

05-1820-CV

05-1509-CV, 05-1693-CV, 05-1694-CV,
05-1695-CV, 05-1698-CV, 05-2450-CV

**UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT**

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

JOE ISAACSON AND PHYLLIS LISA ISAACSON,

Plaintiffs-Appellants

v.

DOW CHEMICAL COMPANY; MONSANTO COMPANY; HERCULES INC.; OCCIDENTAL
CHEMICAL CORPORATION; ULTRAMAR DIAMOND SHAMROCK CORPORATION; MAXUS
ENERGY CORP.; CHEMICAL LAND HOLDINGS, INC.; T-H AGRICULTURE & NUTRITION CO.;
THOMPSON HAYWARD CHEMICAL CO.; HARCROS CHEMICALS, INC.; UNIROYAL, INC.;
C.D.U. HOLDING, INC.; AND UNIROYAL CHEMICAL CO., INC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC OF
PANEL'S REMOVAL JURISDICTION OPINION**

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INTRODUCTION

Rehearing is warranted because the panel's decision¹ on jurisdiction under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), markedly conflicts with this Court's decision in *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 488 F.3d 112 (2d Cir. 2007), and the Supreme Court's decisions in *Watson v. Philip Morris Companies, Inc.*, 127 S. Ct. 2301 (2007), and *Mesa v. California*, 489 U.S. 121 (1989), making reconsideration by the full Court necessary to secure uniformity of the Court's decisions. Moreover, this decision involves a question of exceptional importance, *i.e.* whether a private defendant's mere assertion that it was sued for any act committed while performing a federal government contract suffices to invoke federal jurisdiction under § 1442(a)(1). If so, then a host of cases, including all government-related asbestos cases, will be swept into federal court.

ARGUMENT

I. The Panel Rewrote the Standards for Private Party Removal Under 28 U.S.C. § 1442(a)(1).

Once the panel rejected both the factual findings and the legal underpinnings of the district court's decision in this case, it should have found that

¹ Appended as **Exhibit A**, and hereinafter designated as "Op." followed by a page number. Similarly, the *Bauer* [05-1693-cv] opening and reply briefs will be designated "AB" and "RB." The *Isaacson* [05-1820-cv] opening and reply briefs will be designated "AI" and "RI." The *Stephenson* [05-1760-cv] opening and reply briefs will be designated "AS" and "RS." The Appellants' Appendix will be designated "A."

remand was warranted. Instead, the panel conceived the most expansive reading of § 1442(a)(1) removal for government contractors that any court has ever applied. Under the panel’s formulation, with the singular exception of the government literally purchasing products “off the shelf,” any party entering into a government contract will be entitled to remove claims against it to federal court. This broad view conflicts with decisions of this Circuit and the entire history of the Supreme Court’s jurisprudence regarding § 1442(a)(1).

In order to remove a case under § 1442(a)(1), the Supreme Court has held that a non-governmental party must fulfill a four-pronged test. First, the private party must be an eligible person subject to the statute. Secondly, the private party must assert that the acts complained of were undertaken while “acting under an officer” of the United States government. Next, a party must both raise a colorable federal defense, *see Mesa, supra* at 139, and establish that the suit is “for any act under color of [federal] office,” 28 U.S.C. § 1442(a)(1) (emphasis added). To satisfy the latter requirement, the party must show a nexus, a “*causal connection*’ between the charged conduct and asserted official authority.”

Willingham v. Morgan, 395 U.S. 402, 409 (1969) (quoting *Maryland v. Soper*, 270 U.S. 9, 33, 46 (1926) (emphasis added).

Under the panel’s expansive interpretation virtually every government contractor may satisfy three of the four prongs needed to effectuate removal to

federal court, regardless of whether the conduct alleged was dictated by the government contract: 1) corporations are to be considered persons for purposes of 28 USC §1442(a)(1), which fulfills the jurisdictional requirement; 2) the “special relationship” required pursuant to the “acting under” requirement is met by the mere fact of the government contract; and 3) every federal government contractor fulfills the federal defense prong, because the “government contractor defense” is always a qualified defense. Lastly, the final prong, i.e. whether the act performed has been done “under color of [federal] office,” is rendered moot, because the panel concludes that the removing party’s “theory” of the case must be accepted at face value, regardless of whether it is blatantly wrong.

Decisions by this Circuit have up until now consistently followed the view that removal for private entities pursuant to §1442(a)(1) should be scrutinized carefully, because federal courts are courts of limited jurisdiction. *See, e.g., MTBE*, 488 F.3d at 130 (holding that “the defendants have not met their burden of providing ‘candid, specific and positive’ allegations, *Willingham*, 395 U.S. at 408 (internal quotation marks omitted) that they were acting under federal officers when they added MTBE, and not some approved alternative, to their reformulated gasoline”); *Barbara v. New York Stock Exchange*, 99 F.3d 49 (2d Cir. 1996) (Stock Exchange was not a “person acting under” an officer of the SEC in suit by former floor clerk against Exchange for wrongfully barring him from Exchange

floor and causing him to lose employment opportunities); *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650 (2d Cir. 1996) (removal jurisdiction was not well founded on §1442(a)(1)—because no officer of United States was named in suit against bank for which the FDIC was appointed Conservator); *Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37 (2d Cir. 1991) (Nonappropriated Fund Instrumentality of federal government, as an impersonal entity, was not an “officer” of the United States).

II. The Panel Disregarded Prior Jurisprudence Addressing the “Person Acting Under That Officer” Requirement of §1442(a)(1).

Section 1442(a)(1) states that a removing defendant must be a federal government officer or a “person acting under that officer.” Notwithstanding the clear language of the legislature, the panel eliminates the word “under” from the statute. Until now, all courts of this Circuit and the Supreme Court have held that, the “acting under” language requires that a petition for removal demonstrate that a defendant either carried out an official government function, or stood in the shoes of a government official, or at least was under that official’s direct and very detailed control. Courts in this Circuit have generally employed an “official function” test for private parties seeking §1442(a)(1) removal by asking whether the conduct of the private party invoking §1442(a)(1) jurisdiction was tantamount to official governmental conduct. *See, e.g., Kaplansky v. Associated YM-YWHA’s*

of *Greater New York, Inc.*, 1989 WL 29938 (E.D.N.Y.1989) (parties complying with subpoena were not “acting under” federal officer because defendants were not “asked to stand in the shoes of [federal] officers or agents and perform ‘official’ functions”); *Bakalis v. Crossland Savings Bank* 781 F. Supp 140,145 (E.D.N.Y.1991) (federally regulated bank was not “acting under” federal officer because removal is permitted only “when the corporation is intimately involved with government functions as to occupy essentially the position of an employee of the government”); *Group Health Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887,890 (S.D.N.Y.1984) (private corporations may remove only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government.)

Similarly, in *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992), the same court that decided the case below wrote that:

removal by a ‘person acting under’ a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed pursuant *to an officer’s direct orders or to comprehensive and detailed regulations*. ... [A] person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal.

Id. at 947 (emphasis added). While the district court here arrived at an entirely different conclusion regarding removal, even then it held that removal required “a

substantial degree of direct and detailed control.” *Isaacson v. Dow Chemical Co.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004).

In contrast to these decisions and every other decision within this Circuit, the panel held for the first time ever that all that is necessary is the mere showing that a third party in any way merely “assist[ed]” and “help[ed] carry out [] the duties or tasks of” officers at the Department of Defense. Op. at 12-13 According to the panel, the mere entering into a contract with the government is enough to fulfill the “special relationship” required between the contractor and the Government to fulfill the “acting under” prong.” *Id.* at 13. No more is necessary.

The panel’s abandonment of “control” contrasts starkly with the Supreme Court’s most recent decision discussing §1442(a)(1). In *Watson*, *supra*, the Supreme Court defined “acting under [a Government] officer” as requiring “‘subjection, guidance or control’ of a ‘subordinate’ ... ‘[s]ubordinate or subservient to,’ ‘[s]ubject to guidance, tutorship, or direction of’ ... ‘[s]ubject to the instruction, direction, or guidance of.’”²

² The panel relies on *Watson*’s analysis of *Winters v. Diamond Shamrock*, 146 F.3d 386 (5th Cir.1998), in order to conclude that the prerequisite condition for removal is simply that the contractor provides the government with a product that it needs, because otherwise the government would have to produce that product itself. Op. at 11-13. However, the panel ignores the predicate analysis that the relationship “between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision. See, e.g., *Winters*, 149 F. 3d 387.” *Watson*, 127 S. Ct. at 2308. Furthermore, *Watson* only discussed *Winters*, because *Winters* was central to the lower court’s decision that *Watson* reversed. *Id.*

Here, in its separate opinion affirming summary judgment, the panel clearly stated that the government in fact exercised no guidance, no control over, no tutorship, nor any direction over the manufacturers' production of 2,4,5-T, much less the creation of dioxin during the course of that manufacture:

The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced.. ... Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

Summary Judgment Op. at 31.³

at 2304. Here, unlike in *Winters*, the panel never concluded that such detailed "regulation, monitoring or supervision" ever existed. The panel could not conclude this, because of the nature of the record before it. In its separate opinion affirming summary judgment (*In re "Agent Orange" Product Liability Litigation*, No. 05-1760, et al. (2d Cir. Feb. 22, 2008) (hereafter ("Summary Judgment Op."), the panel limited *Winters* and the Fifth Circuit's companion decision of *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001): "The Fifth Circuit, relying in large part on our *Agent Orange I* determination, conclude the same. See *Miller*, 275 F.3d at 421. But we are required to review the factual record anew as it is presented to us, not as it was presented to a different panel twenty years ago. And we note, as we did in *Agent Orange I*, that we were in 1987 without the benefit of briefing by the parties on this subject. *Agent Orange I Opt-Out Op.*, 818 F.2d at 190." Summary Judgment Op. at 42 n.19.

³ In *Ryan* the District Court granted remand, holding that the defendants "are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." 781 F. Supp. at 950. By contrast, in this case, 304 F. Supp. 2d at 447-50, the same court twelve years later reversed its own understanding of the facts and found that Defendants showed that they were "acting under color of federal office," because, "the government designed, controlled and supervised the

Simply “assisting” or “helping” out the government by entering into a procurement contract which failed to mention, much less control, dioxin content or any method of manufacture cannot possibly evidence the type of “subjection, guidance, or control” described by the Supreme Court in *Watson*. Nor is it the law as described by the Supreme Court, the courts of this Circuit or the courts of any other Circuit.

III. The Panel Abandoned the Supreme Court’s Decisions Requiring That an “Act Under Color of Office” Must Involve a “Causal Connection Between the Charged Conduct and Asserted Official Authority.”

In *Mesa v. California, supra*, two U.S. mail carriers were charged in state court with crimes related to the operation of their mail trucks. The defendants removed the case to federal court. In ordering the case remanded, *Mesa* held that the trigger for removal under § 1442(a)(1) is not simply a defendant’s status as a federal officer, but rather the officer’s ability to show a “causal connection between what the officer has done under asserted official authority and the state prosecution.” *Mesa*, 489 U.S. at 132 (quoting *Soper*, 270 U.S. at 33).

Citing *Mesa*, Plaintiffs alleged that the “causal” requirements of 28 USC § 1442(a)(1) were not met by these private manufacturers of Agent Orange, because the Government did not direct the conduct that is the subject of this action. The

production of Agent Orange.” *Isaacson*, 304 F.Supp. 2d at 449.

panel agreed, finding that the Government did not control the manufacture of Defendants' herbicides nor did it require or even specify dioxin to be in the products it received. *See* Summary Judgment Op. at 31. Defendants completely controlled the manufacturing process and chose not to adopt a state of the art process which would have eliminated detectable dioxin in their product. *Id.* at 21.

The panel demonstrated that it understood the Supreme Court's requirement: "Translated to non-governmental corporate defendants, such entities must demonstrate that the acts of which they are being sued – here, the production of dioxin in Agent Orange – occurred because of what they were asked to do by the Government." Op. at 13. However, whereas the U.S. Supreme Court in its decisions then proceeded to a causation analysis, *see, e.g., Mesa*, 489 U.S. at 131, the panel proceeded to abdicate any analysis. Instead, the panel simply held that: "We credit Defendants' theory of the case when determining whether a causal connection exists." Startlingly, the panel then gave full credit to a theory of the case **that it knew to be incorrect**: "**According to their theory of the case** the government knew that Agent Orange contained dioxin and **the Government controlled the method of formulation.**" Op. 14 (emphasis added). The theory that the government controlled production was exactly what the panel rejected in its summary judgment opinion.

