IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THE SETH PETERSON COTTAGE CONSERVANCY, INC., JOHN PRODOEHL, GERALD McEATHRON, EDWARD PROHASKA and DELORES PROHASKA,

Plaintiffs,

v.

GOODYEAR TIRE AND RUBBER COMPANY, A.C.E. INSURANCE CO., X.L. INSURANCE CO., LTD., ALLIANZ UNDERWRITERS INSURANCE CO. and ALLIANCE INSURANCE CO.,

Defendants.

OPINION AND ORDER

03-C-393-C

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Plaintiffs brought this state law products liability suit against defendants in the Circuit Court for Dane County, Wisconsin. Plaintiffs allege that they sustained damages from defective heating hoses that were installed in their homes and designed and manufactured by defendant Goodyear Tire and Rubber Company. In addition to defendant Goodyear, plaintiffs named as defendants several companies that have issued insurance policies to Goodyear. See Wis. Stat. § 803.04(2) (permitting joinder of insurance company

in negligence action when company has interest in outcome). Defendant A.C.E. Insurance Co. removed the action to this court pursuant to 9 U.S.C. § 205, which is part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Presently before the court is plaintiffs' motion to remand the suit to state court because defendant A.C.E. did not obtain the consent of defendant Goodyear to remove the case to this court. In response, defendant A.C.E. argues that § 205 does not require unanimity to sustain a removal or, in the alternative, that it did not need consent from defendant Goodyear because Goodyear should be realigned as a plaintiff.

I agree with plaintiffs that this case must be remanded to the Circuit Court for Dane County. First, I adhere to the conclusion I reached in Employers Insurance of Wausau v. Certain Underwriters at Lloyd's London, 787 F. Supp. 165, 169 (W.D. Wis. 1992), that § 205 requires consensus among the defendants before a case may be removed to federal court. Further, I conclude that realignment would be improper in this case because plaintiffs have a substantial conflict with both defendant Goodyear and defendant A.C.E. Finally, because defendant A.C.E.'s position was not justified under settled law, plaintiffs are entitled to attorney fees and costs under 28 U.S.C. § 1447.

OPINION

A. Unanimity of Consent

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is codified at 9 U.S.C. §§ 201-208, governs the enforcement, validity and interpretation of arbitration agreements between United States citizens and citizens of foreign countries. See Jain v. de Mere, 51 F.3d 686, 688 (7th Cir. 1995). Agreements that fall within the scope of the Convention may be enforced in federal court. 9 U.S.C. § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."). The Convention also provides for removal of cases from state courts:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C. § 205.

Plaintiffs allege in their complaint that defendant A.C.E. is a citizen of Bermuda and that defendant Goodyear is a citizen of Ohio. According to defendant A.C.E.'s notice of removal, its insurance policy with defendant Goodyear contains a clause in which they agree to arbitrate in London, England, any dispute regarding the scope of A.C.E.'s duty to

indemnify Goodyear. The parties appear to agree that the arbitration agreement "falls within the Convention." See Francisco v. Stolt Achievement MT, 293 F.3d 270, 273 (5th Cir. 2002) (agreement falls within Convention when it is in writing, arises out of commercial legal relationship between United States citizen and non-United States citizen and provides for arbitration in territory of Convention signatory). In addition, plaintiffs do not deny that this proceeding "relates to" the arbitration agreement because plaintiff's ability to recover damages from defendant A.C.E. is contingent on whether it has a duty to indemnify defendant Goodyear. See Beiser v. Weyler, 284 F.3d 665 (5th Cir. 2002). Therefore, this court has jurisdiction to hear this case under 9 U.S.C. § 203.

The crux of the parties' dispute is whether defendant A.C.E.'s notice of removal is defective because it is not joined by defendant Goodyear. Section 205 requires "the defendant or the defendants" to remove an action to federal court. Plaintiffs contend that the phrase means that all defendants that are real parties in interest must consent to removal; defendant A.C.E. argues that the policy behind § 205 requires an interpretation that would allow a foreign insurer to remove a case without consent of the other defendants.

Both sides acknowledge that, in the general removal statute, 28 U.S.C. § 1441(a), the phrase "the defendant or the defendants" means all defendants. See Doe v. GTE Corp., No. 02-4323, slip. op at 2 (7th Cir. Oct. 21, 2003) ("removal [under § 1441] requires the consent of *all* defendants"); see also Phoenix Container, LP v. Sokoloff, 235 F.3d 352, 353

(7th Cir. 2000) (citing Hanrick v. Hanrick, 153 U.S. 192 (1894), and Torrence v. Shedd, 144 U.S. 192 (1892)). Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has squarely determined whether this phrase has the same meaning in § 205. However, in Employers Insurance, 787 F. Supp. at 169, I concluded that it did. I reasoned that § 205 directs courts to apply general removal law, with two exceptions that do not implicate the unanimity rule of § 1441. On appeal, the Court of Appeals for the Seventh Circuit held that 28 U.S.C. § 1447(d) precluded appellate review of the order remanding the case to state court. Matter of Amoco Petroleum Additives Co., 964 F.2d 706, 713 (7th Cir. 1992). The court also stated that it would not issue a writ of mandamus, even if it had the authority to do so, because the district court's opinion was not clearly incorrect and "[m]andamus is not the appropriate means to resolve doubtful issues of procedure or statutory construction." Id.

Defendant A.C.E. advances several reasons why Employers Insurance should be disregarded or distinguished in this case. First, A.C.E. argues that § 205 does not require courts to apply § 1441, as suggested in Employers Insurance. Defendant A.C.E. points out that the statute directs courts to apply "the procedure for removal of causes otherwise provided by law." Citing cases from other jurisdictions, A.C.E. contends that the phrase "procedure for removal" refers to the requirements of 28 U.S.C. § 1446 and not § 1441. This argument is a nonstarter. The Court of Appeals for the Seventh Circuit has held that

the unanimity requirement applies to both § 1441 and § 1446. See Amoco, 964 F.2d at 713 ("Our opinion in [Northern Illinois Gas Co. v.]Airco[Industrial Gases, 676 F.2d 270 (7th Cir. 1982)] . . . holds that participation of all defendants is a condition of an effective notice of removal under § 1446(a)."). Thus, regardless whether "procedure for removal" includes § 1441 or § 1446 only, plaintiff's notice of removal is defective for failing to include the consent of all defendants.

Second, defendant A.C.E. cites Acosta v. Master Maintenance & Construction, Inc., 52 F. Supp. 2d 699, 709 (M.D. La. 1999), in which the court held that "the jurisprudence under 28 U.S.C. § 1441(a) as to the meaning of 'defendant or defendants' has no application to that phrase as used in 9 U.S.C. § 205." The court concluded that it was unnecessary under § 205 for a foreign business to obtain consent from the other defendants before removal. It reached this conclusion on the basis of three premises: (1) the purpose of the Convention Act was to foster international contracts; (2) permitting foreign businesses to litigate in federal court will give them access to a "uniform body of federal law"; (3) if foreign businesses can be denied access to the uniform body of federal law by any other defendant, they will "think carefully before contracting with an American business." Id. at 709.

The second and third premises listed by the court do not necessarily follow from the first. Regardless whether a case is in federal court or state court, the court enforcing the arbitration agreement will be required to apply the Convention Act. Being in federal court

does not guarantee a uniform interpretation of that act. Circuits can and do differ on debatable points of law. Further, it seems unlikely that a foreign business would refuse to do business with companies in the United States simply because there is a chance that an arbitration agreement will be enforced in state rather than federal court. The court cited no legislative history suggesting that Congress was worried about this possibility.

Even if all of the court's premises are accepted, however, this still would not permit an interpretation of "the defendant or the defendants" to mean "the foreign defendant, without consent of the other defendants." Although the purpose of the statute may be to encourage international business, this purpose does not give courts license to read language into the statute that does not exist. "Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals." In re Cavanaugh, 306 F.3d 726, 731 (9th Cir. 2002).

In Acosta, the court recognized that "Congress is presumed to have intended similar terms in its legislation to have similar meaning." Acosta, 52 F. Supp. 2d at 708 (citing National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 470 (1998)). However, it concluded that this presumption was rebutted by what it found to be the policy behind the Convention Act. I am not persuaded that this view is accurate. Had Congress wanted to insure that foreign businesses could enforce their arbitration agreements in federal court, there are at least two ways it could have expressed this intent. For example,

it could have substituted for the words "the defendant or the defendants," the words "any defendant" or "any foreign defendant." Alternatively, it could have given federal courts exclusive jurisdiction over international arbitration agreements. Congress did not choose either of these options; instead, in describing the parties that may remove an action under § 205, it chose terms that courts have interpreted since the 19th century to mean the exact opposite of defendant A.C.E.'s proposed construction. It is a universal presumption that Congress is aware of the way terms have been defined in the case law. Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979). Other specialized removal statutes demonstrate that when Congress wants to create a right of removal without requiring consensus, it departs from the language used in § 1441(a). See 28 U.S.C. § 1441(d) (permitting removal by "the foreign state"); 28 U.S.C. § 1442 (permitting removal by "any of the following" persons); 28 U.S.C. § 1452 (permitting removal by "a party" in bankruptcy case).

In addition to relying on Acosta, defendant A.C.E. advances a number of policy arguments for interpreting § 205 differently from § 1441. Specifically, it argues that it would undermine federal policy to permit defendants having "no federally-protected 'special' status" the ability to deny foreign defendants the right to use the federal courts to enforce an arbitration agreement. Dft. A.C.E.'s Br., dkt. #22, at 8. In addition, it contends without supporting authority that the Convention Act was adopted "to overcome state courts' hostility towards international arbitration agreements." Id. at 9. Again, even if these

assertions are true, they do not empower a court to enforce "policies" not expressed in the language of the statute. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

Defendant A.C.E. suggests also that courts have construed § 1441 "strictly" to protect state interests and in recognition of a plaintiff's right to choose the forum. Dft. A.C.E.'s Br., dkt. #22, at 8-9. It argues that a similarly narrow construction of § 205 is unnecessary because the same concerns are not implicated by removals under that statute. A.C.E. does not explain why or how concern for state autonomy disappears whenever a case is removed under § 205. In this case, defendant A.C.E. seeks to force plaintiffs to try their state law tort claims in federal court so that a federal court can determine whether courts in Wisconsin may exercise personal jurisdiction over it, although the determination involves questions of both federal and state law. See Fed. R. Civ. P. 4(k)(jurisdiction is established over defendant when it would be consistent with Constitution and with law of forum state). Even the question of the scope of the arbitration clause is related only tangentially to plaintiffs' claims. The federal interest in this dispute is weak at best compared to Wisconsin's interest in controlling the interpretation of its own law on products liability.

Furthermore, even assuming that § 1441 has been construed narrowly and that the reasons for that construction are not present when interpreting § 205, it does not follow that

§ 205 may be applied in the manner defendant A.C.E. proposes. In order to adopt A.C.E.'s construction of § 205, at a minimum, I would have to find that the phrase "the defendants" was ambiguous, in that it could be interpreted reasonably either to require consensus or to permit one defendant to remove. This would be a difficult finding to make. Defendant A.C.E. does not explain how the phrase "*the* defendants" may be reasonably construed to mean "*a* defendant." Although federalism concerns may have underscored some judicial interpretations of § 1441, the Supreme Court has not relied on policy considerations in construing § 1441 to impose a unanimity requirement. In Chicago, Rock Island & Pacific Railway v. Martin, 178 U.S. 245 (1900), one of the first cases interpreting 28 U.S.C. § 1441 as requiring unanimity of consent, the Court wrote, "It thus appears *on the face of the statute* that . . . the defendant, if there be but one, may remove, or the defendants, if there be more than one." (Emphasis added.)

In essence, defendant A.C.E. asks this court to disregard the language of the statute and more than one hundred years of case law construing that language to give effect to policy considerations that may or may not have motivated Congress when it enacted 9 U.S.C. § 205. A.C.E. should direct its to request to Congress rather than this court, which does not have the power to amend statutes.

Defendant A.C.E.'s attempt to distinguish Employers Insurance fares no better. A.C.E. contends that even if Employers Insurance announced the general rule correctly, that

case "made it clear that removal/remand jurisprudence is inherently a fact-driven exercise." Dft. A.C.E.'s Br., dkt. #22, at 13. A.C.E. goes on to argue that returning this case to state court "would reward abuse" because plaintiffs "coerced Goodyear into stipulating not to remove the case." Id. at 14.

First, I disagree with defendant A.C.E.'s interpretation of Employers Insurance. Neither that case nor § 1441 contains any language suggesting that the unanimity rule is a discretionary one that is to be applied on a case-by-case basis and that the rule should be ignored in this case because of plaintiffs' separate agreement with defendant Goodyear. Even if I agreed that there was a "misconduct" exception, this would not be an appropriate case in which to apply it. Plaintiffs and defendant Goodyear entered into an agreement that Goodyear would not remove this case to federal court and plaintiffs would not "name the State of Wisconsin as a Plaintiff spokesperson until it becomes necessary or appropriate." If this agreement is "coercive," then all contracts containing provisions benefiting both parties would be vulnerable to invalidation. Considering that defendant Goodyear is a large company represented by capable counsel, it is difficult to accept defendant A.C.E.'s contention that plaintiffs are bullying Goodyear into remaining in state court. At worst, plaintiffs' and Goodyear's stipulation is akin to a forum selection clause. Such clauses are uniformly upheld despite arguments that they are unfair because they are not negotiated. See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 485 (1991). The stipulation at issue

was entered into by sophisticated parties with full knowledge of the terms of the agreement. Defendant A.C.E. cannot turn this agreement into something that it is not simply by using inflammatory language in its brief.

In sum, defendant A.C.E. has failed to show either that Employers Insurance is incorrect or that its holding is inapplicable to this case. Section 205 of the Convention Act required A.C.E. to obtain the consent of all the defendants before removing this case to federal court.

B. Realignment

Defendant A.C.E. argues in the alternative that defendant Goodyear's consent for removal is unnecessary because Goodyear should be realigned as a plaintiff. Its argument is that it and Goodyear should be on opposite sides because they have conflicting interests on the issue of A.C.E.'s duty to indemnify Goodyear for any injuries sustained by plaintiffs.

Defendant A.C.E. seeks to apply a nonexistent test for realigning parties. The question is not whether the defendants have any interests that are adverse to each other but whether there is a substantial conflict between the plaintiff and each of the defendants. "Realignment is proper where there is no actual, substantial conflict between the parties that would justify placing them on opposite sides of the lawsuit." American Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 151 (7th Cir. 1981); see also Prudential Real Estate Affiliates,

Inc. v. PPR Realty, Inc., 204 F.3d 867, 873 (9th Cir. 2000) ("We must align for jurisdictional purposes those parties whose interests coincide respecting the 'primary matter in dispute.'").

It cannot be denied that the primary dispute in this case is whether defendant Goodyear is liable to plaintiffs for manufacturing and designing defective products. On this issue, plaintiff is in conflict with each of the defendants and Goodyear and A.C.E. are in agreement. If Goodyear is not liable, A.C.E. would have no need to indemnify Goodyear, regardless of the scope of coverage. This identity of interest is sufficient to preserve the parties' current alignment. Defendant A.C.E. is not entitled to convert defendant Goodyear into a plaintiff simply because their interests are not identical in all respects.

It may be that, as far as defendant A.C.E. is concerned, the primary issue in this case is whether defendant A.C.E. has a duty to indemnify defendant Goodyear. If this suit were brought by defendant A.C.E. seeking a declaratory judgment against defendant Goodyear, I would agree that it would be appropriate for these parties to be on opposite sides. However, A.C.E. fails to cite any case law holding that it is proper to realign a defendant insurance company as a plaintiff in circumstances similar to this case. As the court of appeals has noted, "Ordinarily the victim of an insured is on one side of the lawsuit and the insured *and his insurance carrier* are on the other." Truck Insurance Exchange v. Ashland Oil, Inc., 951 F.2d 787, 788 (7th Cir. 1992) (emphasis added).

Defendant A.C.E.'s remaining argument is that defendant Goodyear should be realigned at least for purpose of determining whether removal is proper because "Plaintiffs' and Goodyear's interests are . . . aligned for purposes of forum selection." Dft.'s Br., dkt. #22, at 17. If accepted, this argument would apply to *any* case in which one of the defendants did not consent to removal and would eviscerate the unanimity requirement. Defendant cites no authority for this proposition and I am unaware of any. Accordingly, I conclude that because plaintiffs have a substantial conflict with both defendant Goodyear and defendant A.C.E., it would be improper to realign Goodyear as a plaintiff. Defendant A.C.E.'s failure to obtain Goodyear's consent to remove this case requires that the case be remanded to state court.

C. Attorney Fees and Costs

Plaintiffs seek costs and attorney fees under 28 U.S.C. § 1447(c), which provides, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." The decision to award costs or fees is a discretionary one. Wisconsin v. Hotline Industries, Inc., 236 F.3d 363 (7th Cir. 2000). An award is proper when "[r]emoval [is] unjustified under settled law." Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) ("§ 1447 is *not* a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party.")

Defendant A.C.E. advanced two arguments for permitting removal of this case to federal court. A.C.E.'s first argument was foreclosed by Employer's Insurance and the second has no support in the case law. Therefore, I cannot conclude that A.C.E.'s position was justified under current law. Plaintiffs are entitled to reimbursement for their costs and attorney fees in challenging the removal of this case.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion to remand this case to state court is GRANTED.

2. Plaintiffs' motion for costs and attorney fees under 28 U.S.C. § 1447(c) is GRANTED.

3. Plaintiff may have until November 4, 2003, in which to submit a form of judgment itemizing the reasonable attorney fees and costs incurred in responding to defendant A.C.E.'s removal.

4. Defendant A.C.E. may have until November 11, 2003, to file an objection to the form of judgment.

5. The clerk of court is directed to return the record in case number 03-C-393-C to

the Circuit Court for Dane County, Wisconsin.

Entered this 27th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge