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Musical Courts: Plaintiff Picks a Court But Can Defendant Trump the Choice? An Analysis of Breuer v. Jim's Concrete of Brevard, Inc.

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Case at a Glance

The Fair Labor Standards Act (FLSA) requires employers to pay workers minimum wage and overtime and allows employees to sue employers to collect unpaid wages due in either federal or state court. The federal removal statute permits a defendant to remove a lawsuit filed in state court to federal court, where the federal court would have original jurisdiction, unless Congress expressly provided against such removal. The lower federal courts are divided over whether the FLSA contains such an express provision against removal.

Musical Courts: Plaintiff Picks a Court But Can Defendant Trump the Choice?

by Barbara J. Fick

PREVIEW of United States Supreme Court Cases, pages 338–340.

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Editor's Note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

Issue

Does the language of the FLSA providing that "an action ... may be maintained ... in any federal or state court" constitute an express provision prohibiting removal to federal court when the plaintiff has chosen to maintain its lawsuit in state court?

Facts

Phillip Breuer was an employee of Jim's Concrete. He claimed that the employer failed to pay him overtime and filed a lawsuit against Jim's Concrete in Florida state court. The employer removed the case to federal court pursuant to the federal removal statute, 28 U.S.C. § 1441(a). Breuer filed a motion with the federal district court to remand the case back to state court. The district court denied the motion but permitted Breuer to file an interlocutory appeal with the circuit court.

The Eleventh Circuit granted Breuer's petition for an interlocutory appeal to decide the issue of whether Congress expressly provided that an FLSA action, once started in state court, could not be removed to federal court. It then affirmed the decision of the district court denying the motion for remand. It held that the language of the FLSA did not contain the explicit statutory directive prohibiting removal that is required by the federal removal statute. 292 F.3d 1308 (11th Cir. 2002).

Breuer filed a petition for writ of certiorari with the Supreme Court, which the Court granted. 123 S.Ct. 816, 154 L. Ed. 2d 767 (2003).

Case Analysis

The arguments in this case are focused on the meanings of two statutory phrases—one contained in the FLSA and one in the federal removal statute. Section 16(b) of the FLSA provides, in pertinent part:

Breuer v. Jim's Concrete of Brevard, Inc.
Docket No. 02-337

Argument Date:
April 2, 2003
From: The Eleventh Circuit

> An action to recover liability ... *may be maintained* against any employer ... in any Federal or State court of competent jurisdiction.

Section 1441(a) of the federal removal statute provides:

> *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. ...

The employer argues that § 1441(a) specifically requires that a statute contain an express provision precluding removal. The FLSA contains no such express prohibition. Rather, the words "may be maintained" are ambiguous: they could be interpreted to refer to either beginning a lawsuit or continuing a lawsuit. Such ambiguity cannot be considered a specific expression by Congress of an intent to prevent removal.

While agreeing with the employer that the phrase "may be maintained" is ambiguous, Breuer draws a much different conclusion from that ambiguity. Breuer asserts that removal jurisdiction should be narrowly construed in order to give due deference to state power to determine controversies. This federalism principle was emphasized by the Supreme Court in its decision in *Shamrock Oil Corp. v. Sheets,* 313 U.S. 100 (1941), in which the Court held that given due regard for the independence of state governments, federal courts should confine their jurisdiction to the precise limits of the statute. This principle was reiterated just this term in *Syngenta Crop Protection, Inc. v. Henson,* 123 S.Ct. 366 (2002), with the Court holding that removal statutes should be strictly construed. Therefore, ambiguity should be construed against removal, not in its favor.

Moreover, the term "maintain" encompasses not only the commencement of a lawsuit, but also its continuation to conclusion. This is the way the Supreme Court defined the term in *Smallwood v. Gallardo,* 275 U.S. 56, 61 (1927). Thus, § 16(b) of the FLSA gives the plaintiff the right to commence his lawsuit in state court and continue prosecuting that lawsuit in state court to its conclusion.

This was the position taken by the Administrator of the Wage-Hour Division of the Department of Labor (the official responsible for enforcing the FLSA). In a brief filed in *Johnson v. Butler Bros.,* 162 F.Supp. 87 (8th Cir. 1947) (the only other circuit court case to have decided this exact issue), the Administrator argued that by using the word "maintain" in § 16(b), Congress did not intend to permit removal of an FLSA action. The Eighth Circuit agreed with this position and remanded the case back to state court.

The employer counters that the persuasive force of the *Johnson* decision was undercut when Congress, a year later, amended the federal removal statute to include the phrase "except as otherwise expressly provided." The Eighth Circuit had *inferred* a prohibition on removal from the "may be maintained" language, but by subsequently amending the removal statute Congress signaled that such prohibitions on removal must be *expressly* stated. Basing a decision regarding congressional intent on inference is a different exercise than looking for an express statement contained in a statute, and it is the latter that the amended removal statute requires.

Breuer argues that Congress itself distinguishes between the terms "bring" and "maintain" in other parts of the United States code. Therefore, congressional use of the term "maintain" in the FLSA does constitute an express provision against removal. When Congress wants to authorize the institution of civil litigation, it uses the terms "bring," "commence," or "file." Whereas when Congress wants to bar the commencement of litigation, as well as to terminate pending litigation, it uses the term "maintain." Thus, Congress itself has used the word "maintain" to refer to ongoing action and not merely the beginning of such action. Thus, the use of the phrase "may be maintained" in the FLSA to mean continuing the case to conclusion is consistent with congressional meaning in other statutes.

In the FLSA itself, this distinction between "bring" and "maintain" is recognized. Under § 16(c), the right of an employee to "bring" a lawsuit terminates if the Secretary of Labor files an action. However, the courts consistently have held that this provision does not require termination of pending lawsuits brought by employees before the Secretary of Labor has filed an action.

The employer, on the other hand, points to other provisions in the U.S. code in which Congress prohibited removal. In these provisions, Congress used direct, unequivocal language, clearly stating in the statute itself that the lawsuit *may not be removed to any district court.* The language of § 16(b) providing that an action may be maintained in state court falls far short of an express statement that an FLSA action may not be removed.

Breuer notes that the FLSA prohibition on removal preceded the § 1441(a) revision. Thus it is not surprising that the FLSA does not use the express language contained in

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statutes enacted subsequent to the revisions. In any case, the federal removal statute requires only that a statute expressly *provide* that removal is not permitted; this is not the same as saying the statute must expressly *state* removal is prohibited. Section 16(b) contains such an express provision by stating that actions may be maintained in state court.

Moreover, the purpose behind the congressional revision to § 1441(a) was to make clear that there are exceptions to the removability of claims, not to expand removal jurisdiction. At the time of the revision, the prevailing interpretation of the FLSA was that it precluded removal. To read the revision to § 1441(a) as now allowing for removal of FLSA claims would be to expand removal jurisdiction, which is inconsistent with both the congressional intent behind the revision as well as the federalism principles enunciated in *Shamrock Oil.*

The prohibition on removal of FLSA claims was consistent with the practicalities of litigating such cases during the early decades after its enactment. The amounts in contention were relatively small—most of the early cases involved claims for less than $250. Permitting removal to federal courts would have greatly increased the expense of litigation, often resulting in the cost of pursuing the claim outweighing the benefit of winning. At the time, state courts were in easy proximity to most people, whereas federal courts could be hundreds of miles distant, adding to both time and cost. Moreover, litigation in federal courts tended to be slower as there were significantly fewer federal than state judges.

The employer asserts that even if there are sensible policy reasons for prohibiting removal, it is for Congress, and not the courts, to choose among competing policies and implement those choices it deems appropriate. If Congress had wished to give plaintiffs an absolute choice of forum, it could have done so in unmistakable terms consistent with its pronouncement in the federal removal statute that express provision is required.

Breuer counters that legislative history suggests that Congress thought it had prohibited removal in the FLSA. In 1958 Congress enacted 28 U.S.C. § 1445(c), which barred the removal of workers' compensation cases. In discussing this provision, a Senate Committee Report noted that the FLSA gives workers the option of filing a case in either state or federal court, and that if filed in state court the law prohibits removal to federal court.

The employer, in response, points out that the context of that Senate report was a debate regarding diversity jurisdiction, not a discussion of either the FLSA or § 1441. It is a tangential comment by a Congress, different from the one that enacted either the FLSA or the revision to the removal statute. The best evidence of the meaning of a statute is the text of the statute itself, and not legislative history, particularly of a different Congress.

SIGNIFICANCE

This is fundamentally a case about principles of statutory interpretation. While the outcome of the case will directly affect only litigation under the FLSA, the principles applied by the Court in resolving the case may prove useful in other cases requiring statutory analysis.

The impact of this case on FLSA litigation will be confined to choice of forum—will the plaintiff be able to effectively choose where his lawsuit is heard, or will the defendant have the final say? Where a case is heard can indeed affect the course of the litigation: case backlogs differ, which affects how long it takes to get to court; the composition of the jury pool differs, which can affect the makeup of the jury that hears the case; the procedural rules governing the course of litigation differ; and as a result of these differences, the expense of pursuing litigation may differ. The substantive law governing the claim, however, will be the same regardless of whether the case is litigated in state or federal court.

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