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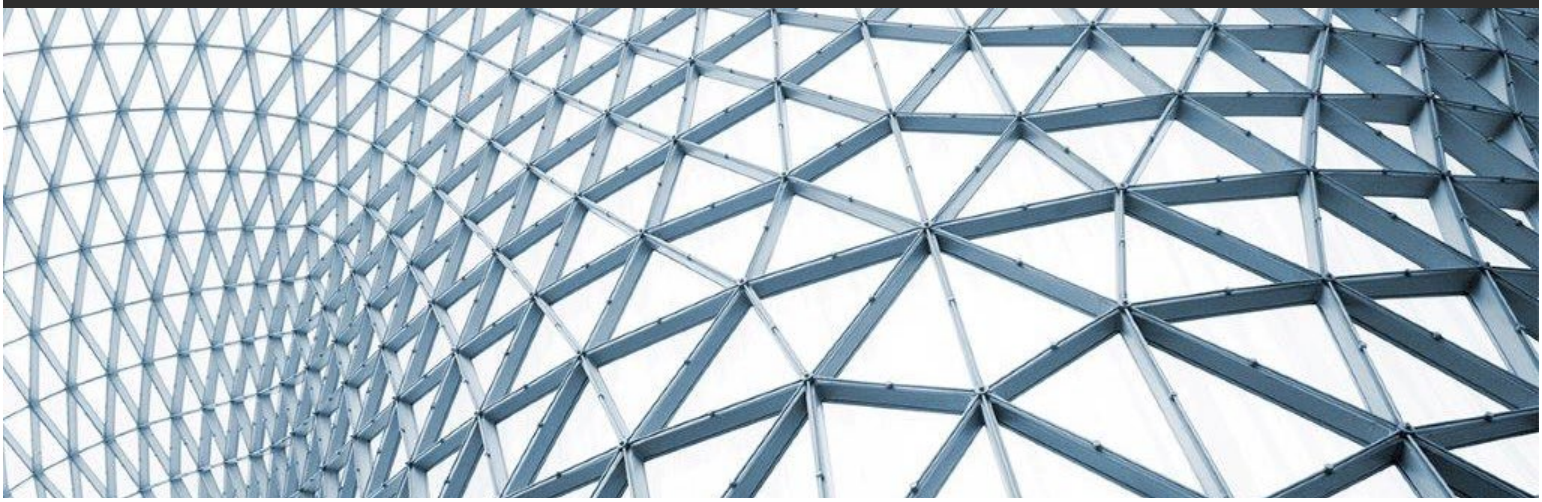
Price-Anderson Act Removal of Litigation Involving a "Nuclear Incident"



Evaluating and seizing the terrain where a legal battle will be waged is the Tao of the litigator.

By David B. Weinstein, Christopher Torres, and Christopher R. White | July 7, 2020 | American Bar Association, Litigation Section, Environmental & Energy Litigation Committee

"Configuration of terrain is an aid to the army. Analyzing the enemy, taking control of victory, estimating ravines and defiles, the distant and near, is the Tao of the superior general." Sun-tzu, *The Art of War* 214 (Ralph D. Sawyer trans., Westview Press 1994).

While the use of Sun-tzu's strategy dramatizes a litigator's role, the principles apply. Where and how a litigation takes place matters. Consequently, parties will seek the advantages of the terrains and respective configurations. This will include considerations of the procedural and evidentiary rules applied by each and their resources, speed, required disclosures, and more.

The issue of a terrain and its configuration may be all the more acute when the action is perceived to be high risk or presents a highly technical subject such as that involving a purported "nuclear incident," which may include the question of whether an action should be adjudicated in federal or state court. Most people shudder at the thought of a lawsuit relating to a nuclear incident. Regardless of the types of claims asserted, actions involving allegations of radiation present specters of substantial damages or confrontations with complex science. Despite the initial reaction, however, allegations concerning a nuclear incident may provide parties, particularly defendants, with the option of selecting the terrain where the battle will be waged. Evaluating and seizing that terrain is the Tao of the litigator.

Removal, Price-Anderson Act, and Nuclear Incidents

Defendants generally prefer litigating in federal courts. Kevin M. Clermont & Theodore Eisenberg, "Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction," 83 *Cornell L. Rev*. 581, 593 (1998) (finding that "[r]emoval of civil cases from state to federal court results in a precipitous drop in the plaintiffs' win rate" and that "the defendants' ability to choose the forum greatly augments their odds of success" (footnote omitted)). However, because "removal statutes are narrowly construed and doubts are resolved against removal," defendants sometimes struggle to reach federal court. *In re Pfohl Bros. Landfill Litig*., 67 F. Supp. 2d 177, 181 (W.D.N.Y. 1999). Indeed, the well-pleaded complaint rule and other restrictions on removal may create challenging hurdles for defendants. Plaintiffs generally enjoy the advantage of selecting the forum of an action.

In fact, Congress has authorized removal only in limited circumstances. 28 U.S.C. § 1441. Consequently, a defendant's option to select a forum is more limited than a plaintiff's option of choosing where to file, assuming that the jurisdictional requirements are met. For example, a defendant generally cannot remove an action to federal court based on diversity jurisdiction if the plaintiff originally filed in the state court where the defendant resides. 28 U.S.C. § 1441(b)(2). Likewise, the well-pleaded complaint rule may limit removal based on subject-matter jurisdiction. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). Generally, even if a defendant raises a federal defense, a defendant may only remove if the plaintiff includes a federal question on the face of the complaint. *Id.* at 152.

However, because Congress controls the jurisdiction of the federal courts, it can expand that jurisdiction by statutory fiat. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) ("For example, the Price-Anderson Act contains an unusual pre-emption provision, . . . that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims."). Via the Price-Anderson Act, Congress chose to provide defendants with a potentially powerful path to removal. 42 U.S.C. § 2210(n)(2).

Under the act, allegations regarding a "nuclear incident" can change the dynamic where forum selection is concerned. In these circumstances, a defendant struggling for a different terrain should look to the act, which is legislation designed to establish a federal system of insurance and limited liability for nuclear incidents. S. Rep. No. 109-99, at 5 (2005). Congress created the act to incentivize private investment in the nuclear power and weapons industries. *Id.* at 2. In addition, though, the act creates federal jurisdiction for claims relating to nuclear incidents. 42 U.S.C. § 2210(n)(2). Defendants are now applying that jurisdictional grant beyond the strict realm of nuclear power and weapons. Accordingly, actions filed in state courts alleging radiological claims may provide defendants access to a new terrain with a different configuration—the federal courts.

History of the Act

By the 1950s, Congress determined that the time had come to encourage private investment in nuclear energy. *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1306 (11th Cir. 1998). However, the risk of liability for an incident related to the development of nuclear assets clearly could be astronomical. The act was a tool to incentivize private industry to develop nuclear power and weapons in the face of that looming liability. See *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 476 (1999). In 1957, Congress amended the Atomic Energy Act with the Price-Anderson Act to

> (1) [r]emove the deterrent to private sector participation in atomic energy presented by the threat of potentially enormous liability claims in the event of a catastrophic nuclear accident; [and] (2)

> [e]nsure that adequate funds are available to the public to satisfy liability claims if such an accident were to occur.

U.S. Nuclear Regulatory Comm'n, The Price-Anderson Act—Crossing the Bridge to the Next Century: A Report to Congress, at xii (1998). The act has since been renewed and revised periodically, with the most recent revision in 2005. Pub. L. No. 109-58. The current version of the act will run through December 31, 2025. *Id*.

Congress created a system to address the risk of massive damages from a nuclear incident. S. Rep. 109-99, at 2 (2005). The act essentially established an insurance system. 42 U.S.C. § 2210. To operate a nuclear facility or to take other actions involving nuclear materials, a company first must obtain a license from the Nuclear Regulatory Commission. Any licensed company must contribute to an insurance fund that can then pay claimants. If the damages exceed a certain amount, then the government indemnifies the licensed company. Perhaps the most famous nuclear incident in American history, Three Mile Island, triggered over $70 million in payments from this insurance fund. Ctr. for Nuclear Sci. & Tech. Info., (Nov. 2005)., The Price-Anderson Act (Nov. 2005).

Removal Under the Act

As part of its program to manage liability, the act provides for federal jurisdiction over claims involving a nuclear incident. *Nuclear incident* is broadly defined as

> any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q).

While the most famous cases involving the act relate to nuclear power generation, nothing in the act limits its removal provision commensurately. *See, e.g., Acuna v. Brown, Root*, 200 F.3d 335 (5th Cir. 2000); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991); *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448 (C.D. Ill. 1991). For example, in at least two recent cases alleging state-law environmental claims, the act's jurisdictional provisions have been applied to remove those actions to federal court because the claims at issue included allegations of radioactive contaminants.

In *Cotromano v. United Techs. Corp.*, the plaintiffs brought an action for alleged contamination at their residences from radionuclides discharged during a defendant's production and testing of aerospace equipment. 7 F. Supp. 3d 1253 (S.D. Fla. 2014). The court held that because the claims involved a "nuclear incident" (i.e., "tort claims based on alleged uranium and thorium contamination"), the act applied and conferred federal jurisdiction. *Id*. at 1257-58. And the court rejected plaintiffs' argument for remand that the act required "licensing and certain financial indemnification" to apply and focused only on the presence of a nuclear incident. *Id*.

More recently, in *Irizarry v. Orlando Utilities Commission*, a defendant removed a state-court-filed action to federal court based on federal question jurisdiction because the alleged conduct allegedly involved a "nuclear incident" as defined in the Act. Notice of Removal, No. 6:19-cv-268-Orl-37EJK, at *3 (M.D. Fla. Aug. 8, 2019). In their complaint, the plaintiffs asserted diminution in property value resulting from a purported increased risk of cancer due, in part, to alleged radioactive fugitive dust emissions from a coal-fired power plant. *Id*. at *6. In the commission's notice of removal, it asserted, among other things: "OUC

strongly disputes Plaintiffs' unsubstantiated contamination allegations in their entirety. Nevertheless, by basing the alleged claims on allegations regarding radioactive materials, Plaintiffs' Complaint gives rise to original federal jurisdiction and provides for direct removal under the Price-Anderson Act." *Id.* ¶ 8. Interestingly, some codefendants did not consent to removal, which is ordinarily required. The commission, however, argued that their consent was not required because the act provides for original jurisdiction and direct removal to federal court without imposing a consent requirement as to other defendants. *Id.*

Some older decisions attempted to limit the jurisdictional provision of the act to the narrow field of nuclear power and weapons. In one Northern District of Florida case, the plaintiffs brought state-law claims relating to the defendants' actions at a Superfund site. *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1308 (N.D. Fla. 2001). The defendants claimed that because the pollutant at issue was radioactive, the act granted the federal court jurisdiction (the defendants also argued for removal on federal question and diversity grounds). *Id.* at 1320-21. The court disagreed, stating that "[t]he Defendants should know the [Price-Anderson Act] only applies to the nuclear energy and weapons industries." *Id.* at 1321 (quoting the Acuna v. *Brown & Root Inc.* court as stating that the "Price-Anderson Act sets up an indemnification and limitation of liability scheme for public liability arising out of the conduct of the nuclear energy and weapons industries," 200 F.3d 335, 339 (5th Cir. 2000)—although not recognizing that Acuna did not specifically exclude other industries from the jurisdictional provision of the act but instead held that removal was proper in cases relating to uranium extraction when the uranium would eventually be used in nuclear power generation, *id.* at 340).

Similarly, an Eastern District of Tennessee court remanded a case involving railroad employees that was removed to federal court under the act. *Irwin v. CSX Transp., Inc.*, No. 3:10 CV 300, 2011 WL 976376, at *1 (E.D. Tenn. Mar. 16, 2011). The workers claimed injury relating to exposure to radiation leaking into the areas around the train lines from the Oak Ridge, Tennessee, government-run nuclear facility. However, the court focused on the fact that the defendant was a railroad, not a nuclear power or weapons facility. Because the defendant did not operate in the industries targeted by the act, the court remanded the action.

Another court rejected removal under the act by reasoning that "the terms 'nuclear incident' and 'occurrence' are inextricably intertwined with 'licenses' and 'indemnification agreements,' thus suggesting licenses and indemnification agreements are an integral part of the [act's] statutory scheme and that there cannot be a nuclear incident without an applicable license or indemnity agreement." *Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759, 771 (E.D. Mo. 2017).

Critically, however, the Third Circuit has expressly rejected the idea that the act's jurisdictional provision is in any way limited to a particular industry. *See Estate of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 284 (3d Cir. 2017). Citing Samples and Irwin as unpersuasive, the court pointed out that the act's text does not limit its jurisdictional provision provided the allegations involve a nuclear incident. However, the court stated that its decision was not "to say that the Act applies to all harm occurring from nuclear material in any situation whatsoever," and acknowledged that naturally occurring radioactive elements may not fall under the act's definition of *nuclear incident*. *Id.*

Although it is not a settled question that the act grants federal jurisdiction concerning any nuclear incident, it should nevertheless be an avenue to consider in any case involving radiological allegations. Courts have granted federal jurisdiction under the act when none of the defendants engaged in the nuclear power or weapons industries. Additionally, a federal appellate court directly considering the question of the act's applicability solely to those industries expressly rejected that construct. Accordingly, defendants should consider using the act to reach federal court for any claim involving an alleged nuclear incident.

Unique Benefits of Price-Anderson Act Removal

There are numerous benefits to utilizing the Price-Anderson Act.

First, "[t]he Act not only gives a district court original jurisdiction over [claims involving a nuclear incident] but it provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999) (internal citations omitted). Consequently, a defendant is entitled to a federal forum "both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested." *Id.* at 484 85. (*El Paso Natural Gas* ultimately held that the act allowed for removal from tribal court as well. *Id.* at 487 88.)

Second, the act's jurisdiction does not carry the same burden of other removals. Indeed, removal appears to require only that the plaintiff has alleged that a nuclear incident is involved. Further, a defendant may not need to obtain the consent of any other defendants to remove such an action as the act gives rise to original federal jurisdiction.

Beyond establishing an alleged nuclear incident, the only other requirement that a defendant must meet is to request removal and to do so in a timely fashion. *Osarczuk v. Ass'n Univs.*, 36 A.D. 3d 872, 874 (N.Y. App. Div. 2007) (noting that "the Act Amendments only require removal to the appropriate federal district court upon the request of a defendant"); *Bessire v. Asbestos*, No. C 07 1563 SBA, 2007 WL 1697311, at *3 (N.D. Cal. Jun. 12, 2007) (finding that the defendants did not remove the action within the 30 days required by the act).

Conclusion

Defendants seeking a federal forum in actions involving radiological allegations should carefully consider whether the Price-Anderson Act confers federal jurisdiction. After all, reaching a favorable terrain with the right configuration is the Tao of the litigator.

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