IADC Committee Newsletter

TRIAL TECHNIQUES AND TACTICS

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IN THIS ISSUE

The authors discuss pre-service removal with the presence of an in-state defendant after the enactment of The Federal Courts Jurisdiction and Venue Clarification Act of 2011.

Pre-Service Removal Exception to the Forum Defendant Rule Post Amendment of the Federal Jurisdictional Statutes

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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org.

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The Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("the Act"), effective January 6, 2012, was unanimously passed by both the Senate and the House of Representatives, and it was signed into law by President Obama on December 7, 2011. The Act brought significant changes to the federal jurisdictional statutes, including changes to the standards for jurisdiction, venue, and removal. Yet, as it relates to the removal of diversity cases involving an in-state defendant, the language of the statutes left unchanged by Congress is as significant as the portions changed.

Section 1441(a) of the general removal statutes provides that any civil action brought in a state court, over which the federal court has original jurisdiction, may be removed by a defendant to the federal district court. Federal courts generally have diversity jurisdiction when complete diversity exists among the parties and the amount in controversy is greater than $75,000. However, under the Forum Defendant Rule, even where there is complete diversity among the parties, the case is "removable only if none of the parties in interest properly joined and served as defendants is a citizen in which such action is brought." 28 U.S.C. §1441(b). Stated differently, even if diversity jurisdiction exists, a case cannot be removed to federal court where an in-state defendant has been "properly joined and served." The rationale behind the rule is that the equities in favor of allowing an out-of-state defendant to remove a case, primarily the burden of litigating in an unfriendly forum, do not exist with an in-state defendant.

Several federal district courts have carved out an important exception to the Forum Defendant Rule that allows a court to disregard the presence of an in-state defendant that is not properly joined ***and served.*** Following the plain language of Section 1441(b), these courts have held that the "properly joined and served" language unambiguously allows for removal prior to service. Although the courts acknowledge that such pre-service removal may raise some policy concerns, holding otherwise would disregard congressional intent as expressed in the text of the statute.[1] And, the courts note that it is Congress' duty to amend the removal statute if it disagrees with courts' interpretations of its language.[2] While there is a lack of binding precedent from the courts of appeal on pre-service removal, the plain language argument appears to be the approach embraced by the majority of federal district courts.

Conversely, a smaller number of district courts have rejected the plain language interpretation of the Forum Defendant Rule on the ground that such a literal application of the statutory language is at odds with the intention of Congress when it drafted §1441(b). These courts contend that the literal interpretation of the "joined and served" language of the removal statute produces an absurd result and, therefore, is improper. The "absurd result" argument is largely policy-driven and relies on speculation as to congressional intent. Courts

[1] *See Terry v. J.D. Streett & Co.*, 2010 WL 3829201 (E.D. Mo. Sept. 23, 2010); *Allen v. Eli Lilly & Co.*, 2010 WL 3489366 (S.D. Cal. Sept. 2, 2010); *Roberston v. Iuliano*, 2011 WL 453618 (D. Md. Feb. 4, 2011); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210 (D. Haw. 2010); *Stewart v. Auguillard Constr. Co.*, 2009 WL 5175217 (E.D. La. Dec. 18, 2009); *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518 (D.N.J. Aug. 10, 2009); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263 (M.D. Fla. 2009).

[2] *Bivins*, 2009 WL 2496518 at *2 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

invoking this approach have posited that Congress included the "properly joined and served" requirement to prohibit plaintiffs from adding in-state defendants purely to defeat diversity; it could not have anticipated that this language would create a loophole for in-state defendants seeking removal.[3] Thus, prior to the passage of the Act, the issue dividing federal district courts was whether a defendant may properly remove a case from state court to federal court based on diversity jurisdiction before an in-state defendant has been served, when removal would not be proper after service.

The Act has arguably resolved the split among the district courts by effectively ratifying the validity of the pre-service removal exception to the Forum Defendant Rule. Of particular significance is the fact that Congress had the opportunity to change the "properly joined and served" language of §1441(b) and eliminate the so called "forum defendant loophole" that has permitted removal in diversity cases where an in-state defendant had not been properly served, yet it chose not to do so. While Congress completely rewrote §1441(b), the "properly filed and served" language remains verbatim in the new version.[4]

Equally important, the passage of the Act has largely discredited the absurd results argument against pre-service removal. That argument has relied on a presumption that Congress could not have intended in-state defendants to avoid litigating in state court based on a technicality in the removal statute. However, the fact that Congress left the pre-service removal language intact after undergoing a comprehensive revision of §1441(b) is a clear indication that it intends to permit this exception. Speculation as to congressional intent otherwise now seems unfounded in light of the amendments to the removal statute. As a result, the Act lends strong support to the continued application by district courts of the pre-service removal exception for in-state defendants.

The Act's changes to the federal jurisdictional statutes certainly provide greater clarity overall to defendants about the removal process. Additionally, the Act is as significant for what it did not change, particularly as it relates to the removal of cases prior to service of an in-state defendant. Prior to the Act, most federal district courts held that where complete diversity exists between the parties, the presence of an un-served resident defendant does not prevent removal. These holdings are based on a plain reading of the "properly joined and served" language of the Forum Defendant Rule, language that Congress left unchanged when it made significant changes to the language of the removal statutes. By preserving the "and served" requirement to the Forum Defendant Rule, Congress has validated the practice of removing diversity cases to federal court where the in-state defendant has not been served.

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[3] *See Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640 (D.N.J. Sept. 10, 2008); *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855 (N.D. Ohio Aug. 13, 2008); *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067 (E.D. Pa. May 30, 2008) (noting that it nonetheless may be proper for an out-of-state defendant to remove before service is effected on an in-state defendant in a case involving multiple defendants).

[4] *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

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