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SUPREME COURT
STATE OF WASHINGTON

No. 80472-9

2007 NOV 29 A 8:46

BY RONALD R. CARPENTER:

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

(COURT OF APPEALS No. 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Petitioner.

STATEMENT OF ADDITIONAL AUTHORITIES

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ORIGINAL

1. *Duffin v. Honeywell Intern., Inc.*, 312 F.Supp.2d 869 (N.D.Miss. 2004) (right to remove is a statutory right);

2. *Lockerty v. Phillips*, 319 U.S. 182, 63 S.Ct. 1019 (1943) (right to remove is a statutory, not constitutional, right).

DATED this 29th day of November, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE 2007 NOV 29 A 8:46

I declare under the penalty of perjury under the laws of the State of

Washington that I am over the age of 18 years, not a party to this action,
competent to testify in this matter and that on November 29, 2007 I caused
to be served one copy of Statement of Additional Authorities, as follows:

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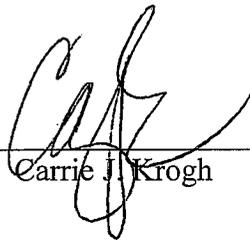
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DATED this 29th day of November, 2007.

By: _____



Carrie J. Krogh

tor's decision arbitrary. After reviewing the record for concrete evidence, the Court finds that there is sufficient proof which could be reasonably relied upon to find that disease contributed to the death. Of greatest significance is the autopsy findings that the deceased had experienced an "acute and ongoing myocardial infarction." The doctor declined to state with any degree of specificity that this caused the accident. However, it is undeniable that such a condition could have logically contributed to Gilmer's death. Furthermore, as the accident investigator so aptly stated, in the absence of any other explanation for Gilmer, a professional truck driver with medical symptoms and habits indicative of heart disease, suddenly swerving into another truck that would have been in plain view on a clear day, a heart attack is a reasonable conclusion. It would be difficult to envision an experienced truck driver attempting to change lanes with another large truck clearly in his field of vision.

Also, it has been suggested that perhaps Gilmer feel asleep at the wheel. In light of the statements taken from Gilmer's employer, this seems the least likely explanation for the crash. The notes from the administrator's file indicate that Gilmer had spoken with his employer between five and six o'clock in the evening the day before the incident. The employer stated that Gilmer was going to sleep and that he, Gilmer, should have "woken up fresh Monday morning."

While the precise events of that day will likely never be known, reasonable conclusions can be gleaned from the surrounding circumstances and evidence gathered. Though the Court may not have reached the same decision, it is not permitted to substitute its judgment for that of the administrator. *Boswell*, 83 Fed.Appx. at 660. Rather, the Court "need only assure that the administrator's decision fall somewhere on a continuum of reasonableness-

even if on the low end." *Vega*, 188 F.3d 287. Consequently, based on the discussion *supra* and particularly in light of the burdens of proof necessary to recover insurance benefits and the corroborating evidence, the Court finds that the administrator's decision is supported by substantial evidence and the denial of benefits was neither arbitrary nor capricious.

D. Conclusion

For the above reasons, the Court holds that the Plaintiff has failed to demonstrate that the Defendant's decision to deny accidental death benefits was an abuse of discretion. Hence, the Court rules in favor of the Defendant.

A separate judgment in accordance with this opinion shall issue this day.

JUDGMENT

After a bench trial and pursuant to an opinion issued this day, the Court rules that

- (1) JUDGMENT is hereby RENDERED in favor of the Defendant PFL Life Insurance Company; and
- (2) this case is CLOSED.



Jerry W. DUFFIN Plaintiffs

v.

HONEYWELL INTERNATIONAL,
INC., et al. Defendants
No. CIV.A. 403CV389.

United States District Court,
N.D. Mississippi,
Greenville Division.

April 5, 2004.

Background: Plaintiffs brought mass-joined asbestos action in state court seeking recovery against manufacturers and retailers for injuries that allegedly result-

ed from exposure to asbestos-containing products. After removal to federal court, plaintiffs moved to remand.

Holding: The District Court, Mills, J., held that plaintiffs did not fraudulently join local retailers in order to defeat federal diversity jurisdiction.

Motion granted.

1. Removal of Cases ⇔107(7)

Removing party, which is urging jurisdiction on court, bears burden of demonstrating that jurisdiction is proper due to fraudulent joinder.

2. Removal of Cases ⇔107(7)

In evaluating motion to remand, court considers summary judgment-type evidence, such as pleadings, affidavits, and deposition transcripts, to pierce pleadings.

3. Removal of Cases ⇔36

Plaintiffs in mass-joined asbestos action did not fraudulently join local retailers in order to defeat federal diversity jurisdiction, and thus removal was not proper, despite manufacturers' contention that there was no reasonable possibility of recovery against retailers, and that "friction" and "non-friction" defendants were mis-joined, where complaint indicated that plaintiffs were proceeding under standard theories of strict products liability against local retailers, applicable state law provided for such retailer liability in products liability cases, and it did not appear that either "friction" or "non-friction" defendants were made up solely of diverse parties.

Wilbur O. Colom, Colom & Colom, Columbus, MS, Robert B. McDuff, Robert B. McDuff, Attorney, Jackson, MS, for Plaintiffs.

Lawrence M. Coco, Baker, Donelson, Bearman & Caldwell, Edward J. Currie,

Jr., Currie, Johnson, Griffin, Gaines & Myers, James Haggard Bolin, Barfield & Associates, Jackson, MS, Charles Michael Evert, Jr., Evert & Weathersby, LLC, Atlanta, GA, Charles Hugh Hathorn, Daniel, Coker, Horton & Bell, William C. Reeves, Smith Reeves & Yarborough, PLLC, Betty A. Mallett, McGlinchey Stafford, Jackson, MS, Charles Henderson Abbott, Abbott, Simses, Knister & Kuchler, New Orleans, LA, Ann Marie Sico, Bernard Cassisa Elliott & Davis, Metairie, LA, Thomas W. Tyner, Aultman, Tyner, McNeese & Ruffin, Hattiesburg, MS, Marcy Leigh Bryan, Forman, Perry, Watkins, Krutz & Tardy, PLLC, Jackson, MS, William C. Spencer, Mitchell, McNutt & Sams, Tupelo, MS, Jeffrey P. Hubbard, Wells, Moore, Simmons & Neeld, Scott William Bates, Baker, Donelson, Bearman & Caldwell, Jackson, MS, Chris H. Deaton, Deaton & Deaton, P.A., Tupelo, MS, Bradley Farel Hathaway, Campbell, Delong, Hagwood & Wade, Greenville, MS, for Defendants.

ORDER

MILLS, District Judge.

This cause comes before the court on the motion of plaintiffs Jerry W. Duffin, et al., pursuant to 28 U.S.C. § 1447, to remand [10-1] this case to the Circuit Court of Washington County. Defendants have responded in opposition to the motion, and the court, having considered the memoranda and submissions of the parties, along with other pertinent authorities, concludes that the motion is well taken and should be granted.

This is a mass-joined asbestos action in which numerous plaintiffs seek recovery against numerous defendants for injuries which allegedly resulted from exposure to asbestos-containing products. Plaintiffs filed suit in the Circuit Court of Washington County on December 30, 2002, and, on October 8, 2003, defendants removed to

this court on the basis of diversity jurisdiction. See 28 U.S.C. § 1332. Plaintiffs have moved to remand, arguing that diversity of citizenship is lacking in this case inasmuch as they seek recovery against certain local retailers of asbestos-containing products which are, like themselves, Mississippi residents. Defendants counter that the local retailers were fraudulently joined for the purpose of defeating removal jurisdiction and that remand would therefore be inappropriate.

[1,2] The removing party, which is urging jurisdiction on the court, bears the burden of demonstrating that jurisdiction is proper due to fraudulent joinder. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992). The Fifth Circuit has stated:

The burden of persuasion placed upon those who cry "fraudulent joinder" is indeed a heavy one. In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir.1981). In evaluating a motion to remand, the court considers summary judgment-type evidence to pierce the pleadings. This evidence may include the pleadings, affidavits and deposition transcripts. *Hart v. Bayer Corp.*, 199 F.3d 239, 246-47 (5th Cir.2000). The Fifth Circuit has recently reaffirmed that it "is insufficient that there be a mere theoretical possibility of recovery," to the contrary, there must "at least be arguably a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder." *Travis v. Irby*, 326 F.3d 644, 648 (5th

Cir.2003)(citing *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 386 (5th Cir.2000)).

In contending that no reasonable possibility of recovery exists against the local retailers, defendants argue that plaintiffs' complaint contains only vague and conclusory allegations against these retailers and that the complaint did not give these defendants sufficient notice of the claims against them. Defendants' use of alleged pleading defects as a basis for a finding of fraudulent joinder is problematic. The Mississippi and Federal Rules of Civil Procedure require only that a complaint make "a short and plain statement of the claim showing that the pleader is entitled to relief," see Miss. R. Civ. P. 8(a)(2); Fed. R.Civ.P. 8(a)(2), and any suggestion that plaintiffs were required to set forth detailed allegations against the local retailers therefore lacks merit. The Mississippi and Federal Rules of Civil Procedure do require a greater degree of particularity for fraud claims, see Fed.R.Civ.P. 9(b), but, even in this context, the Fifth Circuit has indicated that a plaintiff should ordinarily be given an opportunity to amend her complaint to allege fraud with greater particularity, before such claims are dismissed with prejudice upon a finding of fraudulent joinder. See *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n. 6 (5th Cir.2000).

[3] At any rate, the court does not agree that, under liberal notice pleading rules, the complaint is defective as it relates to the local retailers. To the contrary, the complaint clearly indicates that plaintiffs are proceeding under standard theories of strict products liability against the local retailers, alleging that they sold unreasonably dangerous and defective products and that, on this basis, they should be held liable under Mississippi law. Miss.Code Ann. § 11-1-63 clearly provides for such retailer liability in products liability cases, as did Mississippi's common law products liability jurispru-

dence. A complaint does not need a great deal of specificity to convey that plaintiffs are seeking to hold retailers liable under a strict products liability theory, and the complaint in this case is sufficient to set forth plaintiffs' allegations in this regard. The court therefore sees no valid argument that the complaint is defective, much less so defective as to entitle the local retailers to dismissal with prejudice on a finding of fraudulent joinder.

Defendants also argue that an egregious procedural misjoinder exists in this case under *Tapscott v. MS Dealer Service Corporation*, 77 F.3d 1353, 1360 (11th Cir. 1996), but the court does not agree. The Mississippi Supreme Court recently appeared to re-affirm the liberal standards of joinder under Miss. R. Civ. P. 20 in asbestos cases, see *Janssen Pharmaceutica, Inc. v. Armond*, 866 So.2d 1092 (2004) (noting the proper application of liberal rules of joinder to asbestos actions, as a "mature" tort), and the court concludes that there is no egregious misjoinder in this case, including the joinder of the so-called "friction" and "non-friction" defendants. See *Arrington, et al. v. AC & S, et al.*, No. 1:02cv425 (S.D.Miss.2002) (rejecting misjoinder arguments in asbestos removal context.)

The court would initially note that the basic relevance of the misjoinder issue is in question in this case. Defendants argue that the "friction" and "non-friction" defendants were misjoined in this action, but it is not clear to this court whether either the "friction" or "non-friction" defendants in this case are made up solely of diverse parties and, thus, whether severing these defendants from each other would serve to produce a purely diverse class of either defendants. The "friction" defendants are

characterized by counsel for defendants in a similar companion case as "manufacturers and sellers of car parts sold to consumers."¹ Defendants seek to sever these defendants from the traditional "non-friction" defendants, which are characterized by counsel in that case as "diverse and non-diverse manufacturers and sellers of industrial insulation products used by professional tradesmen at industrial worksites around the state."

The court would further note that, since defendants refer to the "non-friction" defendants in the companion case as including "non-diverse" industrial defendants, and since there clearly appear to be non-diverse "friction" defendants (that is, certain Mississippi defendants clearly appear to be automobile parts retailers) in this case, it is not clear to this court whether the severance of either the friction or non-friction defendants would serve to create a diverse class of remaining defendants, even assuming egregious misjoinder based on this distinction were present. If there are, in fact, non-diverse "friction" and also non-diverse "non-friction" defendants in a particular case, then the class distinction would appear to be immaterial for jurisdictional purposes. Accordingly, the court deems an asbestos defendant's burden of proving the basic relevance of the misjoinder issue on the basis of the "friction/non-friction" distinction in a particular case to include a burden of demonstrating 1) how the two classes are defined 2) which defendants belong to each class in a particular case and 3) that either the "friction" or "non-friction" class of defendants in a particular case consists solely of diverse parties.² Barring such a showing, severance and remand of either class would not create diversity among the remaining parties,

1. *Rosamond, et al. v. Garlock, et al.*, No. 3:03cv235, defendants' memorandum brief at 11.

2. The court does not bind the defendants in this case to a definition provided by counsel in another case; the court cites this definition merely as a starting point for discussing the

and the misjoinder issue would appear to simply be irrelevant. In this case, it is not entirely clear to this court exactly what constitutes a "friction" or "non-friction" defendant, nor whether there exists a purely diverse class of either in this case. As such, it is not clear to this court that the misjoinder issue is even relevant herein.

At any rate, even assuming that severance and remand of either the "friction" and "non-friction" defendants would serve to create diversity in this case, the court would still not deem "egregious" misjoinder to be present on the basis of this distinction. Indeed, if the court were to conclude that any joinders in this case were "egregious" (which, in light of Mississippi's liberal joinder rules, it does not) it would likely be the joinder of numerous plaintiffs (each with a distinct medical history and damages) into a single action, rather than the joinder of "friction" and "non-friction" defendants in the same lawsuit. Indeed, defendants' objections to the joinder of these defendants in this case appears motivated more by the jurisdictional necessity of excising the non-diverse retailers from this action than by any genuine anomaly in trying friction and non-friction defendants in the same case.

While there may well be some advantages to trying friction and non-friction

defendants separately, these advantages are not so compelling as to render their joinder "egregious" under Mississippi's liberal joinder rules. It is also apparent that any application of the misjoinder doctrine so as to sever the friction defendants (and those filing suit against them) from this action would be, at best, awkward and wasteful of judicial resources. Indeed, in order to apply the doctrine, it would appear necessary for the court to make findings of fact regarding which defendants constitute "friction" and "non-friction" defendants and also to determine which plaintiffs were making claims against each defendant. Finally, it should be noted that defendants' resort to procedural devices to manufacture diversity only serves to highlight the fact that they have failed to demonstrate that no possibility of recovery exists against the local retailers in this case, as a substantive matter.

The "bottom line" in this and most other asbestos removals is that plaintiffs have filed suit against numerous non-diverse retailers under established products liability theories. While some efforts have been made in the Mississippi legislature to reduce the potential liability of retailers in products cases, none of these efforts would, in the court's view, assist defendants in establishing jurisdiction in this case.³ Accordingly, defendants are faced

issue and also to note the court's confusion regarding which defendants are "friction" and "non-friction" defendants in this case. At the same time, it would certainly be suspect if defendants were to provide varying definitions of "friction" and "non-friction" defendants in different cases, depending upon the residences of defendants in those cases.

3. The removal petition invokes the retailer liability provisions of § 11-1-64, which was passed by the legislature as part of the 2002 tort reform legislation. Section 11-1-64 generally provides retailers with a mechanism to seek dismissal from a products liability action for liability purposes, but, in an obvious at-

tempt to defeat removal jurisdiction, the statute provides that any such dismissed retailers are to remain parties to the action for jurisdictional purposes. Miss.Code Ann. § 11-1-64(6). It seems clear that this statute, with a January 1, 2003, effective date, does not apply to this case, and no local retailer in this case appears to have even sought dismissal under its terms. Even if the statute were somehow applicable, it is noteworthy that Missouri federal courts interpreting a nearly identical Missouri statute have found that statute sufficient to defeat federal removal jurisdiction, based partly on the fact that any dismissal thereunder is properly considered an involuntary dismissal which may not give rise to removal

with the extraordinarily difficult burden of demonstrating that no possibility of recovery exists against numerous local retailers in this case when products liability law clearly allows such retailers to be sued, even absent a showing of fault on the part of those retailers. *See* Miss.Code Ann. § 11-1-63(g) (providing "sellers" with a right of indemnity against manufacturers where the sellers are not at fault in causing product defects, but permitting such sellers to be sued for such defects regardless). As in most asbestos removals, defendants have failed to meet the heavy burden that confronts them, and diversity of citizenship is plainly lacking in this case.

The court is also aware that asbestos removal litigation, as it has developed in this state, generally has less to do with effecting valid removals than with attempting to obtain a transfer of the case to a multi-district litigation (MDL) court, where the case generally languishes for a protracted period of time. While the desire of defendants to reach the comparative safety of an MDL court is understandable, their repeated efforts to do so, regardless of the jurisdictional merits, has resulted in an air of skepticism among the federal courts regarding the validity of most asbestos removals. This court has noted that other district courts in this state will sometimes include language admonishing asbestos defendants against filing subsequent removal petitions, under the pain of contempt or other sanctions. *See, e.g. Knotts, et al. v. Minnesota Manufacturing, et al.*, No. 1:03cv125 (S.D.Miss. 2003) (noting that the "continuous frivolous removal of these cases in addition to being burdensome to the plaintiffs has become taxing on the resources of the court and the court family. . . . Any further attempt to remove this or similar lawsuits

jurisdiction. *See, e.g. Pender v. Bell Asbestos Mines, Ltd.*, 46 F.Supp.2d 937, 940 (E.D.Mo. 1999).

on the same basis by any party will be viewed as contempt and dealt with accordingly.") The fact that courts have found such language to be necessary speaks volumes regarding the current state of asbestos removal litigation in this state.

In this case, the court would simply note that it has already determined that diversity of citizenship is lacking, and it is also apparent that the one-year limitations period for removal in diversity cases has passed. 28 U.S.C. § 1446(b). Plaintiffs assert no federal claims, and the court sees no possible bankruptcy issues which would justify a return of this case to this court.⁴ Thus, the court can envision no scenario under which this case would properly come before it again on removal, and, barring some clear basis for jurisdiction, the court directs that defendants proceed accordingly.

It is therefore ordered that plaintiffs' motion to remand [10-1] is granted, and this case is hereby remanded to the Circuit Court of Washington County.



Roy BLACKMON, Petitioner,

v.

Raymond BOOKER, Respondent.

No. CIV.A. 03-CV-71206DT.

United States District Court,
E.D. Michigan,
Southern Division.

March 19, 2004.

Background: State prisoner filed petition for writ of habeas corpus, challenging con-

4. *See, e.g. In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir.2002).

clearly do not and were not intended to confer independent authority on the Commission to supervise network contracts or to enforce competition between radio networks by withholding licenses from stations, and do not justify the Commission in refusing a license to an applicant otherwise qualified, because of business arrangements that may constitute an unlawful restraint of trade, when the applicant has not been finally adjudged guilty of violating the anti-trust laws, and is not controlled by one so adjudged.

The conditions disclosed by the Commission's investigation, if they require correction, should be met, not by the invention of authority where none is available or by diverting existing powers out of their true channels and using them for purposes to which they were not addressed, but by invoking the aid of the Congress or the service of agencies that have been entrusted with the enforcement of the anti-trust laws. In other fields of regulation the Congress has made clear its intentions. It has not left to mere inference and guesswork the existence of authority to order broad changes and reforms in the national economy or the structure of business arrangements in the Public Utility Holding Company Act, 49 Stat. 803, 15 U.S.C.A. § 79 et seq., the Securities Act of 1933, 48 Stat. 74, 15 U.S.C.A. § 77a et seq., the Federal Power Act, 49 Stat. 838, 16 U.S.C.A. § 791a et seq., and other measures of similar character. Indeed the Communications Act itself contains cogent internal evidence that Congress did not intend

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to grant power over network contractual arrangements to the Commission. In § 215 (c) of Title II, dealing with common carriers by wire and radio, Congress provided:

"The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress had no difficulty here in expressing the possible desirability of regulating a type of contract roughly similar to the ones with which we are now concerned, and in reserving to itself the ulti-

mate decision upon the matters of policy involved. Insofar as the Congress deemed it necessary in this legislation to safeguard radio broadcasting against arrangements that are offensive to the anti-trust laws or monopolistic in nature, it made specific provision in §§ 311 and 313. If the existing network contracts are deemed objectionable because of monopolistic or other features, and no remedy is presently available under these provisions, the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem.

Mr. Justice ROBERTS agrees with these views.



319 U.S. 182
LOCKERTY et al. v. PHILLIPS, United
States Attorney for District of
New Jersey.
No. 934.

Argued May 3, 1943.

Decided May 10, 1943.

1. Courts ⇨258

The Constitution does not require Congress to confer equity jurisdiction on any particular inferior court. U.S.C.A.Const. art. 3, § 1.

2. Courts ⇨258

Under Constitutional provision authorizing Congress to ordain and establish inferior courts, Congress is left free to establish inferior federal courts or not as it deems appropriate. U.S.C.A.Const. art. 3, § 1.

3. Courts ⇨258

The congressional power to "ordain and establish" inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which

to Congress may seem proper for the public good. U.S.C.A.Const. art. 3, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordain and Establish".

4. Courts ⇨258

Provision of Emergency Price Control Act restricting to the Emergency Court of Appeals, and, upon review of its decisions, to the Supreme Court, equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, is within power of Congress to "ordain and establish" inferior courts. Emergency Price Control Act of 1942, § 204(d), 50 U.S.C.A. Appendix, § 924(d); U.S.C.A.Const. art. 3, § 1.

5. Courts ⇨258

Congress had authority to require that a plaintiff seeking equitable relief against enforcement of Emergency Price Control Act, or of regulations promulgated under it, resort to the Emergency Court of Appeals only after first pursuing prescribed administrative procedure. Emergency Price Control Act of 1942, §§ 203(a), 204(a, b, d), 50 U.S.C.A. Appendix, §§ 923(a), 924(a, b, d).

6. Constitutional law ⇨48

Where Emergency Price Control Act provides that no court, federal, state, or territorial, shall have jurisdiction to "set aside" any provision of the Act, a construction of the Act which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored. Emergency Price Control Act of 1942, § 204(d) 50 U.S.C.A. Appendix, § 924(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Set Aside".

7. Constitutional law ⇨45

War ⇨4

Orders and regulations involving an unconstitutional application of Emergency Price Control Act are not in "accordance with law" within statutory provision giving Emergency Court of Appeals, and upon review of its decisions, the Supreme Court authority to determine whether any regulation or order is in accordance with law so that the constitutional validity of the act and of orders and regulations under it may be determined upon the prescribed re-

view in the Emergency Court of Appeals. Emergency Price Control Act of 1942, § 204(d), 50 U.S.C.A. Appendix, § 924(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Accordance with Law".

8. Constitutional law ⇨46(1)

In determining jurisdiction of federal district court to enjoin enforcement of price regulations prescribed by Administrator under Emergency Price Control Act, constitutionality of provision prohibiting all interlocutory relief by Emergency Court of Appeals was not required to be considered since even if such provision were unconstitutional, the separability clause would require Supreme Court to give effect to provision withholding from district courts authority to enjoin enforcement of the Act. Emergency Price Control Act of 1942, § 204(c, d), 303, 50 U.S.C.A. Appendix, §§ 924(c, d), 943.

9. Courts ⇨258

Provision of Emergency Price Control Act withholding from federal district courts authority to enjoin enforcement of the Act is constitutional. Emergency Price Control Act of 1942, § 204(d), 50 U.S.C.A. Appendix, § 924(d); U.S.C.A.Const. art. 3, § 1.

10. Courts ⇨262(4)

War ⇨4

Where Emergency Price Control Act withheld from federal district courts authority to enjoin enforcement of the Act, complaint seeking injunction restraining United States attorney from prosecution of pending and prospective criminal proceedings against plaintiffs for alleged violation of the Act and price regulations prescribed thereunder was properly dismissed by the federal district court. Emergency Price Control Act of 1942, §§ 2(a), 4(a), 204(d), 205(b), 50 U.S.C.A. Appendix, §§ 902(a), 904(a); 924(d), 925(b); 28 U.S.C.A. § 380a.

—◆—
Appeal from the District Court of the United States for the District of New Jersey.

Suit for injunction by Clem Lockerty and others against Charles M. Phillips, United States Attorney for the District of New

Jersey. From a decree, D.C., 49 F.Supp. 513, dismissing the suit, plaintiffs appeal.

Affirmed.

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Mr. Arthur T. Vanderbilt, of Newark, N. J., for appellants.

Mr. Thomas I. Emerson, of Washington, D. C., for appellee.

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Mr. Chief Justice STONE delivered the opinion of the Court.

The question for our decision is whether the jurisdiction of the district court below to enjoin the enforcement of price regulations prescribed by the Administrator under the Emergency Price Control Act of 1942, 56 Stat. 23, was validly withdrawn by § 204(d) of the Act, 50 U.S.C.A. Appendix § 924(d). Appellants brought this suit in the district court for the District of New Jersey for an injunction restraining appellee, the United States Attorney for that district, from the prosecution of pending and prospective criminal proceedings against appellants for violation of §§ 4(a) and 205(b) of the Act, 50 U.S.C.A. Appendix §§ 904(a), 925(b), and of Maximum Price Regulation No. 169. In view of the provisions of § 204(d) of the Act, the district court of three judges, 28 U.S.C. § 380a, 28 U.S.C.A. § 380a dismissed the suit for want of jurisdiction to entertain it.

The amended bill of complaint alleges that appellants are established merchants owning valuable wholesale meat businesses, in the course of which they purchase meat from packers and sell it at wholesale to retail dealers; that Maximum Price Regulation No. 169, promulgated by the Price Administrator under the purported authority of § 2(a) of the Act, 50 U.S.C.A. Appendix § 902(a), as originally issued and as revised, fixed maximum wholesale prices for specified cuts of beef; that in fixing such prices the Administrator had failed to give due consideration to the various factors affecting the cost of production and distribution of meat in the industry as a whole; that the Administrator had failed to fix or regulate the price of livestock; that the conditions in the industry—including the quantity of meat available to packers for distribution to wholesalers, the packers' expectation of profit, and the effect of these conditions upon the prices of

meat sold by packers to wholesalers—are such that appellants are and will be unable to obtain a supply of meat from packers which they can resell to retail dealers within the

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prices fixed by Regulation No. 169; that enforcement of the Regulation will preclude appellants' continuance in business as meat wholesalers; that the Act as thus applied to appellants is a denial of due process in violation of the Fifth Amendment of the Constitution, and involves an unconstitutional delegation of legislative power to the Administrator; that appellee threatens to prosecute appellants for each sale of meat at a price greater than that fixed by the Regulation, and to subject them to the fine and imprisonment prescribed by §§ 4 and 205(b) of the Act for violations of the Act or of price regulations prescribed by the Administrator under the Act; and that such enforcement by repeated prosecutions of appellants will irreparably injure them in their business and property.

Section 203(a), 50 U.S.C.A. Appendix § 923(a), sets up a procedure whereby any person subject to any provision of any regulation, order or price schedule promulgated under the Act may within sixty days "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections". He may also protest later on grounds arising after the expiration of the original sixty days. The subsection directs that within a specified time "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

By § 204(a), "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying

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his objections and praying that the regulation,

order, or price schedule protested be enjoined or set aside in whole or in part." Subsection (b) provides that no regulation, order, or price schedule, shall be enjoined "unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious". Under subsections (b) and (d), decisions of the Emergency Court may, by writ of certiorari, be brought for review to the Supreme Court, which is required to advance the cause on its docket and to expedite the disposition of it.

Although by following the procedure prescribed by these provisions of the Act appellants could have raised and obtained review of the questions presented by their bill of complaint, they did not protest the price regulation which they challenge and they took no proceedings for review of it by the Emergency Court. Appellants are thus seeking the aid of the district court to restrain the enforcement of an administrative order without pursuing the administrative remedy provided by the statute (cf. *Illinois Commerce Commission v. Thomson*, 318 U.S. 675, 63 S.Ct. 834, 839, 87 L.Ed. —, decided April 12, 1943), and without recourse to the judicial review by the Emergency Court of Appeals and by this Court which the statute affords.

Moreover the statute vests jurisdiction to grant equitable relief exclusively in the Emergency Court and in this Court. Section 204(d) declares: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation,

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order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or

price schedule, or to restrain or enjoin the enforcement of any such provision."

[1-5] By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 82, 67 L.Ed. 226, 24 A.L.R. 1077, and cases cited; *McIntire v. Wood*, 7 Cranch 504, 506, 3 L.Ed. 420. The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good". *Cary v. Curtis*, 3 How. 236, 245, 11 L.Ed. 576; *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 330, 58 S.Ct. 578, 582, 82 L.Ed. 872; *Hallowell v. Commons*, 239 U.S. 506, 509, 36 S.Ct. 202, 203, 60 L.Ed. 409; *Smallwood v. Gallardo*, 275 U.S. 56, 48 S.Ct. 23, 72 L.Ed. 152; *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129, 62 S.Ct. 139, 141, 86 L.Ed. 100, 137 A.L.R. 967. See, also, *United States v. Hudson and Goodwin*, 7 Cranch 32, 33, 3 L.Ed. 259; *Mayor v. Cooper*, 6 Wall. 247, 252,

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18 L.Ed. 851; *Stevenson v. Fain*, 195 U.S. 165, 167, 25 S.Ct. 6, 7, 49 L.Ed. 142; *Commonwealth of Kentucky v. Powers*, 201 U.S. 1, 24, 26 S.Ct. 387, 393, 50 L.Ed. 633, 5 Ann.Cas. 692; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed. 329. In

the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure.

[6,7] Appellants argue that the command of § 204(d) that "no court, Federal, State, or Territorial, shall have jurisdiction or power to * * * restrain, enjoin, or set aside * * * any provision of this Act" extends beyond the mere denial of equitable relief by way of injunction, and withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. They insist that the phrase "set aside" is to be read broadly, as meaning that no court can declare unconstitutional any such provision, and that consequently the effect of the statute is to deny to those aggrieved, by statute or regulation, their day in court to challenge its constitutionality. But the statute expressly excepts from this command those remedies afforded by § 204, including that of subsection (b), which gives to complainants a right to an injunction whenever they establish to the satisfaction of the Emergency Court that the regulation, order, or price schedule is "not in accordance with law, or is arbitrary or capricious". A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored. The present Act has at least saved to the Emergency Court,

and, upon review of its decisions,
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to this Court, authority to determine whether any regulation, order, or price schedule promulgated under the Act is "not in accordance with law, or is arbitrary or capricious". We think it plain that orders and regulations involving an unconstitutional application of the statute are "not in accordance with law" within the meaning of this clause, and that the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court.

[8,9] Appellants also contend that the review in the Emergency Court is inadequate to protect their constitutional rights, and that § 204 is therefore unconstitutional, because § 204(c) prohibits all interlocutory relief by that court. We need not pass upon the constitutionality of this restriction. For in any event, the separability clause of § 303 of the Act, 50 U.S.C.A. Appendix § 943, would require us to give effect to the other provisions of § 204, including that withholding from the district courts authority to enjoin enforcement of the Act—a provision which as we have seen is subject to no unconstitutional infirmity.

[10] Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

Affirmed.