

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1031

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA,

Plaintiff - Appellee,

v.

EXPRESS SCRIPTS PHARMACY, INC.; ESI MAIL PHARMACY SERVICE,
INC.,

Defendants - Appellants,

and

MALLINCKRODT PLC; MALLINCKRODT LLC; SPECGX LLC; ENDO
HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS INC.; PAR
PHARMACEUTICAL COMPANIES, INC.; PAR PHARMACEUTICAL, INC.;
TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; BARR
LABORATORIES, INC.; WATSON LABORATORIES, INC.; ACTAVIS
PHARMA, INC.; ACTAVIS, LLC; ALLERGAN PLC; ALLERGAN FINANCE,
LLC; MYLAN PHARMACEUTICALS, INC.; MYLAN INSTITUTIONAL INC.;
INDIVIOR INC.; MCKESSON CORPORATION; MCKESSON MEDICAL-
SURGICAL INC.; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN
DRUG CORPORATION; GENERAL INJECTABLES & VACCINES, INC.;
INSOURCE, INC.; CVS HEALTH CORPORATION; CVS PHARMACY, INC.;
CVS TN DISTRIBUTION, L.L.C.; WALGREENS BOOTS ALLIANCE, INC.;
WALGREEN CO.; WALGREEN EASTERN CO., INC.; EXPRESS SCRIPTS
HOLDING COMPANY; EXPRESS SCRIPTS, INC.; CAREMARK RX, L.L.C.;
CAREMARKPCS HEALTH, L.L.C.; CAREMARK, L.L.C.; CAREMARKPCS,
L.L.C.; UNITEDHEALTH GROUP INCORPORATED; OPTUM, INC.;
OPTUMRX, INC.; WALMART, INC.; RITE AID CORP.; RITE AID OF
VIRGINIA, INC.; RITE AID MID-ATLANTIC; RITE AID OF MARYLAND,
INC.; ECKERD CORPORATION; DOES 1 -100; HENRY SCHEIN, INC.,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:19-cv-01446-AJT-JFA)

Argued: March 9, 2021

Decided: May 3, 2021

Before WILKINSON, NIEMEYER, and QUATTLEBAUM, Circuit Judges.

Reversed and remanded by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

ARGUED: Adriana Riviere-Badell, KOBRE & KIM LLP, Miami, Florida, for Appellants. R. Johan Conrod, Jr., SANFORD HEISLER SHARP, LLP, Nashville, Tennessee, for Appellee. **ON BRIEF:** Matthew I. Menchel, Miami, Florida, Julian W. Park, KOBRE & KIM LLP, San Francisco, California, for Appellants. Grant Morris, Kevin Sharp, Andrew Miller, SANFORD HEISLER SHARP, LLP, Nashville, Tennessee; Joanne Cicala, THE CICALA LAW FIRM PLLC, Dripping Springs, Texas; W. Edgar Spivey, KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellee.

QUATTLEBAUM, Circuit Judge:

This appeal involves the application of 28 U.S.C. § 1442(a)(1)—commonly referred to as the “federal officer removal statute”—to private actors. Under the statute, private actors can remove a case to federal court when they show that they: (1) acted under the direction of a federal officer; (2) possess a colorable federal defense; and (3) engaged in government-directed conduct that was causally related to the plaintiff’s claims. *See Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017).¹

Here, the County Board of Arlington County, Virginia (“Arlington”) sued a host of opioid manufacturers, distributors and pharmacies, including Express Scripts Pharmacy, Inc. and ESI Mail Pharmacy Service, Inc. (collectively the “ESI Defendants”), in state court for causing, or contributing to, the opioid epidemic in Arlington County, Virginia. The ESI Defendants removed the case to federal court pursuant to the federal officer removal statute. They claimed their operation of the TRICARE Mail Order Pharmacy (“TMOP”)

¹ “The federal officer removal statute has had a long history.” *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The original removal statute was enacted “near the end of the War of 1812,” which was unpopular in New England due to a trade embargo with England. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007). As a result, New England shipowners “filed many state-court claims against federal customs officials charged with enforcing [the embargo].” *Id.* Congress responded by passing a statute “that permitted federal customs officers and ‘any other person aiding or assisting’ those officers to remove a case filed against them ‘in any state court’ to federal court.” *Id.* at 148 (quoting Customs Act of 1815, ch. 31, § 8, 3 Stat. 198 (emphasis added)). Since that time, Congress has passed various iterations of the federal officer removal statute. The “basic purpose” of these enactments was to prevent state courts from interfering with the federal government’s operations. *See id.* at 150 (internal quotation marks omitted). For example, “[s]tate-court proceedings may reflect ‘local prejudice’ against unpopular federal laws or federal officials.” *Id.* (quoting *Maryland v. Soper (No. 1)*, 270 U.S. 9, 32 (1926)). Therefore, the statute provides “a federal forum for a federal defense.” *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 210 (4th Cir. 2016).

as a subcontractor to a contract between their corporate affiliate, Express Scripts, Inc.,² and the Department of Defense (“DOD”) satisfied each of the statute’s requirements. Arlington moved to remand the case to state court, contending that the ESI Defendants cannot satisfy the requirements of the federal officer removal statute. The district court granted the motion, emphasizing that the ESI Defendants operated the TMOP as subcontractors of Express Scripts, Inc. and that their interactions with DOD were “too attenuated, infrequent, and peripheral to satisfy the ‘acting under’ requirement.” J.A. 823.

We disagree. The ESI Defendants met their burden of showing that they were “acting under” DOD in operating the TMOP in accordance with the DOD contract. Furthermore, while the district court did not address the other two requirements of the federal officer removal statute—possession of a colorable federal defense and a causal relationship between the government-directed conduct and the plaintiffs’ claims—we find that judicial economy favors resolution of those questions without a time-consuming and costly remand. On the merits, we hold that the ESI Defendants satisfy those two requirements. Accordingly, we reverse the district court’s ruling, hold that removal was proper and remand for further proceedings.

² Express Scripts, Inc. is a distinct entity from the ESI Defendants. Express Scripts, Inc. is the contracting party with DOD, while the ESI Defendants are subcontractors who administer the TMOP pursuant to the requirements of the contract.

I.

Arlington sued a large number of manufacturers, distributors and pharmacies that dispense opioid medications in state court seeking to recover financial costs incurred as a result of widespread opioid use. This case is not unusual, as over 2,000 cases filed by governmental entities have been consolidated into a federal multidistrict litigation case in the Northern District of Ohio (the “Opiate MDL”). See *In re Nat’l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1378 (J.P.M.L. 2017).

Later, Arlington amended its Complaint, adding the ESI Defendants. Arlington alleges that the defendants, including the ESI Defendants, “have caused an opioid epidemic that has resulted in economic, social and emotional damage to virtually every community in the United States and tens of thousands of Americans.” J.A. 53. According to Arlington, “Arlington County has been hit hard by the opioid epidemic,” with increasing rates of neonatal abstinence syndrome and Hepatitis C since 2011. J.A. 55. Moreover, the rate of overdose deaths in Arlington County has approximately tripled during the period of 1999 to 2016.

Arlington has asserted claims against three groups of defendants: (1) opioid manufacturers; (2) opioid distributors; and (3) pharmacies that fill opioid prescriptions. The ESI Defendants fall into the third category, as they operate mail order pharmacies that distribute opioid medications to patients both nationally and in Arlington County. To that end, Arlington seeks to impose liability on the ESI Defendants because they were “keenly aware of the oversupply of prescription opioids through the extensive data and information

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