Forum Shopping Through Federal Agent Removal Jurisdiction and CAFA

Corporate America's Quest for a Uniform Tort Forum

By Gregory T. Gibbs

Judge shopping conjures up unseemly images like the "dons" in *The Godfather* complaining that Don Vito Corleone should share control of his judges with them. Justice is not supposed to be for sale. Impartiality is so important that there are rules not only requiring actual impartiality but also the preserving of its appearance.[1] Yet attorneys often express a preference for a particular judge on a particular issue, believing they will have a better result.

Political groups shop by packing judicial forums with judges of their preferred ideology. In the 1930s, Franklin D. Roosevelt introduced legislation designed to pack the Supreme Court, claiming it would allow the court to "function in accord with modern necessities."[2] In the 1980s, the Reagan administration's insistence on judicial nominees following "judicial restraint" philosophy generated claims of "conservative court packing."[3] Recently, religious groups upset by establishment clause decisions lobbied for legislation confining establishment clause litigants to a state judicial forum.[4] When litigants choose forums packed with a desired point of view, forum shopping becomes judge shopping. In 26 of the last 38 years, Republican administrations appointed federal judges.

While judicial integrity, lifetime tenure, and the requirement of Senate approval go a long way toward preserving the integrity of our federal judiciary, some litigants believe they have an edge in federal court. This is especially true when the litigation involves ideologically driven issues. Most federal practitioners would disagree with the premise that a federal judge's decisions can be consistently predicted on the basis of which party appointed the judge. However, at least one study found a statistical correlation between a federal judicial appointee's decisions on ideological issues and the appointing party.[5] Accordingly, it is not surprising that some litigants view the federal courts as the preferred place to shop for a judge with their point of view.

Litigants cannot automatically choose a federal forum. Article III, Section 2 of the United States Constitution limits jurisdiction. Federal courts are empowered only to hear cases within the judicial power of the United States as defined and entrusted by Congress. It would be an unconstitutional invasion of powers reserved to the states if federal courts entertained cases outside their jurisdiction.[6] Another principle of federalism allows states to fashion their own substantive tort law and requires federal courts to follow the substantive law of the forum state when it

Tort Reform ogy

applies.[7] Therefore, shopping for a federal forum should not be of vital interest to either side in a tort case. Yet there is a trend for some tort defendants sued in state courts to shop for a federal forum.

The Washington Legal Foundation (WLF), which espouses a "free enterprise" ideology, advocates expanding federal jurisdiction for corporate defendants sued in tort.[8] The WLF claims that federal forums protect non-residents from "local prejudice."[9] Logic dictates that the claim centers on the perceived prejudice of the "local judiciary" as opposed to prejudice of the "local citizenry," because federal statute requires federal jurors be from the state from which the action is removed.[10]

The American Tort Reform Foundation (ATRF) claims to "educate the general public on how the American justice system operates" with an annual report identifying "judicial hellholes," defined as "venues where judges systematically apply laws and court procedures in unfair and unbalanced ways generally against defendants in civil suits."[11] The ATRF says the term "judicial hellhole" entered the vernacular through President George W. Bush's exposé of state court litigation abuse, and its report aided the passage of the Class Action Fairness Act (CAFA).[12] The ATRF organization advocates expansion of federal control of litigation through adoption of a proposed federal law known as the Lawsuit Abuse Reduction Act (LARA). Ironically, ATRF says LARA provides a federal solution to "forum shopping," which it claims is a primary cause of judicial hellholes.[13] Of course, one litigant's heaven may be another litigant's "hellhole." For example, ATRF describes the Michigan Supreme Court as a bright light exception to the morass of judicial hellholes in other states.[14] However, others criticize the Michigan Supreme Court's perceived bias in favor of big business and insurance companies.[15] Some tort defense firms have followed the WLF and ATRF lead by claiming they can get federally regulated defendants a fairer shake by removing their tort suits to federal court through federal agent removal jurisdiction or CAFA.[16] This article examines this trend, how removal and CAFA are used to forum shop, and the impact an expansion of federal jurisdiction will have on our federal system.

Removal and Federal Agent Jurisdiction

Removal is the process by which a defendant petitions a federal court to assume jurisdiction over an action pending in state court. Under the general removal statute,[17] a defendant may remove an action from state to federal court only when the federal court has original jurisdiction, such as when there is diversity of citizenship, a federal question, or other statutory grounds.[18] Asserting a defense to a suit arising under state law based on federal law does not ordinarily provide grounds for removal.[19] Therefore, removal is not automatically available to a federally regulated corporate tort defendant when there is no diversity of citizenship or federal question.

The Federal Agent Removal Act[20] permits officers or agents of the United States to remove a case pending against them in state court to federal court. The historical basis for removal was to protect federal officers from hostile state authorities who sought to prevent enforcement of unpopular federal laws.[21] The supremacy clause provides the constitutional basis for removal.[22] Accordingly, the Supreme Court has limited federal agent removal to matters in which there is a federal legal issue.[23]

A defendant seeking federal agent removal must meet three criteria: (1) the defendant must have acted under the direction of a federal officer or a federal agency, (2) there must be a causal nexus between the federal directive and the defendant's conduct at issue, and (3) there must be a colorable federal defense.[24]

Corporations sued in state court under state product liability law for injuries involving their federally regulated products have petitioned for removal under the federal agent removal statute, claiming they are "acting under" directions of federal officers or agencies. Attempts to remove the tort suits had limited success

FAST FACTS:

Some corporate defense counsel who liken state courts to "judicial hellholes" are shopping for a federal forum to litigate state tort claims by using the federal agent removal statute or the Class Action Fairness Act.

Use of removal procedures to avoid state courts should be viewed with suspicion because it can be tantamount to judge shopping and contrary to basic principles of federalism.

before the act was amended to allow federal agencies to petition for removal.[25] In *Ryan v Dow Chemical Co,* the court held that corporations can be persons within the meaning of 1442(a), but denied removal because it did not find that Dow Chemical was "*acting under*" federal officials in producing Agent Orange. The product at issue was developed without direct government control, and the defendant determined the manufacturing process.[26] However, *Fung v Abex Corp*[27] held that Westinghouse was a federal agent acting under control of the secretary of the navy when it exposed workers to asbestos during submarine construction. The court found direct control in *Fung* because, unlike the *Ryan* case, the government contracted for certain specifications; controlled construction, design, and testing; monitored performance; mandated revisions; performed trials; and approved results.[28]

Following an amendment to 1442(a) allowing federal "agency" in addition to federal officer removal, corporations increased their efforts to use the Federal Agent Removal Act to shop for a federal forum, arguing that they only needed to show the control of an agency, instead of a federal officer. This effort has had mixed results.

Proponents of expanded federal jurisdiction over state tort claims through federal agent removal rely on case law broadly construing the "acting under" requirement.[29] Private corporations were held to be federal agents in a suit alleging an oil corporation's additive contaminated groundwater.[30] The litigation expanded the meaning of "acting under" set forth in *Ryan*. The defendants argued that Environmental Protection Agency (EPA) regulations created a situation requiring the use of the additive "MTBE" to blend oxygenates into gasoline because, although other additives existed, MTBE was the only oxygenate available in sufficient quantities to comply with the regulations. They also claimed that both Congress and the EPA were aware they would be forced to use MTBE to comply with federal requirements. Plaintiffs argued acceptance of defendant's claims would federalize all tort actions against federally regulated industries.[31] The court found the "acting under" element was satisfied and allowed the private corporations to be removed as federal agents.

Other attempts to federalize private industry to shop for a federal forum for tort claims under the federal agent removal statute have been unsuccessful. In *Little v Purdue Pharma,*[32] the court distinguished between conforming to federal regulations and complying with federal directives. In *Little,* plaintiffs sued multiple defendants on the theory that they engaged in wrongful conduct in the manufacture, marketing, promotion, sale, and distribution of the drug OxyContin. One party attempted to remove the action to federal court, arguing the courts had held that entities subject to "complex regulations" did qualify for federal officer removal. The court disagreed, distinguishing the instant case from other cases involving publicly financed entities or entities that had a contractual relationship with the federal government, holding that because the defendants were operating on their own initiative without a duty to act, removal was unavailable.

At least one study found a statistical correlation between a federal judicial appointee's decisions on ideological issues and the appointing party. Accordingly, it is not surprising that some litigants view the federal courts as the preferred place to shop for a judge with their point of view.

Expansion of Federal Jurisdiction Through CAFA

It used to be very difficult to remove a class action arising under state tort law to federal court. The lack of complete diversity between the defendants and the plaintiffs was fatal to removal. CAFA eliminates jurisdictional hurdles to removal of class actions to the federal courts. CAFA eliminates the requirement that all plaintiffs be citizens of states different from all defendants, and that each putative class member have individual claims totaling over $75,000. Removal is now permitted if any putative class member and any defendant are citizens of different states, and the aggregate amount in controversy exceeds five million dollars.[33] The right to remove is not absolute, as a court may decline to exercise jurisdiction if more than one-third but less than two-thirds of the members of the proposed class and the primary defendant are citizens of the state in which the action was originally filed. It may also decline to exercise jurisdiction over a class action in which more than two-thirds of

the proposed plaintiff class and the primary defendants are citizens in the state in which the action was originally filed. Finally, the ninth circuit strictly construed CAFA to find that even if the aggregate claims exceed $5,000,000, at least one of the plaintiff's claims must exceed $75,000 before removal is appropriate.[34]

Conclusion

It is ironic that the political party advocating state's rights over federal supremacy has created a federal judiciary perceived to be so appealing on issues involving private enterprise that corporate America strives to expand federal jurisdiction to shop for a federal forum in lieu of state court.[35] Those advocating expansion claim that removal is necessary to avoid local prejudice, but the claim is nothing more than a justification for judge shopping, since the argument is tied to their critical view of the judicial philosophy of the state "judicial hellholes," rather than local jurors.

Urging an overly broad interpretation of federal statutes to forum shop may irreparably damage our federal system. The long-term result of expansion could be federalization of state tort law, which is contrary to a state's rights philosophy. The federal judiciary's resources are being "stretched to the limit."[36] Allowing corporate interests to stretch the resources further not only violates the constitution, it constitutes corporate welfare by diverting scarce federal resources to subsidize corporate interests. Therefore, longstanding authority promoting strict construction of removal statutes and viewing removal attempts with suspicion[37] should remain the rule of law, and attempts to expand federal jurisdiction beyond its proper limit should be rejected. ■

Gregory T. Gibbs has been an attorney in private practice for 30 years. He served as chair of the Federal Practice Committee of the Genesee County Bar Association. He earned his B.A. with distinction in 1973 and J.D. cum laude in 1976 from Wayne State University Law School. Law students Sarah Kaye Conklin of Michigan State University School of Law and Alec Scott Gibbs of University of Pacific McGeorge School of Law assisted with this article.

FOOTNOTES

1. Code of Judicial Conduct, Canon 6.
2. Kline, *Revisiting FDR's court-packing plan: Are the current attacks on judicial independence so bad?,* 30 McGeorge L R 863, 911 (1999).
3. Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* (New York: Charles Scribner's Sons, 1988), pp 48–49.
4. Letter from Donald E. Wildmon, founder and chairman, American Family Association, July 3, 2006, available at <http://www.xanga.com/MikeAtMVNU> (accessed January 6, 2007).
5. Sunstein, *Ideological voting on federal courts of appeals: A preliminary investigation,* 90 Va L R 301, 304 (2004).
6. Wright, *Law of Federal Courts* (St. Paul, Minn: West Publishing Co., 3d ed, 1977), p 17.
7. *Erie R Co v Tompkins,* 304 US 64; 58 S Ct 817; 82 L Ed 1188 (1938).
8. Statement of Richard A. Samp, chief counsel, Washington Legal Foundation, House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, Hearing on Federal Judicial Code Revision, available at <http://judiciary.house.gov/media/pdfs/samp111505.pdf> (accessed January 6, 2007).
9. *Id.*
10. 28 USC 1861 provides that the federal jury shall be selected from the community in which the district court convenes.
11. American Tort Reform Association, *Judicial Hellholes* 2006, pp 4–5, available at <http://www.atra.org/reports/hellholes/report.pdf> (accessed January 6, 2007).
12. *Id.* at 4.
13. *Id.* at 46.
14. *Id.* at 42.
15. Landay, "The Federalist Society: The Conservative Cabal That's Transforming American Law," *Washington Monthly,* March 2000, available at <http://www.washingtonmonthly.com/features/2000/0003.landay.html> (accessed January 6, 2007).
16. Wesser, *Federal Courts/Removal: "Federal Agent" Jurisdiction,* available at <http://www.morankikerbrown.com/CM/Articles/federal_agent_removal.asp> (accessed January 6, 2007).
17. 28 USC 1441.
18. 28 USC 1332 (diversity); 28 USC 1331 (federal question); 28 USC 1442 (removal by federal officers or agents); 28 USC 1443 (removal of civil rights cases); 28 USC 1444 (removal of foreclosure actions against the United States).
19. *Franchise Tax Bd v Construction Laborers Vacation Trust,* 463 US 1; 103 S Ct 2841; 77 L Ed 2d 420 (1983).
20. 28 USC 1442.
21. *Ryan v Dow Chemical Co,* 781 F Supp 934, 941–43 (ED NY, 1992).
22. *Willingham v Morgan,* 395 US 402, 406; 89 S Ct 1813; 23 L Ed 2d 396 (1969).
23. *Mesa v California,* 489 US 121; 109 S Ct 959, 966–67; 103 L Ed 2d 99 (1989).
24. *Jamison v Purdue Pharma Co,* 251 F Supp 2d 1315, 1326 (SD Miss, 2003).
25. *Nebraska Dep of Social Services v Bentson,* 146 F3d 676, 678 (CA 9, 1998).
26. *Id.* at 950.
27. *Fung v Abex Corp,* 816 F Supp 569, 572–73 (ND Cal 1992).
28. *Id.* at 572. See *Pack v AC & S, Inc,* 838 F Supp 1099 (D Md, 1993) for similar result.
29. *Gurda Farms, Inc v Monroe County Legal Assistance Corp,* 358 F Supp 841, 844 (SD NY 1973).
30. *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation,* 342 F Supp 2d 147 (SD NY, 2004).
31. *Id.* at 156.
32. *Little v Purdue Pharma,* 227 F Supp 2d 838, 861–62 (WD Ohio, 2002).
33. 28 USC 1332 (d)(2)(A).
34. *Abrego v Dow Chem Co,* 443 F3d 676 (CA 9, 2006).
35. Gingrich, et al., *Contract with America* (New York: Times Books, 1994), p 196.
36. McFadden, *Removal, remand and reimbursement under 28 U.S.C. § 1447(c);* 87 Marq L R 123, 128 (2003).
37. *Id.* at 123.