United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
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Lyle W. Cayce
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No. 20-30093

ST. CHARLES SURGICAL HOSPITAL, L.L.C.; CENTER FOR RESTORATIVE BREAST SURGERY, L.L.C.,

Plaintiffs—Appellees,

versus

LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY, *doing business as* BLUE CROSS BLUE SHIELD OF LOUISIANA; HMO LOUISIANA, INCORPORATED,

Defendants—Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-13497

Before ELROD, DUNCAN, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

This case centers on a remand order that the district court entered after Blue Cross Blue Shield of Louisiana ("BCBS") removed this action to federal court. St. Charles Surgical Hospital ("St. Charles") sued BCBS in Louisiana state court, alleging state law fraud and abuse-of-right claims. After St. Charles filed its third-amended petition and (inadvertently, St. Charles contends) produced documents that listed claims involving patients

insured under the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, BCBS removed the lawsuit. BCBS relied on the federal officer removal statute as a basis for removal. *See* 28 U.S.C. § 1442(a). The district court granted St. Charles's motion to remand, holding that there was insufficient evidence to show that BCBS "acted under" any federal officer. BCBS now appeals that decision. We VACATE the order remanding this case to state court and REMAND for further proceedings.

I.

This case is the latest chapter in an extensive history of litigation between St. Charles and BCBS. At the heart of the current dispute, St. Charles contends that BCBS promised to pay reasonable compensation for medical services and then failed to do so. St. Charles filed its first petition in this action on February 3, 2017. In the pleading, St. Charles alleged four state-law claims: breach of contract, detrimental reliance, negligent misrepresentation, and fraud. St. Charles filed a first amended petition against BCBS on April 12, 2017, but the state trial court permanently enjoined all but one of St. Charles's claims under the All Writs Act and the Anti-Injunction Act because of the prior litigation between St. Charles and BCBS. Subsequently, St. Charles filed a second amended petition in state court on June 19, 2017, this time alleging only fraud and abuse-of-rights claims under Louisiana law.

On October 10, 2019, St. Charles filed a motion for leave to file a third amended petition, which the state court granted on November 7, 2019. It is the third-amended petition that gives rise to this appeal. Beyond realleging its fraud and abuse-of-right claims, St. Charles expressly pled that it waived

recovery for any fraud or abuse-of-right claim that may have occurred in connection with federally-insured patients. [1]

Notwithstanding the express waivers in its pending third-amended petition, on October 31, 2019, St. Charles produced discovery documents that detailed individual patient transactions at issue in the litigation. According to BCBS, these documents contained "dozens" of claims that implicated FEHBA-governed insurance benefits. BCBS contends that this document production was the first notice BCBS received that St. Charles's claims included federally-insured patients. St. Charles counters that the disclosures were inadvertent, pointing to the express waiver in its third-amended petition of all federal claims and any damages in connection with FEHBA-governed health insurance plans.

On November 7, 2019, BCBS removed the case to federal court,[2] asserting federal subject matter jurisdiction based on the FEHBA-governed claims listed in the documents produced by St. Charles. To support its assertion of jurisdiction, BCBS contended that St. Charles's claims were preempted by the Employee Retirement Income Security Act of 1974

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[1] St. Charles's third amended petition states that "[n]othing herein alleges any relief governed by or available pursuant to . . . any claims involving a federal officer." More specifically, the petition also includes the following waiver:

> Plaintiffs do not seek to recover benefits from FEHBA-governed health benefits plans for their patients and hereby expressly waive same. Furthermore, Plaintiffs do not seek to recover any amounts for Defendants' payment misrepresentations that are related to treatment of any patient who may have an FEHBA insurance policy, and hereby expressly waive and disclaim such recovery.

[2] BCBS removed the case on the same day the state court granted St. Charles's motion for leave to file its third-amended petition. The record indicates that the state court entered its order granting leave to amend *before* BCBS filed its notice of removal; BCBS attached the state court's order to its removal notice. Therefore, as the district court did, we treat St. Charles's third-amended petition as the operative complaint.

("ERISA"), 29 U.S.C. § 1001 *et seq.*, and FEHBA, resulting in federal question jurisdiction, and, further, that removal was proper under the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

St. Charles moved to remand. Granting the motion, the district court concluded that there was no preemption under ERISA or FEHBA, and also that BCBS could not properly remove the case under § 1442(a)(1). BCBS timely appealed the district court's remand order.

II.

"Although an order remanding a case to state court is not generally reviewable, 'an order remanding a case to the [s]tate court from which it was removed pursuant to section 1442 . . . of this title shall be reviewable by appeal or otherwise.'" *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 290 (5th Cir. 2020) (en banc) (quoting 28 U.S.C. § 1447(d)). This court reviews de novo an order remanding a case removed under the federal officer removal statute. *Id.* "Notably, federal officer removal under 28 U.S.C. § 1442 is unlike other removal doctrines: it is not narrow or limited." *State v. Kleinert*, 855 F.3d 305, 311 (5th Cir. 2017) (internal quotation marks omitted) (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)). Therefore, assessment of whether jurisdiction exists must be "without a thumb on the remand side of the scale." *Latiolais*, 951 F.3d at 290 (cleaned up).

III.

On appeal, BCBS challenges only the district court's conclusion that BCBS could not remove this case under § 1442(a)(1). That section provides that an action filed in state court

> that is against or directed to any of the following may be removed . . . :
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of

> any agency thereof, . . . for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for . . . the collection of the revenue.

Specifically, BCBS argues that the district court erred in its federal officer removal analysis by improperly conflating the "acting under" and "causal nexus" (or as we discuss, now "connection") elements of the federal officer removal test. BCBS also contends that the district court's ruling conflicts with our recent en banc decision in *Latiolais*, which clarified that test.

We agree with BCBS that the district court must revisit its analysis. But before we to get to the meat of BCBS's position, we digress briefly to address a threshold issue—whether the express waiver pled by St. Charles of FEHBA-governed claims is enforceable—and add context to today's discussion provided by two recent cases on federal officer removal (in the first one, the parties will sound familiar). Then we return to the district court's remand order here.

A.

Before we discuss the federal officer removal test as employed by the district court, there is a more basic question: whether federal officer jurisdiction is even implicated. In its third-amended petition, St. Charles expressly waived "relief governed by or available pursuant to . . . any claims involving a federal officer" and any damages arising "from FEHBA-governed health benefits plans." St. Charles contends that its express disclaimer of any such relief means that BCBS could not have been "acting under [a federal] officer," federal jurisdiction is therefore lacking, and the district court's remand order was proper, even if for a different reason than that offered by the court.

Generally, courts respect express disclaimers such as those pled by St. Charles, so long as they are not merely "artful pleading designed to

circumvent federal officer jurisdiction." *Reinbold v. Advanced Auto Parts, Inc.*, No. 18-CV-605, 2018 WL 3036026, at *2 (S.D. Ill. June 19, 2018) (quoting *Dougherty v. A O Smith Corp.*, No. 13-CV-1972, 2014 WL 3542243, at *10 (D. Del. July 16, 2014)). But there's the rub. BCBS argues that, waivers notwithstanding, the documents produced by St. Charles disclose "dozens" of FEHBA-governed claims at issue, implicating BCBS's handling of federal benefits at the direction of the Office of Personnel Management ("OPM"), the federal agency that contracted with BCBS for administration of claims under federal health insurance plans. *Cf. Marley v. Elliot Turbomach Co.*, 545 F. Supp. 2d 1266, 1275 (S.D. Fla. 2008) (rejecting circular disclaimers that would defeat purpose of § 1442(a)(1) by forcing federal contractors to prove in state court that they were acting under the direction of the federal government).

The district court did not address this threshold question. Instead, both parties invite us to consider evidence not before the district court to determine the effect of St. Charles's waivers and its seemingly contrary discovery disclosures. We decline the invitation. Because the issue was neither a basis for the district court's decision nor extensively briefed by either party, and because the record was not fully developed in the district court, the appropriate course is for the district court to determine on remand whether St. Charles's waivers defeat federal officer jurisdiction.

B.

If St. Charles's waiver of FEHBA-governed claims does not settle the matter, the district court's jurisdiction hinges on a proper analysis of federal officer removal. Under § 1442(a)(1), private entities may remove a state court lawsuit if they are "acting under" an officer of the United States. This court clarified what that means, and what a private defendant must show to be eligible for federal officer removal, in *St. Charles Surgical Hospital, L.L.C.*

v. Louisiana Health Service & Indemnity Co., 935 F.3d 352 (5th Cir. 2019) ("*St. Charles I*"), and *Latiolais*, 951 F.3d at 286. We review each case in turn.

In *St. Charles I*, this court held that BCBS properly removed St. Charles's claims under the federal officer removal statute based on BCBS's role in administering the same FEHBA-governed health insurance plans implicated in this appeal. 935 F.3d at 358. Specifically, we held that BCBS satisfied the "acting under" element of the federal officer removal test because OPM exerted a "strong level of guidance and control over [BCBS]" in BCBS's administration of the federal insurance claims at issue. *Id.* at 356.

St. Charles I detailed the arrangement between OPM and BCBS. The federal government paid 75% of the premiums for the insurance plans administered by BCBS from a fund held by the U.S. Treasury. *Id.* In the event of a dispute between BCBS and a patient (even when the patient had assigned the right to payments to a provider like St. Charles), OPM's directives controlled. *Id.* This was so, regardless of any agreement to the contrary between BCBS and a provider, as alleged by St. Charles. OPM's directives even governed when they required that BCBS act contrary to Louisiana law, as St. Charles asserted. "Based on the structure of the relationship between OPM and [BCBS]," and given the "strong level of guidance and control" exercised by OPM, we found that BCBS was "acting under" a federal officer when it denied the payments sought by St. Charles, such that removal under § 1442(a)(1) was proper. *Id.*

More recently, and after the district court granted St. Charles's motion to remand this case to state court, our en banc court clarified the test for federal officer removal. *Latiolais*, 951 F.3d at 291, 296. In *Latiolais*, a private contractor, Avondale, was hired by the U.S. Navy to refurbish the USS Tappahannock. *Id.* at 289. After the plaintiff contracted mesothelioma, he sued Avondale in Louisiana state court for failing to warn him against the

"dangers of asbestos and fail[ing] to take measures to prevent exposure" during the refurbishment. *Id.* at 296. Avondale removed the case to federal court under § 1442(a)(1). *Id.*

After Avondale removed the case, the district court inquired as to whether the United States, or any of its officials, controlled Avondale's safety practices. The court "found no such control and concluded that removal under § 1442(a)(1) was improper." *Id.* at 290.

We reversed. In doing so, we noted that when it amended the statute in 2011, "Congress broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Id.* at 292. We explained that, instead of considering whether there is a "direct causal nexus" between the removing defendant's actions and a federal officer's instruction, the proper inquiry centers on whether that defendant's actions "related to" a federal directive. *Id.* at 291, 296. Because Avondale's alleged negligence was "connected with the installation of asbestos during the refurbishment of the USS Tappahannock," and Avondale "performed the refurbishment . . . pursuant to the directions of the U.S. Navy," removal under § 1442(a)(1) was proper. *Id.* at 296. Functionally, this court's decision in *Latiolais* thus abandoned the "causal nexus" requirement of the federal officer removal test and, following the Third and Fourth Circuits, replaced it with the somewhat broader "connection" or "association" element.

C.

Back to today's case. In its analysis of whether BCBS could properly remove under the federal officer removal statute, the district court applied the test for federal officer removal as it was articulated before *Latiolais*, namely, that: (1) the defendant must be a person within the meaning of the statute, (2) the defendant acted under the direction of a federal officer, (3) a

causal nexus exists between the defendant's actions under color of federal office and the plaintiff's claims, and (4) the defendant has a colorable federal defense. *See, e.g.*, *St. Charles I*, 935 F.3d at 355. The district court anticipated that our eventual ruling in *Latiolais* might modify the "causal nexus" element of the test but stated that it did not play a role in the court's decision to remand:

> The Fifth Circuit recently granted rehearing in a case that challenges the causal nexus requirement, arguing that the Fifth Circuit should adopt the "broader" test employed by the Third and Fourth [C]ircuits. The "causal nexus" element has no bearing on the [c]ourt's decision in this case.

Instead, the district court cabined its decision as resting solely on the "acting under" element of the test.

The issue thus framed, the court held that BCBS could not properly remove this case under § 1442(a)(1) because BCBS failed to establish that it was "acting under" OPM as to the conduct underlying the claims asserted by St. Charles in its third-amended petition. The district court explained that St. Charles's claims "do not arise out of procedures dictated by OPM but rather arise out of BCBS's alleged misrepresentations that procedures were covered and reasonable compensation would be paid."

In determining that BCBS was not "acting under" OPM, the district court distinguished *St. Charles I* from the present case. First, the court emphasized that the claims asserted in *St. Charles I* centered on a conflict between OPM directives to BCBS and representations allegedly made by BCBS to St. Charles under state law. Specifically, St. Charles alleged that BCBS had violated Louisiana Revised Statute § 40:2010, which requires insurance companies to pay health benefits to the provider rather than to the patient when the insurer has notice that the patient has assigned benefits. *St. Charles I*, 935 F.3d at 355. BCBS countered that it was bound to follow

OPM's binding directives to pay benefits directly to patients regardless of an assignment of benefits. Thus, in *St. Charles I*, BCBS pointed to specific directives from OPM to substantiate that BCBS was "acting under" OPM, and thus could properly remove the case. *Id.* at 356. By contrast, the district court emphasized that here, St. Charles alleged fraud and abuse-of-right claims, which evoked no such tension between state law and specific directives from OPM. In fact, as the district court noted, St. Charles had expressly disclaimed any recovery or damages under Louisiana Revised Statute § 40:2010 as to its current claims.

Second, the district court concluded that *St. Charles I* "did not hold that insurance companies 'act under' the direction of OPM for all purposes." Rather, the court read *St. Charles I* to hold that BCBS "acted under the direction of OPM '*when it paid the patients directly*, rather than the hospital, notwithstanding its awareness of the patients' assignment of benefits to the hospital.'" quoting *St. Charles I*, 935 F.3d at 355 (emphasis added by district court). The district court reasoned that because St. Charles's instant claims "do not arise out of procedures dictated by OPM," *St. Charles I* did not support federal officer removal here.

The district court relied upon *Transitional Hospitals Corporation of Louisiana, Inc. v. Louisiana Health Services*, No. Civ. A. 02-354, 2002 WL 1303121 (E.D. La. June 12, 2002), to support its conclusion that BCBS did not "act under" OPM in this case. In *Transitional*, a healthcare provider alleged that a patient's insurance company misrepresented that the provider would be reimbursed for the patient's treatment pursuant to the patient's health insurance plan. *Id.* at *1. The insurance company removed the case to federal court, but the *Transitional* court granted the provider's motion to remand because the alleged misrepresentations "[did] not arise out of any of the procedures dictated by OPM." *Id.* at *3. The district court found the

present case to be analogous to *Transitional*, and accordingly held that remand was warranted pursuant to 28 U.S.C. § 1447(c).

D.

Weighing the district court's remand order against *Latiolais*'s clarified test for federal officer removal, we conclude that the district court erred in its analysis. First, the district court applied *St. Charles I* too narrowly in determining that BCBS was not "acting under" OPM merely because St. Charles's claims "do not arise out of procedures dictated by OPM." Relatedly, even though the district court stated that the "causal nexus" element "ha[d] no bearing on the [c]ourt's decision in this case," (and the parties apparently did not contest the issue either), this should be revisited on remand.

To frame our analysis, in *Latiolais*, the en banc court restated the test for federal officer removal:

> [h]enceforth, to remove under section 1442(a), a defendant must show (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that 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.

951 F.3d at 296. Relying on amendments that broadened the statutory text, *Latiolais* replaced the "causal nexus" element of the test with a broader standard, i.e., that a defendant's conduct only needs to be "connected or associated with" (or "related to") a federal directive. *Id.* at 291, 296. And, though the "acting under" and "connection" elements may often ride in tandem toward the same result, they are distinct. In other words, a defendant might be "acting under" a federal officer, while at the same time the specific conduct at issue may not be "connected or associated with an act pursuant to the federal officer's directions."

As noted, the district court focused its decision to remand this case on the "acting under" element. We do likewise, with the caveat that, to the extent the district court blurred the "acting under" and "connection" elements, the "connection" element may separately bear on the ultimate question of whether BCBS can properly remove St. Charles's claims here, particularly in the light of *Latiolais*.

In order to satisfy the "acting under" requirement, a removing defendant need not show that its alleged conduct was precisely dictated by a federal officer's directive. For example, courts in this circuit have held that negligence claims against federal contractors are removable under the federal officer removal statute, even though the negligence was not directed by federal authorities. *E.g.*, *id.*; *see also McGee v. Arkel Int'l, LLC*, 716 F. Supp. 2d 572 (S.D. Tex. 2009) (holding that contractor hired to provide logistical support to military forces in Iraq acted under federal officer for purposes of removal of personal injury suit that resulted from negligently connected equipment); *Madden v. Able Supply Co.*, 205 F. Supp. 2d 695 (S.D. Tex. 2002) (holding that federal contractor could remove under § 1442(a)(1) when sued for state law claims for negligence and personal injuries resulting from emission of asbestos particles).

Instead, the "acting under" inquiry examines the *relationship* between the removing party and the relevant federal officer, requiring courts to determine whether the federal officer "exert[s] a sufficient level of subjection, guidance, or control" over the private actor. *See St. Charles I*, 935 F.3d at 356. In *St. Charles I*, BCBS's administration of FEHBA-governed insurance plans was at issue. *Id.* "Based on the structure of the relationship between OPM and [BCBS], we conclude[d] that OPM enjoy[ed] a strong level of guidance and control over [BCBS]," such that BCBS satisfied the "acting under" requirement of § 1442(a)(1). *Id.* The holding in *St. Charles I* that BCBS was acting under OPM thus was not solely based on the specific

OPM directives that triggered BCBS's conduct allegedly giving rise to St. Charles's claims. The district court here erred to the extent it read *St. Charles I* that narrowly.

Indeed, if the district court on remand determines that the claims asserted by St. Charles involve BCBS's administration of FEHBA-governed health insurance plans, our holding in *St. Charles I* may be hard to square with a different result in this case. By the same token, as the district court correctly noted, we did not hold in *St. Charles I* that BCBS "acts under" the direction of OPM for all purposes. If the district court concludes that St. Charles's waivers are valid, then there may be little room to contend that BCBS "acted under" OPM in administering non-federal health insurance payments. And the same may be true if, irrespective of the waivers, the court concludes that St. Charles's complaint does not include any federally-governed claims, because the discovery disclosures to the contrary were inadvertent, or otherwise. And finally, even if BCBS is determined to have been acting under OPM in this case, it is possible that the alleged conduct underlying St. Charles's fraud and abuse-of-right claims was not connected or associated with (or related to) any federal directive from OPM. We leave these considerations to the district court.

* * *

Based on the foregoing, we VACATE the district court's order remanding this action to state court and REMAND for further proceedings consistent with this opinion.