

The Supreme Court has given practitioners an important tool by allowing federal courts to rule on jurisdictional issues such as personal jurisdiction, forum non conveniens, and venue – prior to deciding subject-matter jurisdiction. In some instances, this allows the removal of cases to federal court for dispositive rulings on the other jurisdictional issues even while subject-matter jurisdiction is contested.

THE YIELDING JURISDICTIONAL HIERARCHY

By Sherri S. Rich

Removal Proceedings After *Ruhrgas AG v. Marathon Oil Co.*

Article III of the U.S. Constitution provides that “[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. Art. III, § 1. Because the district courts of the United States are created by the Congress and have no ability to act except within the limitations imposed by Congress, it is axiomatic that they are courts of “limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Northwest Airline Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). In order to resolve a case, a federal district court must have both “authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court’s decision will bind them.” *Ruhrgas AG V. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). As stated by the Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998), “[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” The *Steel* Court analogized a federal court’s acting without jurisdiction to a corporate executive acting outside his authority as an officer of the corporation: “For a court to pronounce upon a law’s meaning or constitutionality when it has no jurisdiction to do so is, by very definition, an ultra vires act.”

Beginning in 1990, the federal circuit courts of appeal introduced the doctrine of “hypothetical jurisdiction,” which holds that it is proper for a federal court to proceed to the merits of a claim – despite jurisdictional objections – where (1) the

merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. *Steel Co.*, 523 U.S. at 93-94 (internal citations omitted). The emergence of this doctrine coincided with the explosion of litigation in the federal courts in the 1990s. *See Federal Court Management Statistics, Judicial Caseload Profile, 1992-1997, published by the Administrative Office of the U.S. Courts.* Under the doctrine of hypothetical jurisdiction, the court could avoid deciding the issue of whether it had jurisdiction to decide the matter and proceed directly to the merits of the claim. But in *Steel Co.*, the Supreme Court declined “to endorse such an approach, because it carries the court beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.”

Subsequently, in *Ruhrgas AG v. Marathon Oil Co.*, the Supreme Court addressed the question of whether “a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction.” In that decision, the Court retreated from the absolute rule that a federal court had to satisfy itself of its jurisdiction over the subject matter before it considered any other issue in the case. The Supreme Court’s decision in *Ruhrgas* and preceding and succeeding decisions of the court of appeals *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998), and *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497 (2d Cir. 2002), established that no jurisdictional hierarchy precluded a federal court from deciding issues of personal jurisdiction, forum non conveniens, and

venue before it decided the issue of its own subject-matter jurisdiction.

Ruhrigas AG v. Marathon Oil Co.

In *Ruhrigas*, two Texas corporations – Marathon Oil Company and Marathon International Oil Company, together with a Norwegian company they owned call Marathon Petroleum Norge (Norge) (collectively known as Marathon) – filed an action against a German company, Ruhrigas AG, in a Texas state court. Marathon claimed that Ruhrigas had diminished the value of a gas production license formerly held by Norge.

Marathon had previously acquired Norge and Marathon Petroleum Company (MPCN) to produce gas in the North Sea’s Heimdal field. Norge then assigned its gas production license to MPCN. Thereafter, MPCN contracted to sell Heimdal field gas to Ruhrigas. The sales agreement between MPCN and Ruhrigas provided that any disputes would be resolved by arbitration in Sweden.

Marathon’s lawsuit against Ruhrigas alleged state law causes of action for fraud, tortious interference with prospective business relations, breach of fiduciary duty, and civil conspiracy. Marathon claimed that Ruhrigas had induced it with false promises to invest in MPCN for the development of the Heimdal field and the construction of a pipeline to Ruhrigas’ plant in Germany. According to Marathon, Ruhrigas’ actions were made possible as a result of three meetings held in Houston and correspondence with Marathon in Texas.

Ruhrigas responded to the action by removing the case to federal district court on three grounds: (1) diversity of citizenship pursuant to 28 U.S.C. § 1332, on the grounds that Norge, the only nondiverse plaintiff, had been fraudulently joined to defeat diversity; (2) the presence of a federal question under 28 U.S.C. § 1331 because of the alleged involvement of a foreign sovereign; and (3) removal of cases relating to international arbitration agreements, as permitted under 9 U.S.C. § 205. Ruhrigas then moved to dismiss the complaint based on lack of personal jurisdiction. Marathon moved

to remand the case back to state court based on lack of federal subject-matter jurisdiction. The District Court granted Ruhrigas’ motion to dismiss based on lack of personal jurisdiction, stating that Ruhrigas’ contacts with Texas were insufficient to support personal jurisdiction.

On appeal before the Fifth Circuit Court of Appeals, a panel held that “respect’ for the ‘proper balance of federalism’” required that the District Court first address the issue of subject-matter jurisdiction before deciding the issue of personal jurisdiction. Thus, the panel considered and rejected all three of Ruhrigas’ arguments for federal jurisdiction. According to the panel, the issue of whether Norge had a legal interest in the gas production license assigned to MPCN was a difficult question that should be decided by Norwegian law; therefore, Ruhrigas could not show that Norge was fraudulently joined. Thus, complete diversity of citizenship did not exist. The panel also decided that a federal question was not implicated, because the claims asserted by Marathon did not concern a nation’s sovereignty. Lastly, the panel decided that, because Marathon was asserting claims independent of the sales agreement with Ruhrigas, the case did not concern an in-U.S.C. § 205. Consequently, the Fifth Circuit panel vacated the District Court’s judgment and remanded the case to state court.

Then, on its own motion, the Fifth Circuit vacated the panel’s decision and granted a rehearing en banc. Thereafter, the Fifth Circuit held that, in removed cases, district courts were required first to address the issue of subject-matter jurisdiction. The issue of personal jurisdiction could thus be considered *only if* subject-matter jurisdiction existed. The Fifth Circuit’s 9-7 en banc decision was limited to removed cases, because, the court reasoned, removals from state courts represented “the most grave threat that federal courts would ‘usurp...state courts’ residual jurisdiction.” The Supreme Court granted certiorari to resolve a conflict between the Second and Fifth Circuits on the issue and reversed the Fifth Circuit.

In deciding *Ruhrigas*, the Supreme Court acknowledged the different “bedrocks” from which subject-matter jurisdiction and personal jurisdiction

arise. Subject-matter jurisdiction “serve[s] institutional interests” by “keep[ing] the federal courts within the bounds prescribed by the Constitution and Congress.” Because of the importance of this function, federal courts must dismiss an action if it becomes apparent at any time in the course of the action that subject-matter jurisdiction is lacking. 526 U.S. at 583, citing *Steel Co.*, 523 U.S. at 94-95; F.R. Civ. P. 12(h)(3); 28 U.S.C. § 1447(c). In contrast, personal jurisdiction “represents a restriction on judicial power...as a matter of individual liberty.” 526 U.S. at 584, citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Accordingly, a party has the right to require the court to observe the limits of its authority over the party, or, alternatively, a party can waive the right and choose to submit to the court’s authority.

Despite the fact that subject-matter jurisdiction is nonwaivable and demands nondiscretionary exercise by the federal courts, *Ruhrgas* states that “[t]hese distinctions do not mean that subject-matter jurisdiction is ever and always more ‘fundamental.’ Personal jurisdiction, too, is ‘an essential element of the jurisdiction of a district...court,’ without which the court is ‘powerless to proceed to an adjudication.’” 526 U.S. at 584, citing *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937). Moreover, “[w]hile *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues. ...[A] court that dismisses on...non-merits grounds such as...personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying *Mansfield* and *Steel Company*.” 526 U.S. at 584, 584-85, citing *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998).

The rationale of the *Ruhrgas* decision is based on the principle that “federal and state courts are complementary systems for administering justice in our Nation: Cooperation and comity, not competition and conflict are essential to the federal design.” Although “a State’s dignitary interest bears consideration when a district court exercises discretion,” in choosing whether to adjudicate the

issue of subject-matter or personal jurisdictional issues, a need for district courts to rigidly defer to the authority of state courts does not exist. If the personal jurisdiction issue concerns difficult questions of state law and if subject-matter jurisdiction is easily resolved, then a district court, in the interest of federalism, should ordinarily rule first on the issue of subject-matter jurisdiction. Conversely, if the personal jurisdiction issue can be easily decided or if it involves an issue of federal constitutional issues (where deference to the state court would not be appropriate) – where the subject-matter jurisdiction issue is complex, difficult, or raises novel questions – then a court does not abuse its discretion by first deciding the issue of personal jurisdiction.

In re Papandreou

In *Ruhrgas*, the Supreme Court favorably referred to the prior decision of the District of Columbia Circuit Court of Appeals in *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). In *Papandreou*, the D.C. Circuit emphasized the absence of priority in jurisdictional defenses, especially where a potentially dispositive jurisdictional defense could be easily decided and would minimize the total costs imposed on a defendant. *Papandreou* involved a lawsuit for breach of contract by Marrecon Enterprises and Rosemarie Marra, a Liberian corporation and its sole shareholder, against the Greek minister of tourism and other entities of the Greek government. The underlying lawsuit concerned the Greek government’s revocation of Marrecon’s license to operate a casino in Athens. The Greek government sought a dismissal of the action on several grounds, including standing, the act of state doctrine, personal jurisdiction, forum non conveniens, and the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. §1603 *et al.* Marrecon claimed that oral depositions of Greek government officials were necessary to respond to the Greek government’s FSIA jurisdictional defense. Under the FSIA, the Greek government, as a foreign state, would be immune to a civil action in U.S. courts unless Marrecon could show that the Greek government’s activities were “based upon” a commercial activity having “substantial contact with the United States.” 28 U.S.C. §§1604 and 1605(a)(2). After the District

Court issued an order authorizing depositions of Greek government officials in the underlying case, the Greek government sought a writ of mandamus to vacate the discovery order.

One basis for the appeals court's grant of mandamus was the District Court's "failure to explore the ease with which other potentially dispositive jurisdictional defenses could be evaluated." The Court of Appeals agreed that depositions of Greek government officials were relevant in unearthing facts about the possible involvement of U.S. investors in the casino venture and in determining whether the Greek government was immune from suit under the FSIA. The Court of Appeals also agreed that deciding whether the FSIA applied to the Greek government was a significant and primary issue in the case. But the Court of Appeals rejected the District Court's decision to give priority to the issue of subject-matter jurisdiction under the FSIA over considering a dismissal of the Greek government on other jurisdictional grounds, such as standing, forum non conveniens, personal jurisdiction, and the act of state doctrine. The Court of Appeals explained its reasoning in this way: "If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first. It would be bizarre if an assertion of immunity worked to increase litigation costs via jurisdictional discovery, to the neglect of swifter routes to dismissal."

Thus, the District Court erred when it failed to consider the Greek government's alternative grounds for dismissal before evaluating its FSIA claim. While acknowledging the importance of subject-matter jurisdiction, the Court of Appeals held that a dismissal on other nonmerit grounds, such as forum non conveniens and personal jurisdiction prior to finding subject-matter jurisdiction, "makes no assumption of law declaring power that violates the separation of powers principles underlying *Mansfield* and *Steel Company*."

Eliminating the presumption that a jurisdictional hierarchy exists does not resurrect the doctrine of "hypothetical jurisdiction" or offend

"fundamental principles of separation of powers." See *Steel Co.*, 523 U.S. at 94. Although the Supreme Court unambiguously held that "[f]or a court to pronounce upon a law's meaning or constitutionality when it has no jurisdiction to do so, by very definition, an ultra vires act," addressing the issue of personal jurisdiction before tackling the question of subject-matter jurisdiction does not involve the merits. "Dismissal for want of personal jurisdiction is independent of the merits and does not require subject-matter jurisdiction." 139 F.3d at 256.

Monegasque de Reassurances S.A.M v. Nak Naftogaz of Ukraine

In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002), demonstrates a federal court's freedom to bypass murky procedural issues in favor of dismissal on the cleanest and clearest procedural basis. *In re Arbitration Between Monegasque* involved a contract dispute between a Russian company, Gazprom, and a Ukrainian company, Ukragazprom. The contract between Gazprom and Ukragazprom provided that Ukragazprom would transport Gazprom's natural gas through its pipelines to Europe in exchange for a measured quantity of natural gas. Gazprom subsequently alleged that Ukragazprom breached the contract by withdrawing additional, unauthorized amounts of natural gas.

Gazprom made a claim and was reimbursed for the value of Ukragazprom's unauthorized natural gas withdrawals from its insurer, Sogaz Insurance Company. Sogaz sought reimbursement for Gazprom's claim through a reinsurance contract with Monegasque de Reassurances S.A.M. (Monde Re), a corporation organized under the laws of Monaco, whose parent company was an Australian corporation. Monde Re then asserted its right to arbitrate Gazprom's claims that Ukragazprom had withdrawn natural gas without authorization by filing a claim against Ukragazprom in the International Commercial Court of Arbitration in Moscow. In connection with the arbitration proceedings, the natural gas transportation company, Nak Naftogaz of Ukraine (Naftogaz), assumed the rights and obligations of Ukragazprom.

The Moscow Court of Arbitration subsequently voted against Naftogaz and in favor of Monde Re. Although Naftogaz appealed the decision, the Russian Federal Supreme Court affirmed the decision.

Prior to Naftogaz's appeal of the decision issued by the Moscow Court of Arbitration, Monde Re filed a petition in the U.S. District Court for the Southern District of New York in an effort to confirm the Moscow Court's arbitration award against Naftogaz and the state of Ukraine, even though Ukraine had not been a party to the arbitration proceeding. Monde Re proceeded on the theory that the arbitration award against Naftogaz should be entered against Ukraine as well as against Naftogaz, because Naftogaz was an alter ego, agent, or instrumentality of Ukraine. Monde Re's petition invoked the authority of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by the Federal Arbitration Act, 9 U.S.C. §§ 201-08, as well as the provisions of the FSIA. Naftogaz responded by seeking a dismissal of the action based on lack of personal jurisdiction on the grounds that, as a Ukrainian company, it had no contacts with the United States and that the events surrounding the natural gas transportation contract took place in Ukraine and in Europe. Ukraine sought a dismissal based on the following: (1) The District Court lacked personal and subject-matter jurisdiction under the FSIA, which provides Ukraine immunity from suit, (2) the District Court should decline jurisdiction under the forum non conveniens doctrine, and (3) the case should be dismissed because Monde Re failed to state a claim upon which relief could be granted. The District Court chose to grant Ukraine's motion for dismissal on the grounds of forum non conveniens. On that basis, the District Court declined to rule on Naftogaz's motion, stating that the motion was moot. The Second Circuit affirmed the District Court's refusal to address various defenses based on personal jurisdiction and subject-matter jurisdiction in favor of a dismissal based on forum non conveniens.

Noting that the "district court ...failed to address the jurisdictional issues raised by Ukraine's motion, proceeding instead to the forum non conveniens issue raised in that same motion," the

Court of Appeals gave its opinion that "it was acceptable for the district court to do so." Although acknowledging that the Supreme Court in *Steel Company* had disapproved of the federal courts' assumption of "hypothetical jurisdiction," in which the courts previously overlooked contested issues of jurisdiction for the purpose of deciding the merits of cases, the appellate court observed that the Second Circuit had previously limited the applicability of that principle:

We have read the *Steel Co.* decision as "barring the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question."...Indeed, we have gone so far as to hold that where "a governmental provision is challenged as unconstitutional, and a controlling decision of this Court has already entertained and rejected the same constitutional challenge to the same provision, the Court may dispose of the case on the merits without addressing a novel question of jurisdiction."

Since Ukraine's challenge to Monde Re's asserted basis for jurisdiction raised only questions of statutory construction regarding the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Foreign Sovereign Immunities Act, the Second Circuit held that no constitutional issue of jurisdiction was present, and accordingly the courts were free to decide the forum non conveniens issues without deciding on subject-matter jurisdiction:

Whether the Convention or the FSIA is invoked by Monde as a basis for jurisdiction here, Ukraine's challenge to jurisdiction revolves around statutory requirements, and no constitutional issue is present. Accordingly, neither we nor the district court are barred from passing over the question of jurisdiction and going directly to the forum non-conveniens issue raised by Ukraine.

In further support for its decision, the court cited *Papandreou* for the proposition that a dismissal on forum non conveniens grounds is not a decision on the merits and, therefore, does not require subject-

matter jurisdiction. 311 F.3d at 497, citing *Papandreou*, 139 F.3d 247, 255-56.

Thus, the Second Circuit specifically rejected the idea of jurisdictional hierarchy in favor of the court's freedom to select and apply the jurisdictional defense that will promote the efficient, economical, and just disposition of cases.

Post-Ruhrgas Removal Considerations

In the post-*Ruhrgas* removal landscape, it is now possible to successfully remove a case – and perhaps obtain a dismissal of an action or a change of venue – when the basis for subject-matter jurisdiction is not entirely clear. As the U.S. Code continues to grow, the issue of subject-matter jurisdiction has become exceedingly complex. The opinions of the circuit courts on subject-matter jurisdiction often diverge, and even within an individual circuit, decisions sometimes contradict one another. For example, prior to *Dole Food Co. v. Patrickson*, ___ U.S. ___, 123 S.Ct. 1655, 155 L. Ed. 2d (2003), the issue of subject-matter jurisdiction based on the FSIA produced a split in the circuits – *cf. Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1996) with *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000); *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 946 (7th Cir. 1996); *Gould Inc. v. Pechiney Ugine Kuhlman*, 853 F.2d 445, 448-50 (6th Cir. 1988) – and two lines of authority in the Ninth Circuit. In *Straub v. Atlas Turner Inc.*, the Ninth Circuit held that, for purposes of the FSIA, a government-owned company that was controlled through a “tiered” subsidiary was a foreign state for the purposes of the FSIA. 38 F.3d 448 (9th Cir. 1994). However, the following year, in *Gates v. Victor Fine Foods*, the Ninth Circuit took the opposite view, which was ultimately upheld in *Dole*. A removal and a *Ruhrgas* dismissal or venue change would have been appropriate based on these conflicting opinions prior to the *Dole* decision.

Nevertheless, a federal court practitioner can now – consistent with the responsibilities imposed by Rule 11 of the Federal Rules of Civil Procedures – remove a case to federal court and request a ruling on the issues of personal jurisdiction, forum non conveniens, or a venue transfer before the issue of

subject-matter jurisdiction is reached. Although it may be argued that such a rule raises the possibility of abuse by defense counsel, this argument was definitively rejected by the *Ruhrgas* Court:

The Fifth Circuit and Marathon posit that state-court defendants will abuse the federal system with opportunistic removals. A discretionary rule, they suggest, will encourage manufactured, convoluted federal subject-matter theories designed to wrench cases from state court. This specter of unwarranted removals, we have recently observed, “rests on an assumption we do not indulge – that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed...The well-advised defendant...will foresee the likely outcome of an unwarranted removal – a swift and non-reviewable remand order attended by the displeasure of a district court whose authority has been improperly invoked.

526 U.S. at 587.

The Supreme Court's decision in *Ruhrgas* does not give a party carte blanche to remove every case, even when subject-matter jurisdiction is clearly lacking or when a controlling law in the forum's circuit precludes removal. However, when legal support for a removal exists, the “well-advised” federal practitioner should give serious consideration to whether a removal and an appeal to the discretion granted to the District Court by the *Ruhrgas* decision would be appropriate.

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