In the

United States Court of Appeals

For the Seventh Circuit

No. 23-3285

PEARL RAY and ANDREW RAY, SR.,

Plaintiffs-Appellees,

v.

MUHAMMAD TABRIZ,

Defendant.

APPEAL OF: BLUE CROSS AND BLUE SHIELD ASSOCIATION

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:23-cv-01467 — **Virginia M. Kendall**, *Chief Judge*.

ARGUED MAY 30, 2024 — DECIDED AUGUST 2, 2024

Before ST. EVE, KIRSCH, and KOLAR, *Circuit Judges*.

KIRSCH, *Circuit Judge*. Pearl Ray and her husband, Andrew Ray, Sr., sued medical providers in Illinois state court, alleging that the providers' medical malpractice injured her and that Andrew consequently suffered a loss of consortium. The plaintiffs settled with all but one of the defendants.

Under the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. §§ 8901 et seq., the Office of Personnel Management (OPM) may contract with private carriers for federal employees' health insurance. 5 U.S.C. § 8902(a). Since before the alleged malpractice, Pearl has been enrolled in the Service Benefit Plan (the "Plan"), a federal health benefits plan. FEHBA governs the Plan, and Blue Cross and Blue Shield Association (BCBSA) is the Plan's carrier. The Plan's terms, as well as OPM regulations, provide that a Federal Employees Health Benefits (FEHB) carrier is entitled to full reimbursement for benefits paid to an enrollee to treat an injury or illness if the enrollee makes a monetary recovery from a third party in connection with the same injury or illness. For instance, in 2015, OPM promulgated a regulation providing that a FEHB carrier is entitled to pursue reimbursement recoveries, 5 C.F.R. § 890.106(a), and that a carrier's reimbursement right supersedes other parties' rights, *id.* § 890.106(e).

After the plaintiffs reached the settlement (making a recovery from third parties), and under these reimbursement provisions, BCBSA asserted a reimbursement lien on the settlement for the benefits it paid in connection with Pearl's medical malpractice injuries. The plaintiffs subsequently filed a motion for lien adjudication, arguing that Illinois's common fund doctrine reduces the reimbursement amount BCBSA receives by a proportionate amount of the plaintiffs' attorney's fees and costs. BCBSA removed the case to federal court under 28 U.S.C. §§ 1441 and 1442, arguing that the court had federal question jurisdiction over the entire action and that the motion for adjudication was removable on federal officer grounds. The plaintiffs moved to remand. In response, BCBSA did not argue that the court could exercise jurisdiction over just the motion on federal officer grounds if it lacked

federal question jurisdiction over the entire case. Instead, BCBSA asserted that it could remove only the motion for adjudication if § 1442 were the only basis for removal but that there was an alternate removal basis: federal question jurisdiction.

The court denied the remand motion but later granted the plaintiffs' motion to reconsider, remanding the entire case because the court concluded that it lacked federal question jurisdiction. It stated it remanded the entire case because in "agree[ing] with the Rays that under 28 U.S.C. § 1442(d)(1), only the Motion for Adjudication, and not the entire case, could be removed to federal court unless there was a separate basis for removal[,] … BCBSA hung its hat on federal question jurisdiction." BCBSA appealed. On appeal, it argues that the court has federal question jurisdiction over the case, 28 U.S.C. §§ 1331 and 1441, and that the motion for adjudication was removable under the federal officer removal statute, *id.* § 1442(a)(1). We address these arguments in turn, reviewing the district court's order de novo. *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1180 (7th Cir. 2012).

I

The party seeking removal to federal court must establish that removal is proper. *Id.* BCBSA first contends that removal was proper under § 1441, which allows for the removal of suits over which federal courts have original jurisdiction. It argues that federal common law governs the action and thus that the district court has federal question jurisdiction under § 1331. *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 680 (7th Cir. 2001) ("Sometimes the federal interest in a controversy is so dominant that federal law applies—activating federal-question jurisdiction under § 1331—even if the national

government is not a party."); see also *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) ("It is well settled that [§ 1331's] statutory grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'") (quotation omitted). But a court may create federal common law only when state law would sit in "significant conflict" with "uniquely federal interests." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 688 (2006) (cleaned up).

BCBSA asserts that federal common law displaces the Illinois common fund doctrine and governs the action because the common fund doctrine significantly conflicts with uniquely federal interests in FEHBA reimbursement disputes. In BCBSA's view, the common fund doctrine, which "allows a person who incurs attorney's fees in obtaining a judgment or settlement that confers a benefit on another to deduct a portion of the fee," conflicts with both the Plan's reimbursement provision and OPM's regulation. *Blue Cross Blue Shield of Ill. v. Cruz* (*Cruz II*), 495 F.3d 510, 511 (7th Cir. 2007). But the Supreme Court stated in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), that though FEHBA reimbursement disputes implicate "distinctly federal interests" (like the OPM-BCBSA contract's negotiation by a federal agency), federal common law does not govern them because "countervailing considerations control"—namely that a reimbursement right predicated on a FEHBA authorized contract "is not a prescription of federal law." *Id.* at 696. Instead, such claims, which "seek[] recovery from the proceeds of state-court litigation, are the sort ordinarily resolved in state courts." *Id.* at 683; see also *id.* at 692 (noting the Plan's provisions on reimbursement and subrogation "depend upon a recovery from a third party under terms and conditions ordinarily governed

by state law"). The Court concluded, "Had Congress found it necessary or proper to extend federal jurisdiction further, in particular, to encompass contract-derived reimbursement claims between carriers and insured workers, it would have been easy enough for Congress to say so. We have no warrant to expand Congress' jurisdictional grant 'by judicial decree.'" *Id.* at 696 (citations omitted).

We then squarely addressed the issue in *Blue Cross Blue Shield of Illinois v. Cruz* (*Cruz II*), 495 F.3d 510 (7th Cir. 2007). In *Cruz II*, Blue Cross and Blue Shield of Illinois argued that its contract with OPM "involves a unique federal interest that has to be protected against conflicting state laws, such as Illinois's common fund doctrine, and that achieving this purpose requires that all disputes arising from the contract be resolved under federal common law." *Id.* at 512 (citation omitted). But we rejected this argument, holding that there was no unique federal interest in "whether a state's common fund doctrine should be allowed to override a term in the insurance contract" and thus that there was no federal question jurisdiction over Blue Cross's reimbursement suit. *Id.* at 512–14. We reasoned that Blue Cross's argument "ignores the principle that jurisdictional provisions should be simple and clear so that a party is not placed in the position of filing a suit in one court only to discover after years of litigating there that it has to start over in another court because the first court lacked jurisdiction." *Id.* at 513.

We also explained that our decision in *Blue Cross & Blue Shield of Illinois v. Cruz* (*Cruz I*), 396 F.3d 793 (7th Cir. 2005), erroneously applied federal common law to a FEHBA reimbursement dispute against Blue Cross in which the defendant sought application of Illinois's common fund doctrine, *id.* at

796. *Cruz II*, 495 F.3d at 513. In *Cruz I*, we found a conflict between state law and the federal policy of uniform healthcare benefits and thus applied federal common law. 396 F.3d at 799 (vacated, *Cruz v. Blue Cross & Blue Shield of Ill.*, 548 U.S. 901 (2006), and abrogated by *McVeigh*, 547 U.S. 677). But that use of federal common law was misplaced: *McVeigh*, which succeeded *Cruz I*, distinguished between benefits and reimbursement. *Cruz II*, 495 F.3d at 513. As we noted, the Plan determines the benefits amount, which is uniform across states and unaffected by the common fund doctrine. *Id.* The common fund doctrine only "affects how much of a tort judgment or other judgment against (or settlement with) a third party the plaintiff gets to keep and how much he must give the insurer. The disuniformity that results is not a disuniformity in benefits." *Id.*

In response, BCBSA argues that *Cruz II* does not survive the Supreme Court's decision in *Coventry Health Care of Missouri, Inc. v. Nevils*, 581 U.S. 87 (2017), and that the common fund doctrine significantly conflicts with an OPM regulation promulgated in 2015. Both arguments fail. First, *Cruz II* survives *Nevils*, as does *McVeigh*. In *Nevils*, the Court held that under FEHBA's express preemption provision, 5 U.S.C. § 8902(m), contractual subrogation and reimbursement provisions override state laws barring subrogation and reimbursement. 581 U.S. at 95–96. The Court cast no doubt on *McVeigh*'s "principal holding" that § 1331 does not confer jurisdiction over FEHBA reimbursement actions. *Id.* at 97. It explained that *McVeigh* did not reach the choice of law question presented in *Nevils* because "[e]ven if FEHBA's preemption provision reaches contract-based reimbursement claims," "that provision is not sufficiently broad to confer federal jurisdiction." *Id.* (quotations omitted). True, the Court discussed the

"distinctly federal interests" involved in *Nevils*, citing to *McVeigh*, but it emphasized that the provision at issue was simply "not a jurisdiction-conferring provision." *Id.* at 96–97 (quotation omitted). *Cruz II*'s jurisdictional holding therefore survives *Nevils* and precludes federal question jurisdiction over BCBSA's suit.

Further, BCBSA argues that OPM's 2015 promulgation of a FEHBA reimbursement regulation creates a significant conflict between state law and federal interests, but the countervailing considerations outlined in *McVeigh* still control: the reimbursement right is not a creature of federal law. Though the 2015 regulation provides that a FEHB carrier is entitled to pursue reimbursement recoveries, 5 C.F.R. § 890.106(a), and that a carrier's reimbursement right supersedes other parties' rights, *id.* § 890.106(e), a carrier's reimbursement right is still not a prescription of federal law, and BCBSA does not argue otherwise. The right instead stems from a personal injury recovery, and state law governs the claim underlying that recovery. *McVeigh*, 547 U.S. at 698. Thus, under *McVeigh* and *Cruz II*, there is still no uniquely federal interest that supports federal question jurisdiction, and the district court properly held that it did not have such jurisdiction.

II

A

We now turn to BCBSA's federal officer removal argument. Under § 1442, a defendant may remove a motion "separately from an underlying case not otherwise removable." *Hammer v. U.S. Dep't of Health & Hum. Servs.*, 905 F.3d 517, 526 (7th Cir. 2018); 28 U.S.C. § 1442(d)(1) ("If removal is sought for a proceeding …, and there is no other basis for removal,

only that proceeding may be removed to the district court."). The defendant "must show it was a (1) 'person' (2) 'acting under' the United States, its agencies, or its officers (3) that has been sued 'for or relating to any act under color of such office,' and (4) has a colorable federal defense to the plaintiff's claim." *Ruppel*, 701 F.3d at 1180–81 (quoting 28 U.S.C. § 1442(a)). The statute thus operates as an exception to the well-pleaded complaint rule: whereas an action may generally be removed to federal court under federal question jurisdiction only if "the federal question ... appear[s] on the face of [the] properly pleaded complaint," under the federal officer removal statute, "the federal-question element is met if the defense depends on federal law," and removal is proper if all elements for federal officer removal are established. *Jefferson County v. Acker*, 527 U.S. 423, 430–31 (1999).

On appeal, the plaintiffs make no argument as to whether BCBSA satisfies the four requirements for federal officer removal. Instead, they argue that federal officer removal should be limited to where the federal defense involves "participation in federal law enforcement" and that the common fund doctrine does not conflict with FEHBA policies. We address these arguments, which fail, before analyzing the four prongs for removal.

The federal officer removal statute is not limited to when the federal defense involves federal law enforcement's participation. The plaintiffs cite *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142 (2007), and *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210 (7th Cir. 2022), to say otherwise. They argue that the Supreme Court stated in *Watson* that the statute's main purpose is to prevent states from using their courts to interfere with the federal government's enforcement of federal

laws. But the passage from *Watson* the plaintiffs cite instead discusses that federal regulation of a party, standing alone, does not make federal officer removal proper. Similarly, we concluded in *Martin* that federal officer removal was improper because the defendant claimed it was "acting under" a federal officer when it was merely subject to extensive regulation. 37 F.4th at 1212–13. As we will discuss below, BCBSA was not just complying with federal law but was also acting on OPM's behalf, and thus *Watson* and *Martin* are inapposite.

The plaintiffs insist that finding BCBSA's removal proper in this case would cause removal to "become the norm in virtually all cases involving state-law claims against companies in regulated industries or involving federal employees covered by BCBSA." But again, mere regulation is not enough for federal officer removal, and so this argument fails, too. We are similarly unpersuaded by the plaintiffs' assertion that removal was improper because the common fund doctrine is compatible with FEHBA subrogation interests. They do not explain how this compatibility affects BCBSA's fulfillment of the requirements for federal officer removal. To the extent they assert that BCBSA does not have a colorable defense, this argument fails, as we will explain below. All of the plaintiffs' arguments against removal are thus unavailing.

Turning to the requirements for federal officer removal, the first prong is met: BCBSA is a "person" under the statute. "[U]nless the context indicates otherwise," we construe the term "person" in a statute to include corporations and companies. *Ruppel*, 701 F.3d at 1181. There is no indication that the definition of person in § 1442 excludes corporations, *id.*, and the plaintiffs do not suggest otherwise.

Second, BCBSA was "acting under" a federal agency—OPM. BCBSA's "'acting under' must involve an effort to *assist*, or to help *carry out*, the federal superior's duties or tasks." *Id.* (emphasis in original) (quotation omitted). "'Acting under' covers situations … where the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Id.* BCBSA helps OPM, the federal superior, establish a health benefits program for federal employees; OPM retains "direct and extensive control over these benefit contracts under the FEHBA." *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1233 (8th Cir. 2012), abrogated on other grounds by *BP P.L.C. v. Mayor & City Council of Balt.*, 593 U.S. 230 (2021). As Justice Breyer noted in *McVeigh*, BCBSA's "only role in this scheme is to administer the health benefits plan for the federal agency in exchange for a fixed service charge." 547 U.S. at 704 (Breyer, J., dissenting). Similarly, the Ninth Circuit explained in *Goncalves v. Rady Children's Hospital San Diego*, 865 F.3d 1237 (9th Cir. 2017), in finding a motion to expunge a subrogation lien removable under § 1442, that the government delegated OPM's responsibility "to make reasonable efforts to pursue [reimbursement and] subrogation claims and decide when filing suit in federal court is a wise decision" to the carriers. *Id.* at 1247; see also *Jacks*, 701 F.3d at 1234 (noting that Blue Cross and Blue Shield of Kansas City was not merely complying with federal law but rather "ha[d] been delegated particular authority by OPM"). BCBSA is acting under OPM, pursuing a reimbursement claim on OPM's behalf.

Third, this action is for or relating to BCBSA's acts under OPM's authority. In other words, there was a "causal connection between the charged conduct and asserted official authority." *Ruppel*, 701 F.3d at 1181 (quotation omitted). BCBSA

can establish this causal connection if its relationship with the plaintiffs is "derived solely from its official duties" for OPM. *Id.* (cleaned up). As discussed above, OPM has delegated the responsibility to pursue reimbursement claims to private carriers, including BCBSA. BCBSA's relationship with the plaintiffs is derived solely from its official duty to pursue reimbursement claims for OPM; the plaintiffs filed the motion for adjudication because of BCBSA's assertion of the reimbursement right on OPM's behalf. BCBSA has thus shown that the plaintiffs have sued it for an act under federal authority.

Fourth, BCBSA has a colorable federal defense. "[T]he claimed defense need only be 'plausible.'" *Id.* at 1182 (quotation omitted). BCBSA's express preemption defense is plausible, so we need not address its other proffered defenses. For its express preemption defense, BCBSA argues that under *Nevils*, the Plan's reimbursement provisions preempt the common fund doctrine. This defense is colorable because, as previously discussed, the Supreme Court held in *Nevils* that under FEHBA's express preemption provision, § 8902(m)(1), contractual reimbursement provisions override state laws barring reimbursement. 581 U.S. at 94–97; see also *Goncalves*, 865 F.3d at 1249 ("In light of *Nevils*, we have little trouble concluding that the Blues' assertion that § 8902(m)(1) preempts any state law supporting Goncalves's motion to expunge the lien is a colorable federal defense."). BCBSA has therefore satisfied all four elements for federal officer removal.

Because removal of the motion was proper, the district court erred in remanding the entire case, including the motion for adjudication. "Federal law does not permit a district judge to remand the complete litigation just because portions belong in state court. Judges must exercise the jurisdiction they

have been given." *Bergquist v. Mann Bracken, LLP*, 592 F.3d 816, 819 (7th Cir. 2010). Thus, "[i]f some parts of a single suit are within federal jurisdiction, while others are not, then the federal court must resolve the elements within federal jurisdiction and remand the rest." *Id.* We recognize that BCBSA did not argue below that the court should exercise jurisdiction over the motion for adjudication even if it remanded the rest of the case back to state court. We do not doubt that the district court would have kept the motion if the parties had fully presented this issue.

B

Finally, the prior exclusive jurisdiction doctrine is not a barrier to the court's exercise of jurisdiction over the motion. The plaintiffs abandoned their prior exclusive jurisdiction argument on appeal, but we address it to ensure the district court's exercise of jurisdiction would be proper. Under the doctrine, "two suits, both of which are *in rem* or *quasi in rem* and require the courts to have possession or control of the same property, cannot proceed at the same time, and the second court must yield to the first." *Hammer*, 905 F.3d at 536. A proceeding in rem "is one which is taken directly against property or one which is brought to enforce a right in the thing itself." *Austin v. Royal League*, 147 N.E. 106, 109 (Ill. 1925). An action is not in rem or quasi in rem when it "seek[s] only to establish rights," thereby "adjudicat[ing] questions which precede distribution" rather than "deal[ing] with the property and other distribution." *Commonwealth Tr. Co. of Pittsburgh v. Bradford*, 297 U.S. 613, 619 (1936). Such an action is instead in personam.

The prior exclusive jurisdiction doctrine is inapplicable here because the motion for adjudication is in personam. "An

action to recover fees under the common fund doctrine is an independent action invoking the attorney's right to the payment of fees for services rendered." *Bishop v. Burgard*, 764 N.E.2d 24, 31 (Ill. 2002). The plaintiffs seek an order finding that the common fund doctrine applies (and thus reduces the reimbursement amount BCBSA receives). In other words, they seek "merely to establish … [their attorney's] right to share in [the settlement funds], and thus to obtain an adjudication which might be had without disturbing the control of the state court." *United States v. Bank of N.Y. & Tr. Co.*, 296 U.S. 463, 478 (1936). Such a motion is in personam, and the prior exclusive jurisdiction doctrine is inapplicable to it. See *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (noting the doctrine "has no application to a case in a federal court … wherein the plaintiff seeks merely an adjudication of his right of his interest as a basis of a claim against a fund in the possession of a state court").

Unlike a motion for enforcement, the plaintiffs' motion for adjudication "does not by itself get [them] any money." *Silk v. Bond*, 65 F.4th 445, 453 (9th Cir. 2023). For this reason, we are unpersuaded by case law concluding that a motion for lien adjudication is in rem. These cases are premised on the Illinois Supreme Court's discussion of an in rem action as one "brought to enforce a right in the thing itself." *Zilinger v. Allied Amer. Ins. Co.*, 957 F. Supp. 148, 149 (N.D. Ill. 1997) (quoting *Austin*, 147 N.E. at 109); see also *Jayko v. Fraczek*, 966 N.E.2d 1121, 1132–33 (Ill. App. Ct. 2012); *Smith v. Hammel*, 14 N.E.3d 742, 745 (Ill. App. Ct. 2014). But again, the plaintiffs' motion for adjudication merely seeks to establish a right—that the common fund doctrine applies, entitling the plaintiffs' attorney to settlement funds—not to enforce the lien or settlement agreement or to expunge the lien. Cf. *Goncalves*, 865 F.3d at

1260 (Wardlaw, J., dissenting) (finding a motion for lien expungement is quasi in rem). The district court should thus exercise its jurisdiction over the motion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED