Products Liability Law Daily Wrap Up, JURISDICTION—CHEMICAL PRODUCTS—N.D. Ill.: City of Chicago's suit against oil companies for allegedly concealing climate change harms is remanded to state court, (May 20, 2025)

Products Liability Law Daily Wrap Up

By Nicholas Kaster, J.D.

The court, however, declined to award the City fees and expenses.

A federal district court in Illinois has granted a motion brought by the City of Chicago to remand to state court its product liability suit alleging that fossil fuel companies concealed and misrepresented the impact of their products on climate change. The court found that the companies failed to satisfy three out of four elements for federal officer removal (*City of Chicago v. BP P.L.C.*, No. 24-cv-02496 (N.D. Ill. May 16, 2025)).

Background. The City of Chicago sued oil companies BP P.L.C., BP America Inc., BP Products North America Inc., Chevron Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, ConocoPhillips, Phillips 66 Company, Phillips 66, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Shell Oil Products Company LLC, Shell PLC, Shell USA, Inc., and their primary trade organization, the American Petroleum Institute, alleging that they misrepresented and concealed information about their fossil fuel products in violation of numerous state laws and various state common laws. The City alleged that, for decades the fossil fuel industry has misled consumers and the public about climate change.

The City sued the companies in state court, alleging causes of action for strict products liability, failure to warn; negligent products liability, failure to warn; negligence; public and private nuisance; civil conspiracy; unjust enrichment; consumer fraud; misrepresentations in connection with sale or advertisement of merchandise; and recovery of City costs. The companies removed the case to federal district court. The City now moved to remand the case back to state court, arguing that the federal court lacked subject matter jurisdiction.

Federal officer removal statute. The companies asserted that the federal district court has subject matter jurisdiction pursuant to the federal officer removal statute. The federal officer removal statute permits a defendant to remove to federal court a state court action, if the action is against the United States "or an agency thereof" or a federal officer. Federal officer removal is proper when the defendant: (1) is a person within the meaning of the statute, (2) is acting under the United States, its agencies, or its officers, (3) is acting under color of federal authority, and (4) has a colorable federal defense.

The City argued that the case should be remanded to state court because the companies do not satisfy the elements of the federal officer removal statute. Specifically, the City advanced four arguments for remand: (1) the City does not seek any relief for injuries arising from the companies' supplying specialized fuels to the federal government for military and national defense purposes; (2) the companies were not acting under the direction or control of federal officers during any of the activities cited as grounds for removal; (3) the City does not seek to hold the companies liable for any act that they allegedly took at the behest of a federal officer; and (4) the companies have not pled a colorable federal defense. The City pointed out that eight courts of appeals have rejected the companies' removal attempts in similar cases. The companies, however, argued that they satisfied each element of the federal officer removal statute.

Disclaimer of injuries. As a preliminary matter, the City argued that many of the companies' removal arguments

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were irrelevant because its complaint expressly disclaimed injuries arising from the companies' provision of non-commercial, specialized fossil fuel products to the federal government for military and national defense purposes. That is, the complaint, from the City's point of view, did not place the companies' sales of specialized military fuels at issue. Courts, the City asserted, grant motions to remand where the plaintiff expressly disclaims the claims upon which the federal officer removal was based.

The court noted that the City's claims were based on the companies' alleged deceptive and misleading campaign minimizing the dangers of fossil fuel consumption, so there was no contradiction with the City's disclaimer regarding the companies' provision of fossil fuels to the government for military and national defense purposes. However, said the court, even if the companies were correct that the City's disclaimer was invalid, the court nonetheless agreed with the City that the companies failed to satisfy other requirements of federal officer removal.

Federal officer elements. As noted above, federal officer removal is proper when the defendant (1) is a person within the meaning of the statute, (2) is acting under the United States, its agencies, or its officers, (3) is acting under color of federal authority, and (4) has a colorable federal defense.

The court found that the companies easily satisfied the first element for federal officer removal, but that they failed to satisfy the other three elements for federal officer removal.

Acting under federal officers. The second element, the "acting under" requirement, looks to the relationship between the defendant seeking to remove the case and the United States, its agencies, or its officers. This element includes situations where the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete. "Acting under" covers situations where defendants work hand-in-hand with the federal government to achieve a task that furthers an end of the federal government. Similarly, this element is satisfied where the government enlists a private party in an effort to assist, or to help carry out, the federal superior's duties or tasks.

The companies here insisted that they were "acting under" federal officers when they engaged in several types of activities. First, they contended that they acted under federal officers by repeatedly performing critical and necessary functions for the U.S. military to further national defense – specifically, when they produced aviation fuel gas or "avgas" and operated petroleum infrastructure, particularly during World War II and the Korean War. Second, the companies maintained that they continue to produce and supply large quantities of highly specialized fuels that are required to conform to exact DOD specifications to the military to this day. Third, they contended that removal was appropriate because of the role of Standard Oil of California, a Chevron predecessor, in operating Elk Hills Reserve in California. The Elk Hills Reserve was a petroleum reserve created in 1912 intended to preserve oil in the ground for national emergencies. Fourth, the companies asserted that they acted under federal officers "by producing oil and gas pursuant to the federal mineral exploitation and production regime created by the Outer Continental Shelf Lands Act." Fifth, the companies contended that they acted under federal officers by supplying federally owned oil for gas and managing the Strategic Petroleum Reserve for the government.

As an initial matter, the City contended — and the court agreed – that the City's disclaimer excluded injuries caused by the companies' production of avgas during World War II and the Korean War, as well as sales of specialized, non-commercial fuels to the military at any time. So too with companies' interactions with the Strategic Petroleum Reserve.

The City also argued that none of the above-listed activities demonstrated federal control because they were not closely controlled by the government. Rather, they demonstrated "the story of a narrow business relationship," which other courts, including several appellate courts, have found to be insufficient to show the requisite "subjection, guidance, or control" required for the "acting under" element. Additionally, the City argued, the companies simply

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complied with federal laws, rules, and regulations when they executed the listed activities, which was insufficient to constitute acting under a federal officer.

The court not only agreed with the City as to it arguments on disclaimer, but it also found that the timing of certain activities and the relationship of the activities to the crux of the City's claims did not support a finding that the companies were acting under a federal official.

Specifically, the City argued that the companies' activities during World War II and the Korean War could not justify federal officer removal because the companies' activities during those wars predated the deceptive conduct alleged in its complaint. Similarly, the City maintained that Standard Oil of California's status as the operator of the Elk Hills petroleum reserve does not preclude remand, as it "precedes and bears no relationship to Defendants' charged conduct."

The court found this reasoning persuasive. Here, the City's complaint does not take aim at the companies' production of fossil fuels during World War II or the Korean War. Instead, the complaint takes issue with the companies' alleged campaign of deception and misrepresentation in the 1980s of the dangers of fossil fuel vis-à-vis the environment. The fact that the companies acted under the federal government by operating and managing government-owned and/or government funded petroleum production facilities is of no import, said the court. This case is about the companies' alleged misrepresentations; not their work with or on behalf of the government that led to or contributed to fossil fuel emissions.

So too with the companies' more recent activities, involving the extraction of gasoline or operation of energy infrastructure, either under federal regulations or via commercial relationships with the federal government. The companies' activities involving fossil fuel production rather than concealment or misrepresentation of information about fossil fuel products, said the court, cannot support the "acting under" element because "those activities fail to show the required relatedness," and the companies did "not argue the federal government required them to market or describe their products in a certain way."

The court thus agreed with the City that the companies failed to satisfy the "acting under" element of federal officer removal.

Acting under color of federal authority. The third element requires that the gravamen of the claim against the companies occur while they acted under color of federal authority. The companies argued that the City's claims were "for or relating to" acts they performed under color of office. To satisfy this element, the companies asserted, there need only be a "connection or association with acts under federal office." It was not necessary, the companies argued, that the complained-of conduct itself was at the behest of a federal agency. The court, however, disagreed, finding that the charged conduct was insufficiently connected to any acts taken by the companies under federal authority to support federal officer removal.

Colorable defense. The fourth and final element for federal officer removal is the existence of a colorable defense. The companies must establish that they have a "colorable" federal defense to the City's claims.

The companies asserted that they had several colorable defenses to the City's claims: the government contractor defense, preemption, federal immunity, as well as the Interstate and Foreign Commerce Clause, the Supremacy Clause, the Due Process Clause, and the foreign affairs doctrine. The City argued that none had merit.

The government contractor defense immunizes government contractors from state tort law when the government had a hand in a defendant's allegedly defective design. The companies maintained that they produced oil and gas at the direction of the federal government and thus have a colorable argument that they are immune from liability for any

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alleged injuries resulting therefrom.

The City contended that, not only has it disclaimed injuries relating to the military sales of specialized fuels, but also the federal contractor defense has nothing to do with the complaint. The court agreed that the federal contractor defense was unavailable to the companies based on the City's disclaimer, and importantly, the fact that the companies did not allege that the government ordered their allegedly deceptive acts.

The City argued that the companies' remaining alleged defenses were inapplicable because they had nothing to do with the actions the companies claimed they took under federal direction. Again, the court agreed, finding that the defenses did not arise from any official duties.

Request for fees. The City requested that the court award it fees and costs due to the companies' "objectively baseless removal arguments" that have been soundly rejected by myriad courts, including courts of appeal in eight different circuits. The companies disagreed, arguing that they raised "numerous meritorious grounds for removal."

The City noted that most of the companies' arguments and exhibits "are recycled and have been rejected by every out-of-Circuit court to consider them." Still, the court could not say that the companies "lacked an objectively reasonable basis for seeking removal." Thus, the court found that an award of attorneys' fees would be improper.

The case is No. 24-cv-02496.

Judge: Valderrama, F.

Attorneys: Rebecca Alfert Hirsch, Office of the City's Attorney, for the City of Chicago. Diana E. Reiter (Arnold & Porter Kaye Scholar LLP) for BP P.L.C.

Companies: BP P.L.C.

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