



UNITED STATES GOVERNMENT

MEMORANDUM

FORM G-115f (1-92)

RAILROAD RETIREMENT BOARD

T - 97 - 46

NOV 04 1997

TO : Catherine C. Cook
General Counsel

FROM : Steven A. Bartholow *Steven A. Bartholow*
Deputy General Counsel

SUBJECT : Recovery of Plaintiff's Attorney Fees from 12(o) Lien

In a recent personal injury suit in the Cook County Circuit Court, attorneys for plaintiff argued that as the Board would derive a benefit from recovery of sickness insurance benefits paid to their client, a portion of the sickness insurance benefits recovered under section 12(o) of the Railroad Unemployment Insurance Act should be offset by attorney's fees pursuant to the "common fund" doctrine evolved under Illinois state law. An Assistant United States Attorney represented the Board in a hearing on the matter of the Board's lien before the Illinois Circuit Court. At the hearing, the judge strongly indicated his preference that the Board reach a settlement with plaintiff. Afterward, the Assistant U.S. Attorney questioned whether the difficulty of enforcing the Board's lien in the Illinois Circuit Court could successfully be avoided by removing the issue to the United States District Court, in light of the June 3, 1997, decision of the United States Court of Appeals for the Seventh Circuit in Blackburn v. Sundstrand Corporation, 115 F. 3d 493 (7th Cir. 1997). In that case the Court rejected removal of an Illinois tort suit to District Court, finding that attorneys' fee awards under the common fund doctrine was not preempted by the Employee Retirement Income Security Act (ERISA). For the reasons set forth below, it is my opinion that the Blackburn decision would not control the outcome with respect to liens asserted under section 12(o).

I. Attorney fees payable under the "common fund" theory of common law.

A longstanding rule of common law allows a court exercising equitable jurisdiction to order an allowance of attorney's fees to one who at his own expense wins a suit which preserves, protects, increases, or otherwise creates a

fund in which others share. Allowance of Attorney's Fees Against Property or Fund Increased or Protected by Attorney's Services, 49 A.L.R. 1149, 1150 (1927); supplemented in 107 A.L.R. 749, 750 (1937). The rule is supported by the notion that the person who has taken the risks and costs of litigation should not pay the expenses alone, while others share in the benefits. 49 A.L.R. at 1153, 107 A.L.R. at 750. The party to be charged must receive more than an incidental benefit, and there is authority that they must not have chosen counsel of their own. 107 A.L.R. 753 and 752.

The classic case for application of the doctrine would be where one beneficiary of an estate wins a suit which increases the shares of fellow beneficiaries, e.g. Wallace v. Fiske, 80 F. 2d 897 (8th Cir., 1935). However, venturing into the landscape of statutory benefits such as the RUIA renders claims for attorney's fees less certain. In particular, an Illinois Appellate Court held that where an employer had paid compensation benefits under the Illinois workmen's compensation statute, the employer was not required to contribute a share of the employee's attorneys fees when the injured employee obtained a recovery from a third party tortfeasor. The employer thus received full reimbursement for benefits, while the employee paid his attorney's fees from the remainder of the settlement. Manion v. Chicago, Rock Island & Pacific RR, 119 N.E. 2d 498 (Ill. App., 1954). The Illinois statute was later specifically amended to provide that the employer share attorney fees. Reno v. Maryland Casualty Co., 188 N.E. 2d. 657 (Ill., 1963).

On occasion, attorneys for sickness insurance beneficiaries have claimed that the Board's reimbursement of sickness benefits paid to the employee should be reduced by a share of the attorney's fee under the common fund theory, thereby increasing the amount of damages which remain in the employee's hands. In the case of Lewis v. Railroad Retirement Board, 54 So. 2d 777 (Ala., 1951), the Alabama Supreme Court rejected the claimant's argument that a portion of the lien amount otherwise due the Board under section 12(o) should be offset for a share of attorneys' fees pursuant to Alabama decisions applying the common fund doctrine. The court found:

The suit brought by complainant against the Louisville & Nashville Railroad Company was not in any sense a class suit or brought for the benefit of others. The complainant sought only to establish his own rights. The incidental benefit resulting to the Railroad Retirement Board is not a basis for charging the Railroad Retirement Board with the creation of a fund for its benefit. [54 So. 2d at 782.]

Faced with a like claim for attorneys fees, the United States Court of Appeals for the Third Circuit also concluded in Richter v. United States, 296 F. 2d 509, (3rd Cir., 1961), 511-512:

The plaintiffs say * * * that, even though the act does not provide for an attorney's fee, they should be allowed to recover one either under Pennsylvania law or general federal equity principles. * * *

We find no basis for taking any such liberty with the statute. What we are in effect asked to do is to write a provision which is not there. * * * There is nothing in the legislative history to which we are cited that says anything for or against attorney's fees in this situation. Congress when it desires to make provision for attorney's fees knows perfectly well how to do so, as it has in the Federal Employees' Compensation Act and an abundance of other situations. It has not done so here and we do not think it a proper subject for court action. [Footnotes omitted].

Such reported case law as exists thus supports the Board's traditional position that the sickness insurance beneficiary, rather than the agency, should pay any attorney fees in connection with recovery of damages for the underlying infirmity. See Legal Opinion L-58-82 (citing Lewis as a basis for declining to deduct attorney's fees), and Craig v. Jo B. Gardner, Inc., 586 S.W.2d 316, 327, (Mo., 1979), (attorney had no standing to claim that recovery of the Board's full lien under 12(o) without concurrent liability for attorney's fees constituted a "taking" without constitutional due process, where his fee was paid in full by the injured beneficiary.)

II. Removal of state court actions to Federal district court.

On occasion, it has been the Board's practice to request the appropriate United States Attorney's office to remove the sickness beneficiary's tort suit to Federal district court to enforce the claim to a portion of the plaintiff's damages under section 12(o). Removal of state court cases is authorized by 28 U.S.C. 1441.¹ Section 1441(a) provides that a case may be removed by the defendant to

¹Although removal of cases where a Federal official is named as a defendant is authorized by another provision (28 U.S.C. 1442(a)), this provision has been strictly construed not to include government agencies. Western Securities Co. V. Derwinski, 937 F. 2d 1276, (7th Cir., 1991), at 1279.

Federal court where the Federal court would have had original jurisdiction. Insofar as is pertinent here, this means the case must involve either a Federal question under 28 U.S.C. 1331, or the United States as a plaintiff or defendant (section 1345 and 1346, respectively). Removal is subject to numerous additional qualifications beyond the scope of this limited discussion, but it may be noted that under section 1441(c), where a case involves claims which are not removable, the claim upon which removal is sought must be separate and independent from those which may not be removed.

III. The impact of the Seventh Circuit decision in Blackburn v. Sundstrand.

The controversy in the Blackburn case originated in an auto accident. Mr. and Mrs. Blackburn sued the driver in Illinois state court, and ultimately settled their damages claim for \$105,000. While the litigation was pending, the Blackburns received over \$25,000 in medical insurance payments under a health benefits plan provided by Sundstrand which was drafted in accordance with the requirements of ERISA. After the Blackburns settled their injury suit, Sundstrand demanded reimbursement of the medical insurance payments under a subrogation clause of the health benefits plan. Mr. and Mrs. Blackburn then filed a petition in Illinois state court to apportion the \$105,000 so that a portion of their attorney's fees and expenses might be deducted from the amount of medical benefit payments, thereby reducing Sundstrand's recovery to approximately \$17,000. Sundstrand then obtained removal of the action in Illinois state court to the Federal District Court for the Northern District of Illinois, on grounds that as the subrogation clause was part of a plan drawn under ERISA, and as ERISA preempted state law with respect to covered plans, the Blackburns could not reduce a payment due Sundstrand under the plan by application of Illinois law. The District Court ruled against the Blackburns' claim for an attorney's fee set off. The Court held that applying Illinois law to reduce Sundstrand's recovery would interfere with the plan's operation, and thus conflict with the objectives of ERISA. Blackburn v. Becker, 933 F. Supp. 724 (1996), at 728.

On appeal, however, the Seventh Circuit reversed the District Court. Primarily, the Court of Appeals found that the District Court lacked jurisdiction over the case in the first instance because the case removed (Blackburn v. Becker) was merely a tort suit under state, rather than Federal, law. 115 F. 3d at 494, citing 28 U.S.C. 1441(b). Moreover, the Court stated that Sundstrand's ERISA preemption argument itself was at best a Federal defense to a claim under state law, and a Federal defense does not create removal jurisdiction. Id. at 495. In reaching this conclusion, the Seventh Circuit also resolved a conflict with the

Illinois Court system, as the Illinois Supreme Court had previously determined that ERISA did not preempt the common fund doctrine. Scholtens v. Schneider, 671 N.E.2d 657 (Ill., 1996).

The position of Sundstrand in Blackburn is similar in some respects to the Board's position vis-a-vis the lien under section 12(o). In both instances, reimbursement for previous payments is claimed by a third party from a payment between parties to a tort suit. Also, in both instances, the reimbursement claim is made under color of a Federal statute. The fact that personal injury claims against which the Board may assert a 12(o) lien may be litigated against railroad employers under the Federal Employers' Liability Act rather than state law is not significant, as FELA suits once brought in state court may not be removed. 28 U.S.C. 1445(a).

However, unlike Sundstrand Corporation, the Board is an agency of the Federal government. Sundstrand was constrained to establish a Federal question under 28 U.S.C. 1331 to show that the District Court could have exercised original jurisdiction for purposes of removal under section 1441. If the Board were to seek an adjudication of a 12(o) lien in Federal court, it would be in the form of a claim for money due the United States. Aside from Federal question as a basis of original District Court jurisdiction, the Board may potentially show another ground for jurisdiction as a Federal plaintiff. See U.S. v. State of Illinois, 454 F. 2d 297, 301, (7th Cir., 1971), (U.S. indemnity claim as third party plaintiff establishes district court jurisdiction under 28 U.S.C. 1345)². The question of preemption of state law by a Federal statute as a basis for District Court jurisdiction need not arise.

Even considering removal jurisdiction based upon a Federal question, Blackburn is distinguishable on several counts. Most obviously, Blackburn involved ERISA rather than the RUIA. As noted above, such case law as currently exists under 12(o) supports the Board's traditional position that it is not required by state equity law to allow a portion of the claimant's attorney's fees to be deducted from the amount otherwise recoverable under section 12(o).

Blackburn not only involved another statute; it did so more tangentially than a claim by the Board under 12(o). To construct a Federal issue, Sundstrand was

²Although it has been held that the mere presence of the United States as a defendant is not a basis for removal (see e.g. Eastern Indemnity Co. v. J.D. Conti Electric Co., 573 F.Supp. 1036 (U.S.D.C, E.D. Va., 1983), 1039) existence of an independent Federal claim under 12(o) may avoid this difficulty.

forced to look past the subrogation provision of its plan to the Federal statute which provided the general drafting criteria for the plan. Yet, ERISA did not address subrogation, and as the Seventh Circuit observed, "Illinois's common-fund doctrine * * * is not about employee benefit plans." 115 F. 3d at 495. Different subject matter meant no Federal preemption. In contrast, the Board's claim arises directly under section 12(o). By establishing a lien for the amount of benefits paid, section 12(o) preempts state law which would interfere with that recovery. There is no need to hypothesize whether payment of attorney's fees would conflict with some general purpose of Congress in establishing a law governing another field.

Finally, unlike Blackburn, which involved private funds, applying the common fund theory to the Board results in payment of a private party's attorney fee from the public fisc. Such charges cannot be made without Congressional authorization. Richter, supra.

In view of the foregoing, it is my opinion that the Board is not barred by the decision in Blackburn v. Sundstrand from removing a case from state to Federal court in order to enforce its claim for a lien under section 12(o) of the Railroad Unemployment Insurance Act.

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period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

Subsection (c) has been substituted for the provision in section 71 of Title 28, U.S.C., 1940 ed., "and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States."

This quoted language has occasioned much confusion. The courts have attempted to distinguish between separate and separable controversies, a distinction which is sound in theory but illusory in substance. (See 41 Harv.L.Rev. 1048; 35 Ill.L.Rev. 576.)

Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation.

Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions. Therefore there will be no procedural difficulty occasioned by the removal of the entire action. Conversely, if the court so desires, it may remand to the State court all nonremovable matters.

The provisions of section 71 of Title 28, U.S.C., 1940 ed., with respect to removal of actions under the Federal Employer's Liability Act (U.S.C., 1940 ed., Title 45, Railroads, §§ 51-60) and actions against a carrier for loss, damage, or delay to shipments under section 20 of Title 49, U.S.C., 1940 ed., Transportation, are incorporated in section 1445 of this title.

1976 Acts. House Report No. 94-1487, see 1976 U.S. Code Cong. and Adm. News, p. 6604.

1986 Acts. House Report No. 99-423, see 1986 U.S. Code Cong. and Adm. News, p. 1545.

1988 Acts. House Report No. 100-889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

1990 Acts. Senate Report No. 101-416, House Report Nos. 101-123, 101-512, 101-514, 101-734, and 101-735, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6802.

1991 Acts. House Report No. 102-322, see 1991 U.S. Code Cong. and Adm. News, p. 1303.

Effective Dates

1986 Acts. Section 3(b) of Pub.L. 99-336 provided that: "The amendment made by this section [amending this section] shall apply with respect to claims in civil actions commenced in State courts on or after the date of the enactment of this section [June 19, 1986]."

1976 Acts. Amendment by Pub.L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

COMMENTARIES

See 28 U.S.C.A. § 1441, for Commentary by David D. Siegel.

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(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, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act¹ under color of office or in the performance of his duties:

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(June 25, 1943, c. 646, 62 Stat. 938; Oct. 19, 1996, Pub.L. 104-317, Title II, § 206(a), 110 Stat. 3850.)

¹ So in original. Probably should be "act".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 76 and 77 (Mar. 3, 1911, c. 231, §§ 33, 34, 36 Stat. 1097, 1098; Aug. 23, 1916, c. 399, 39 Stat. 532 [Derived from R.S. §§ 643, 644; Act March 3, 1875, c. 130, § 8, 18 Stat. 401; Feb. 8, 1894, c. 25, § 1, 23 Stat. 36]).

Section consolidates sections 76 and 77 of Title 28, U.S.C., 1940 ed.

The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. Section 76 of Title 28, U.S.C., 1940 ed., was limited to revenue officers engaged in the enforcement of the criminal or revenue laws.

The procedural provisions of section 76 of Title 28, U.S.C., 1940 ed., are incorporated in sections 1446 and 1447 of this title. (See reviser's notes [now Revision Notes and Legislative Reports] under those sections.)

Changes were made in phraseology.

Enactment of Section

Section effective Oct. 1, 1997, see section 3(d) of Pub.L. 104-331, set out as a note under section 1296 of this title.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-820, see 1996 U.S. Code Cong. and Adm. News, p. 4348.

Codifications

Amendment by Pub.L. 104-331, § 3(b)(2)(A), which directed the addition of this section to the end of chapter 37 of this title, was executed by adding this section to the end of this chapter, as the probable intent of Congress.

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Subsection (c) section 71 of Title mentioned in this is wholly between; be fully determined more of the defer sy may remove s States."

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See 28 U.S.C. Siegel.

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

- Sec. 1441. Actions removable generally.
1442. Federal officers and agencies sued or prosecuted.¹
1442a. Members of armed forces sued or prosecuted.
1443. Civil rights cases.
1444. Foreclosure action against United States.
1445. Nonremovable actions.
1446. Procedure for removal.
1447. Procedure after removal generally.
1448. Process after removal.
1449. State court record supplied.
1450. Attachment or sequestration; securities.
1451. Definitions.
1452. Removal of claims related to bankruptcy cases.

¹ in original. Does not conform to section catchline.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predomi-

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(June 25, 1948, c. 646, 62 Stat. 937; Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub.L. 99-336, § 3(a), 100 Stat. 637; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1016(a), 102 Stat. 4669; Dec. 1, 1990, Pub.L. 101-650, Title III, § 312, 104 Stat. 5114; Dec. 9, 1991, Pub.L. 102-198, § 4, 105 Stat. 1623.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 71, 114 (Mar. 3, 1911, c. 231, §§ 28, 53, 36 Stat. 1094, 1101; Jan. 20, 1914, c. 11, 38 Stat. 278; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54).

Section consolidates removal provisions of sections 71 and 114 of Title 28, U.S.C., 1940 ed., and is intended to resolve ambiguities and conflicts of decisions.

Phrases such as "in suits of a civil nature, at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with Rules 2 and 81(c) of the Federal Rules of Civil Procedure.

Ambiguous phrases such as "the District Court of the United States for the proper district" have been clarified by the substitution of the phrase "the district and division embracing the place where such action is pending." (See *General Investment Co. v. Lake Shore & M.S. Ry. Co.*, 1922, 43 S.Ct. 107, 112, 260 U.S. 261, 67 L.Ed. 244 and cases cited therein.)

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction