The Cutting Edge: A Non-traditional Basis For Federal Jurisdiction Under The Edge Act

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How can a federally chartered bank find a basis for federal court jurisdiction even without a federal question or diversity among the parties? The answer is the very powerful, but little-known, provision of the Edge Act codified at 12 U.S.C. § 632 ("Section 632").

Section 632 provides original federal jurisdiction for cases in which (1) a federally chartered bank is a party, and (2) the suit arises out of transactions involving international banking or out of international financial operations. As domestic corporations increasingly engage in international transactions and seek financing abroad, litigation counsel who prefer a federal forum should investigate the facts of the case to find international elements that support jurisdiction under the Edge Act.

Recent decisions in the Southern District of New York demonstrate that courts interpret Section 632 broadly and routinely grant jurisdiction pursuant to it even in cases based on state law causes of action and where the international or foreign banking activity is not central to the case. Thus, any element of international finance – however remote or marginal – will satisfy the statute. In addition, any defendant can remove an action to federal court even if it is the only party seeking removal. Section 632 is therefore a powerful tool that should be carefully considered by commercial litigators.

Broad Applicability For Litigants

The elements of Section 632 are relatively simple. So long as a federally chartered bank is a party, the statute is satisfied if "the events out of which the suit arises are (a) foreign; and (b) are either banking transactions or financial operations." The factual circumstances that support removal and original jurisdiction under Section 632 are extremely varied. Litigation counsel should therefore keep the facts of these cases in mind when evaluating potential bases for federal jurisdiction.

International Financing Operations

Section 632 applies to situations in which the parties engage in "traditional" banking activities such as making loans, providing letters of credit, processing checks, preparing mortgage agreements and providing guarantees of transactions and instruments. The statute also provides federal jurisdiction whenever a case involves "international or foreign financing operations." Courts have interpreted this language broadly, holding that "financial operations" include such items as the sale of securities, the management of trust funds, and the processing of credit card charges. In any event, the requirement is satisfied by financial operations other than those that fall within the more strict definition of "banking."

International Activity Need Not Be Central To The Dispute

In In re Lloyd’s Antitrust Litig., Judge Sweet of the Southern District of New York held that a lawsuit satisfies the jurisdictional requisites of Section 632 "if any part of it arises out of transactions involving international or foreign banking." Section 632 therefore "does not require that the claims themselves have a foreign character; it only requires that the lawsuit ‘arise out of’ transactions with a foreign aspect." For example, the following courts found jurisdiction under Section 632 in situations in which the nexus with international banking or financial operation was tenuous:

• In a condemnation suit in which a domestic bank held the mortgage on the subject parcel, which was located in Puerto Rico, an "insular possession of the United States."

• In a lawsuit between domestic parties to enjoin a domestic bank from acting on a letter of credit issued for the benefit of a non-party foreigner.

• In a lawsuit in which plaintiff alleged fraud, negligence, conversion, breach of warranty and of contract, and intentional infliction of emotional distress resulting from bank robbery that occurred in London.

Courts have also upheld Edge Act jurisdiction where very few of the total number of transactions at issue involved foreign banks. For example, in Pinto v. Bank One Corp., plaintiff sued two domestic credit card issuers on the theory that their cash advances to him constituted illegal loans, since the advances allowed him to gamble on the internet in violation of New York law. Defendants removed the case to the

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Southern District of New York under the Edge Act, noting that plaintiff’s credit card statements revealed that five transactions were processed by a merchant bank located in Hamilton, Bermuda. Judge Buchwald denied the plaintiff’s motion to remand, even though the five Bermuda transactions represented only “a small portion of the total [transactions] listed on all [plaintiff’s] statements.”

Similarly, Judge Haight found jurisdiction under Section 632 in a case in which a domestic corporation sued another domestic corporation for the breach of a series of shipment contracts, because two of the eight letters of credit listed a foreign account party.

**Foreign Party Not Required**

The breadth and strength of the Edge Act is even greater because a foreign party need not be named in the action to meet the requirements of the statute. In a case that kicked off the contemporary Edge Act jurisprudence, the Second Circuit held that jurisdiction is not defeated where the party that facilitated the international transaction is dismissed from the case, even if such dismissal leaves only domestic parties in the case.

**Section 632 Applies Even If Plaintiff Alleges Only State Law Claims**

Section 632 may also provide federal jurisdiction in situations in which the plaintiff only alleges state statutory and common law claims. In *Pinto*, plaintiff asserted only state law claims against domestic credit card providers. Judge Buchwald, nonetheless, upheld federal jurisdiction under the Edge Act, noting that “the presence of state law issues does not divest federal courts of Edge Act jurisdiction so long as the foreign banking transactions are involved.” Judge Buchwald also surmised that “other federal court decisions have routinely applied Section 632, even in cases based on state law causes of action and containing only an incidental connection to banking law.”

**Any Defendant Can Remove Under 632 – Unanimity Not Required**

Section 632 unambiguously provides that “any defendant” may remove an action under the statute. This procedure is in stark contrast to removal under 28 U.S.C. § 1441(a), which provides that an action “may be removed by the defendant or the defendants,” thereby only authorizing removal in situations in which the defendants unanimously agree to such action. For example, in *Wenzoski v. Citicorp*, the Northern District of California held that “unanimous joinder in the removal petition was not necessary.” It therefore stands to reason that the party removing the action pursuant to Section 632 need not be the federally chartered bank whose presence is required for jurisdiction.

**Case Study – City of Stockton v. Bank of America, N.A., Case No. CV 08-4060 (N.D. Cal.)**

Recently, a number of domestic and foreign banks successfully removed a case pursuant to Section 632 which was filed by the plaintiff in a California state court in order to avoid consolidation with a federal multidistrict litigation (the “Consolidated Class Action”).

The Consolidated Class Action originated with several complaints filed in federal district courts throughout the United States in early 2008, each of which alleged a price-fixing and bid-rigging conspiracy in the market for municipal derivatives by nearly 40 defendants, mostly consisting of domestic and foreign banks. These suits were consolidated by the Joint Panel for Multidistrict Litigation and transferred to the Southern District of New York.

The City of Stockton (“Stockton”), rather than file in federal court and join the Consolidated Class Action, filed a suit against most of the same defendants in the Superior Court of the State of California in and for the County of San Francisco on July 23, 2008. Stockton alleged price-fixing and bid-rigging violations against defendants, but only asserted claims under the Cartwright Act, California’s version of the Sherman Act. Thus, the Stockton complaint did not involve a federal question, although its claims were identical to those asserted in the Consolidated Class Action. Stockton also sued a number of California banks, thereby defeating diversity jurisdiction.

Defendant AIG Financial Products Corporation and AIG SunAmerica Life Assurance Company (collectively, “AIG”) removed the action to the Northern District of California pursuant to Section 632. Stockton moved to remand, arguing that the municipal derivatives transactions at issue did not arise out of international banking or financial operations, and on the ground that AIG did not remove the action with the unanimous consent of the defendants.

Last November, Judge Chesney rejected Stockton’s arguments, and held that removal under Section 632 did not require unanimity of the defendants. The Court further ruled that Stockton’s allegation of an agreement between domestic and foreign banks arose out of transactions that involved international banking.

Prior to the order, however, Stockton voluntarily dismissed the five foreign banks named as defendants, and made a second motion for remand. In a subsequent order several weeks later, the court denied Stockton’s second motion, holding that the complaint still alleged a conspiracy involving foreign and domestic banks, and therefore arose out of transactions involving international banking despite the prior dismissal of the foreign banks. Thus, the requirements of Section 632 were satisfied even though no foreign parties remained in the case.

**Conclusion**

There is surely an increasingly global approach to business, and a corresponding increase in the complexity of financial transactions. These trends make litigation with federally chartered banks arising out of international dealings all the more prevalent. For these reasons, litigation counsel seeking the benefit of a federal forum should review the transactions at issue to determine if elements of international banking or foreign financial operations are sufficiently present to create federal jurisdiction under the Edge Act.