The Legal Intelligencer

Removal Woes: Two New Decisions Portray a Narrow Gate of Entry

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Most trial lawyers know the basic rule: Defendants may remove a case from state to federal court if the federal court has original jurisdiction — because of either diversity of citizenship or subject matter. But removal jurisdiction, particularly when based on diversity, is limited by the so-called "forum defendant rule." That rule, 28 U.S.C. § 1441(b)(2), precludes removal on the basis of diversity jurisdiction where one of the defendants that has been "properly joined and served" is a citizen of the forum state.

If one of the defendants who has been served is a citizen of the forum state, there is no diversity jurisdiction and removal is not proper. But what if a co-defendant removes before the forum defendant is served? A recent case in the Eastern District of Pennsylvania dealt with that very issue.

In *Swindell-Filiaggi v. CSX*, No. 12-6962 (E.D. Pa. Feb. 8, 2013), U.S. District Judge Michael M. Baylson granted a motion to remand, finding that removal prior to service on the forum defendant was legally ineffective. Although achieving a sensible result under the circumstances, Baylson's opinion presents a conflict with other decisions in the Eastern District of Pennsylvania. It also presents an interesting issue of statutory interpretation. When reading a statute, must one give compelling deference to the literal text, even if doing so undermines the statute's intent?

In his thoughtful opinion, Baylson balanced several considerations. He recognizes, and builds on, Congress' intent to restrict removal. But he acknowledges a competing concern that plaintiffs may unfairly frustrate removal by naming, but not serving, defendants who are citizens of the forum state. Naming, but not proceeding against, in-state defendants is a tactic designed solely to avoid removal. It is a tactic ripe for abuse.

The law does not countenance such gamesmanship by plaintiffs. For this reason, the removal statute allows nonforum defendants to remove in cases where the in-state defendant hasn't been served. That, however, creates the potential for counter-abuse by defendants. It allows a clever and speedy defendant to remove a case before the in-state defendant is served. If the in-state defendant hasn't been served, as a literal matter the "forum defendant rule" is not invoked and there is no bar to removal. U.S. District Judge Harvey Bartle III has already issued an opinion, *Valido-Shade v. Wyeth*, No. 12-20003 (E.D. Pa. July 11, 2012), noting that defendants who "dash to the federal courthouse" with a notice of removal before service is completed may successfully pass through this technical loophole on their way to federal court.

In *Swindell-Filiaggi*, the plaintiff had served the forum defendant, but it was served several hours after the removal papers were filed. Although Baylson's opinion does not elaborate upon this factual point, one senses that it must have been of critical importance. For the court did observe the concern over placeholder defendants named, but not served, to defeat removal. Thus, the court was clearly aware that defendants may remove if a forum defendant is never served in timely fashion.

Shifting the "gamesmanship" label to defendants who race to remove before the plaintiff can complete service, Baylson refused to allow removal where the defendants had outraced the plaintiff to the next step — removing only hours before the plaintiff completed service. In barring removal, Baylson relied heavily upon two canons of statutory construction: (1) removal statutes should be strictly construed and (2) a statute should not be read literally when doing so produces "an absurd result at odds with congressional intent."

In *Swindell-Filiaggi*, the defendant's removal did not violate the literal text of the "forum defendant rule," because the in-state defendant had not yet been "joined and served." Thus, there was no properly "joined and served" in-state defendant at the time of removal. It may appear, then, that the removal was proper. But Baylson declined to enforce the plain meaning of the statute. He found that removal in the circumstances of this case — where the plaintiff made service on the in-state defendant only a few hours after the removal petition was filed — would frustrate the intent of the "forum defendant rule." The decision, however, conflicts with Bartle's decision in *Valido-Shade* and reflects a different philosophy of statutory interpretation. Rejecting the "plain meaning" or textual approach adopted by Bartle, Baylson took note of the critical fact that the plaintiff was attempting service on the forum defendant and therefore treated the case, in effect, as if service had been accomplished. He found that it was only the defendant's gamesmanship that took the case out of the forum defendant rule. Then, employing a teleological interpretative philosophy, Baylson barred the attempted removal. Expect the U.S. Court of Appeals for the Third Circuit to be faced with this issue down the road.

Less than two weeks after Baylson's opinion was issued in *Swindell-Filiaggi*, the court issued another opinion on removal. In *Johnson v. National Consolidation Services,* No. 12-5083 (E.D. Pa. Feb. 21, 2013), U.S. District Judge Gene E.K. Pratter was concerned, not with quick-thinking, quick-acting defendants, but rather with "ineffective and untimely" notices of removal. At issue was the rule that removal must take place within 30 days of when the defendant receives a copy of the initial pleading or 30 days after the defendant receives an amended pleading, motion, or "other paper from which it may first be ascertained" that the case has become removable. (See 28 U.S.C. § 1446(b)(1) (3).)

The plaintiff, Russell Johnson, who was a Pennsylvania resident, alleged in his Pennsylvania state court complaint that one of the defendants, whom he called "Walgreen's Distribution Center Inc.," was a Pennsylvania corporation with a principal business address in Pennsylvania. That would, on its face, invoke the "forum defendant rule" and bar removal. Co-defendant Walgreen Co. nevertheless filed removal papers, asserting therein that the distribution center did not exist as a corporate entity. Therefore, there was no Pennsylvania defendant and removal was proper.

The court disagreed. It granted Johnson's motion to remand, finding that Walgreens had not supported its assertions about the corporate status of the distribution center with an affidavit or other admissible evidence. Walgreens then filed a second notice of removal and attached an affidavit from a corporate legal assistant for Walgreen Co. stating that no corporate entity called "Walgreen's Distribution Center Inc." exists. Pratter noted that this notice was filed more than 120 days after Walgreens was served with

Johnson's complaint.

Despite that delay, Walgreens argued that it satisfied the 30-day rule. It asserted that its second notice of removal was filed within 30 days after it received a "paper" — the affidavit from the corporate legal assistant — from which it first ascertained that the case was removable. Pratter found that argument disingenuous and unpersuasive under the language of the statute.

She reasoned that Walgreens obviously had access to relevant information about the corporate status and citizenship of the distribution center at the time that Johnson filed his complaint and by the time Walgreens first filed for removal. Thus, Pratter found that the second notice of removal was untimely, and the case was sent back to the Philadelphia Court of Common Pleas.

Several lessons can be learned from these two recent decisions. First, the Eastern District of Pennsylvania takes limitations on removal seriously. Both new cases rest on statutory interpretations that restrict, rather than expand, federal removal jurisdiction. Second, the cases prove the need for counsel to avoid what may be viewed as "gamesmanship" in the removal field of play. In the one case, the perceived gamesmanship was jumping ahead of service with a lightning-quick removal filing. In the other case, it was unsupported allegations about corporate citizenship followed by an argument that a self-generated affidavit was the "paper" triggering the 30-day period for removal.

Removal, then, is not as straightforward as it seems. Litigation counsel does well to stay current with judicial decisions that fill the cracks left by removal statutes and which review the creative efforts of counsel to wiggle through the narrow portal of removal. For now, at least, the courts in the Eastern District of Pennsylvania are not likely to reward such creativity. To remove successfully, do so within the 30 days, with the factual support needed to resolve citizenship disputes, and not before giving the plaintiff fair time to serve defendants.

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