputes will be litigated.

Given the significance of the forum in any litigation, defendants seeking to secure federal jurisdiction must be alert to strategies to get to — and remain in — federal court. In the usual case, defendants will remove an action to federal court, or oppose motions to remand, on the grounds that the court has federal question or diversity jurisdiction. But what, if anything, can defendants do when faced with a state court case in which no federal question or complete diversity exists, or when faced with an argument in a motion to remand that seems to conclusively dispose of the issue giving rise to federal jurisdiction? Is there ever a circumstance in which defendants can secure federal jurisdiction despite the apparent absence of federal question or diversity jurisdiction?

The Westfall Act, codified at 28 U.S.C. § 2679, a long-valued resource by U.S. Attorneys, can be an immensely valuable tool even for private defendants and their counsel to secure federal jurisdiction in cases that otherwise lack federal question and diversity jurisdiction. The Westfall Act becomes relevant in a specific class of cases where a federal actor is sued directly or could in good faith be sued by a defendant through a third-party complaint. This circumstance can occur in a variety of situations, such as medical malpractice cases involving a medical provider employed by a federally funded entity, a business tort case alleging tortious interference with existing contracts and/or business relationships by

a federal employee or a premises liability case where the facts support a claim against a federal employee.

In such cases, regardless of whether the federal employee is a direct or third-party defendant, the representative U.S. Attorney, acting on behalf of the Attorney General, can certify under § 2679 that the federal employee was acting within the scope of his office or employment at the time of the complained-of conduct. Removal is then permitted under § 2679 or under 28 U.S.C. § 1442 — the federal officer removal statute — and the nondiverse defendant facing purely state law claims will go along for the ride.

The Westfall Act's value to nonfederal corporate defendants and their counsel becomes clearer after removal following a determination by the district court that the certification was erroneous or that dismissal of the claims against the federal employee is warranted for any reason. Such rulings seemingly would reduce the case to one involving purely state law claims between nondiverse parties and effectively eliminate federal jurisdiction, thus necessitating remand, correct? Actually, wrong.

The most useful language in the Westfall Act for defendants and attorneys seeking to secure federal jurisdiction renders remand in such cases not only preventable, but arguably prohibited. With regard to § 2679(d)(2) certifications, the statute states that "[t]his certification of the Attorney General *shall conclusively establish scope of office or employment for purposes of removal*." (Emphasis added.) On its face, this language may resolve the question of remand in the case of removals supported by § 2679(d)(2) certifications by directing that the certification conclusively establishes for the purposes of removal the only requirement for federal officer removals — that the federal employee's complained-of conduct occurred within the scope of his or her federal office or employment.

Though seemingly clear on its face, § 2679(d)(2) was the subject of an important dispute in Osborn v. Haley, wherein the U.S. Supreme Court set out to determine whether the statute bars remand even if the federal court determines, postremoval, that the certification was incorrect.

In Osborn, the plaintiff sued a federal employee in Kentucky state court alleging that the employee tortiously interfered with her employment with a private contractor and conspired to cause her wrongful discharge, and further alleging that such conduct was outside the scope of the employee's federal employment. The representative U.S. Attorney issued a § 2679(d)(2) certification and removed the case to the U.S. District Court for the Western District of Kentucky. Accepting the plaintiff's allegation that the conduct occurred outside the scope of the federal employee's office, the district court entered an order rejecting the U.S. Attorney's certification and remanding the case to state court.

After the Sixth Circuit vacated the order and instructed the district court to retain jurisdiction, the Supreme Court affirmed, holding that § 2679(d)(2) certifications are "conclusive for purposes of removal (i.e., once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to state court."). In so holding, the court reasoned that if a district court was able to remand a removed action on the ground that the certification was erroneous "the final instruction in § 2679(d)(2) would be weightless" as the "scope certification would supply only a tentative basis for removal, rather than a conclusive one."

Nevertheless, in the aftermath of Osborn, some courts have recognized ambiguity in the court's language as to whether the prohibition on remand following certification is limited only to cases where the district court rejects the certification or whether it applies to all cases removed under § 2679(d)(2). One district court rejected the notion that Osborn prevents remand of any case certified under §

2679(d)(2), instead concluding that Osborn held only that "district courts have no authority to return cases to state courts based on *the district court's disagreement with the Attorney General's scope-of-employment determination*." (See Salazar v. PCC Cmty. Wellness Ctr.) (Emphasis in original.) Consequently, the Salazar court remanded a medical malpractice action after the plaintiff voluntarily dismissed the federal employee, leaving only state law claims and nondiverse parties, reasoning that to retain jurisdiction of a case where "[a]ny federal question that may have arisen pursuant to the certification is no longer outstanding ... would allow ... access to the federal courts by haphazardly naming a federally funded defendant as a party to the action, only to ensure that the government will initially certify the matter."

By contrast, the Eastern District of Virginia later rejected the Salazar Court's reasoning, stating that the fact that certification was not contested was "immaterial, for Osborn holds that § 2679(d)(2) provides a conclusive basis for federal subject matter jurisdiction in all cases, regardless of whether certification is ultimately upheld." (See Kebaish v. Inova Health Care Servs., 731 F. Supp.2d 483, 487 (E.D. Va. 2010).) Thus, the court held that subject matter jurisdiction remained despite the facts that the federal defendant was dismissed, the remaining claims arose solely under state law, and the remaining parties were all Virginia citizens.

While there exists a risk that federal district courts might reach a Salazar-like, result-oriented conclusion, counsel should nevertheless be prepared to utilize this basis to assert or preserve federal jurisdiction under Kebaish's broader application of § 2679, as foreshadowed by Osborn. Thus, nondiverse state court defendants facing purely state law claims that seek to secure federal jurisdiction should undertake a diligent investigation to determine whether a good faith basis exists to pursue a third-party action against a federal actor and trigger the representative U.S. Attorney's certification and removal. If so, the U.S. Attorney may issue a § 2679 certification to remove the action to federal court and, at that point, plaintiffs may nevertheless be forced to proceed with their state law claims in federal court.

Following § 2679 certifications, defendants should rely upon § 2679 to contend that remand is impermissible, regardless of the disposition of the certification and/or claims against the federal actor. In multiparty cases, counsel should also consider employing this strategy as good-faith leverage to encourage dismissal of their clients by advising opponents of their intent to obtain federal jurisdiction where appropriate. Ultimately, the Westfall Act constitutes yet another weapon in defendants' and attorneys' arsenals either to obtain or protect federal jurisdiction and, in the appropriate case, can allow parties to dispense with unnecessary expenditures of time and resources developing strategies to remove cases or prevent remand that are less likely to succeed.

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