Fifth Circuit Reverses 2020 Decision on Timeliness of Removal of Louisiana Coastal Zone Lawsuits

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A year after holding that removal was too late, the U.S. Court of Appeals for the Fifth Circuit reconsidered and reversed its 2020 decision affirming orders remanding forty-two lawsuits filed on behalf of numerous Louisiana parishes against various oil and gas companies ("CZMA Cases").[1] This time, the Fifth Circuit concluded that the defendants timely removed the CZMA Cases after receiving an expert report from which it could first be ascertained that the cases were removable based on either federal-officer jurisdiction or federal question jurisdiction.

Though the court found that there was no federal question jurisdiction, it did not decide whether federal-officer jurisdiction exists. Instead, the Fifth Circuit remanded the CZMA Cases back to Louisiana federal district courts to decide that issue under the standard set forth in the court's recent decision in *Latiolais v. Huntington Ingalss, Inc*.[2]

A. First and Second Removals

The CZMA Cases were filed by six Louisiana parishes asserting claims under the Louisiana State and Local Coastal Resources Management Act of 1978. Both the Louisiana Department of Natural Resources and the Louisiana Attorney General intervened on behalf of the State of Louisiana in each of the 42 cases. The defendants' first removal of the CZMA Cases to federal court was unsuccessful, and the cases were remanded in 2015.

After the cases were remanded, the plaintiffs served an expert report in *Parish of Plaquemines v. Rozel Operating Co.* that addressed the defendants' activities during World War II. The expert report included a certification that it represented the Louisiana Department of Natural Resources' position in all 42 cases. According to the defendants, this report, known as the "*Rozel* Report," made clear for the first time that the plaintiffs' claims are at least partly based on the defendants' wartime activities, which the defendants claim were conducted pursuant to the authority of the Petroleum Administration for War, a federal wartime agency.

Based on the wartime operations and activities addressed in the *Rozel* Report, the defendants removed the CZMA Cases again in May 2018 under the federal-officer removal statute, 28 U.S.C. § 1442, as well as on the basis of federal question jurisdiction. The defendants argued that the second removal was timely under § 28 U.S.C. 1446(b)(3), which allows removal within 30 days after the defendant receives "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."

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[1] *Parish of Plaquemines. v. Chevron USA, Inc.*, No. 19-30492, 2021 WL 3413161 (5th Cir. Aug. 5, 2021); *Parish of Plaquemines. v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020).
[2] *Latiolais v. Huntington Ingalss, Inc*., 951 F.3d 286 (5th Cir. 2020).

The plaintiffs promptly moved to remand the CZMA Cases, arguing that the second removal was untimely and also challenging the factual basis for federal jurisdiction. The remand motions were granted in 2019. Though remand orders are typically not appealable, there is an exception allowing for appellate review of such orders relating to federal-officer jurisdiction. Thus, the defendants appealed the remand orders to the U.S. Court of Appeals for the Fifth Circuit, and the district courts' remand orders were stayed.

B. Fifth Circuit's 2020 Opinion

On August 10, 2020, the Fifth Circuit affirmed the Louisiana federal district courts' orders remanding the 42 CZMA Cases and held that the second removals were too late.

The court succinctly set forth the issue by stating that the "parties agree that the companies' second notice of removal is untimely unless it was not evident on the face of the complaints that the case included claims arising during World War II." With little to no fanfare, the Fifth Circuit concluded:

> The *Rozel* Report simply repeated information from a 1980 Louisiana Coastal Resources Program Final Environmental Impact Statement (FEIS) that the Parishes filed with the court before the companies' first removal attempt in 2013. The FEIS discusses many of the specific wells involved in this litigation by referring to their unique serial numbers. And those serial numbers refer to wells the companies drilled before or during World War II.

The Fifth Circuit held that the *Rozel* Report was thus not a "paper from which it may first be ascertained that the case is one which is or has become removable." The court found that the removals were untimely and affirmed the district courts' remand orders.

C. Fifth Circuit's 2021 Opinion

Almost a year to the day after affirming the remand orders following the second round of removals, the Fifth Circuit granted the defendants' petition for rehearing and reversed its 2020 decision on the timeliness of removal. The court held that, based on *Rozel* Report, the second removals were timely. Though it concluded that the district courts correctly held that no federal question jurisdiction exists, it remanded the CZMA Cases back to the federal district courts to decide whether federal-officer jurisdiction exists.

In stark contrast to the Fifth Circuit's sparse 2020 opinion, the court's 2021 opinion provides a detailed analysis of the two issues relevant to whether removal was timely: (1) whether the basis of federal jurisdiction was evident on the face of the petitions; and (2) if not, whether the *Rozel* Report was an "other paper" from which defendants could first ascertain that the CZMA Cases were removable. First, the Fifth Circuit considered whether the parishes' petitions affirmatively revealed grounds for federal-officer removal. Though the petitions alleged that the defendants violated various Louisiana regulations before 1978 and identified the locations of the alleged violations, the petitions did not specify *which* provisions of those regulations were supposedly violated or *when* those violations occurred. Moreover, the Louisiana regulations

referenced in the petitions that were in effect during World War II did not govern the specific activities identified in the *Rozel* Report that the defendants cited as the basis for federal-officer jurisdiction. The Fifth Circuit concluded that "[a]t most, the petitions revealed that certain World War II-era conduct *might* be implicated by the parishes' suit, because World War II occurred before 1978."[3] Because the parishes' petitions revealed only the possibility that certain conduct *might* be relevant, the Fifth Circuit found that the petitions failed to affirmatively reveal the information needed to invoke federal-officer removal.

The court also rejected the parishes' reliance on the petitions' allegations that "most if not all" of the defendants activities were not legally commenced. The parishes argued that these allegations triggered the removal clock because the defendants were claiming that the federal government directed *all* of their World War II activities. The Fifth Circuit disagreed. Because the petitions did not specify what the defendants allegedly did wrong, the defendants could not establish a causal nexus based on the petition because they "were still left guessing as to how to connect the dots" between their alleged wrongdoing and a federal wartime directive.[4]

Likewise, the Fifth Circuit rejected the plaintiffs' argument that the *Rozel* Report "simply put a finer point on what the plaintiffs already placed at issue" in their petitions rather than revealed "an entirely new legal theory." The court noted that the *Rozel* Report relied on the FEIS (the 1980 environmental impact statement) rather than the Louisiana orders that the plaintiffs allege were violated in the petitions. Additionally, the report defined the absence of "good faith" based on the defendants' alleged departure from certain prudent industry practices, which were not identified in the petitions or in FEIS. "[I]n contrast to the petitions' vague citations to Louisiana regulations covering numerous aspects of oil production, the *Rozel* report identified, for the first time specific conduct that the parishes alleged was unlawful."[5] The Fifth Circuit concluded that because the defendants had no way to connect their alleged violations to World War II-era directives based on the petitions, the petitions did not affirmatively reveal grounds for federal-officer removal.[6]

Because the basis for federal jurisdiction was not evident on the face of the petitions, the Fifth Circuit next addressed whether any other papers triggered the removal clock before the *Rozel* Report was served by revealing information that made the grounds for federal-officer removal "unequivocally clear and certain."[7] The parishes first pointed to a copy of the 1980 environmental impact statement, FEIS, attached to briefing on the first round of removals; however, the Fifth Circuit concluded that FEIS did not make the grounds for removal unequivocally clear and certain, especially when it did not discuss the prudent industry practices outlined in the *Rozel* Report.

The court also rejected the parishes' arguments that certain discovery revealed that wartime activities were at issue long before the *Rozel* Report. The parishes first pointed to their discovery

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[3] *Parish of Plaquemines. v. Chevron USA, Inc.*, No. 19-30492, 2021 WL 3413161, *10 (5th Cir. Aug. 5, 2021) (emphasis in original).
[4] *Id*. at *13.
[5] *Id*. at *15.
[6] *Id*. (explaining that, though the parishes' original petitions may have put the defendants 'on notice that some pre-1980 activities may be at issue, "the trigger for starting the removal clock requires a higher burden").
[7] *Id*.

requests to defendants, which defined the relevant period as January 1, 1920 to November 8, 2013. However, the Fifth Circuit explained that the "requests merely underscore the fact that the parishes' allegations are quite broad. They did not tell the companies what they did to violate the Louisiana orders—essential information for the causal-nexus requirement."[8] The parishes' reliance on the defendants' discovery responses, which they claimed revealed that the defendants were well aware that war time activities were at issue, also failed. The court explained that the issue is not whether the defendants were on notice that wartime activities may be relevant; rather, the issue is "whether other papers clearly revealed a causal nexus between a federal wartime directives" and the defendants' alleged wrongdoing.[9] Moreover, the removal clock can only be triggered by an "other paper" that results "from the voluntary of act of a plaintiff," and the defendants' own discovery responses therefore could not suffice.[10]

The Fifth Circuit concluded that, "in contrast to the petitions' vague citations to Louisiana regulations covering numerous aspects of oil production, the *Rozel* report identified, for the first time, specific conduct that the parishes alleged was unlawful."[11] And because the conduct identified in the *Rozel* Report provided a basis for federal jurisdiction, the Fifth Circuit held that the second removals were timely.

As noted above, the Fifth Circuit did not resolve the underlying issue of whether federal-officer jurisdiction exists. Instead, it remanded the CZMA Cases back to the Louisiana federal district courts to decide that issue in light of the Fifth Circuit's recent decision *Latiolais v. Huntington Ingalls, Inc.*, which overruled the causal-nexus test in favor of a new four-part test that broadens the scope of removable proceedings based on federal-officer jurisdiction. Under the new *Latiolais* test, to remove based on federal-officer jurisdiction under § 1442(a), a defendant must show that (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) it has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions.[12]

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[8] *Id*. at *16.
[9] *Id*. at *17.
[10] *Id*.
[11] *Id*. at *15.
[12] *See Latiolais v. Huntington Ingalss, Inc*., 951 F.3d 286, 296 (5th Cir. 2020).