Removal to Federal Court / Fraudulent Joinder of Party

Philadelphia County is reputed to be a forum producing large and favorable verdicts to plaintiffs. It should be of no surprise, therefore, that plaintiffs clamor to bring lawsuits in Philadelphia County hoping for a big payday. Your Defense counsel should aggressively attempt to move cases out of Philadelphia County when possible. Yet, petitions contesting the convenience of the forum are routinely summarily denied. If the "convenient forum" is an adjacent county, the likelihood of moving the case is slim to none, even if you can somehow establish that Philadelphia County is inconvenient to the plaintiff. A consideration that must not be overlooked is the possibility of removing the case to federal court based on the diversity of citizenship of the parties. The United States District Court for the Eastern District of Pennsylvania pulls jurors from a county area, which can significantly level the playing field for the defense with respect to damages in a civil case.

To establish federal court jurisdiction based on 28 U.S.C. § 1332 there must be complete diversity of the parties, which means that plaintiff vis-à-vis all defendants must be from different states.[1] A person shall be deemed a citizen of the state whereby he/she resides. A corporation, however, shall be deemed a citizen of the state by which it has been incorporated and of the state where it has its principal place of business. If plaintiff and one defendant are from Pennsylvania, the case cannot be removed as complete diversity among the parties does not exist. Interestingly, there is a line of cases in the eastern district where plaintiff's counsel have employed a strategy to bust diversity even where it is obvious that diversity *should* exist. Cipriani & Werner recently successfully challenged the strategy.

Plaintiff, in the case in question, initiated a negligence suit against a non-resident corporation. The cause of action stemmed from an accident occurring at one of the corporation's stores located in Philadelphia. Without more, the case would have been ripe for removal to the federal court in that there was complete diversity among the parties – plaintiff being a resident of Pennsylvania and defendant being a Seattle Corporation. As sure as the sun will rise, plaintiff attempted to avoid federal jurisdiction over this matter by "artful" pleading. That is, instead of suing only the corporation, plaintiff asserted a claim against the store manager of the store as well. The store manager, as the case law on this issue divulged, is, almost without exception, a citizen of Pennsylvania. As a result, complete diversity is destroyed.

Despite what appears on its face to be a brazen attempt to avoid federal court jurisdiction, the defendant that seeks to challenge the joinder is faced with a difficult burden. That is, the defendant must demonstrate the joinder was fraudulent. Removal is a simple filing, but the defendant must be prepared to stave off the inevitable motion for remand by plaintiff seeking costs and fees. To do this, the defense must demonstrate that plaintiff joined the store manager "with no reasonable basis in fact or colorable claim against the joined [store manager] or no real intention in good faith to prosecute the action against the [store manager].

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[1] Jurisdiction based upon 28 U.S.C. § 1332 also requires the matter in controversy exceed $75,000.00.

Again, despite what is typically an obvious attempt to thwart removal by bogus pleading, the vein of cases in the United States District Court for the Eastern District of Pennsylvania on this issue underscore just how difficult it is to actually prove. In fact, upon researching this issue, a series of slip opinions suggested it was practically impossible for the defense to survive remand against the standard that *only a possibility* need exist that a state court would find the complaint states a cause of action against the store manager to warrant remand of the case to state court. Accordingly, under what is know as the "participation theory" an employee may be held liable for the negligence of the corporation if it can be shown that the employee directed or participated in the tort alleged. A corporate officer can be held liable for *improper performance* of an act but not for the *omission* of an act. Plaintiff has routinely been able to meet the mere "possibility" burden and satisfy the requirements of the participation theory by alleging, whether accurate or not, the store manager's own acts in bringing about plaintiff's injuries.

As indicated above, C&W recently challenged the existing precedent. Despite plaintiff having named the store manager as a party-defendant, C&W, on behalf of its client, removed the case to the Eastern District and then survived a motion to remand. It did so by breaking through what has otherwise been an impervious plaintiff-friendly case law precedent from the Eastern District, flushing out the ambiguities as well as contradictions existing in the Court's decisions discussed below.

In our case, plaintiff alleged in several specific averments, that the store manager failed to perform acts or duties, which resulted in plaintiff's injuries. However, the store manager was neither working nor present at the time of the alleged accident. Surprisingly, this same set of facts was decided in a recent case against the defendant. Nevertheless, without more, it was this modicum of detail that C&W seized upon to mount its attack against plaintiff's fraudulent joinder. Upon removal and in its argument for remand, plaintiff cited several cases regarded as the foundation of the daunting precedent described above.

In Wicks v. Milzoco, the Pennsylvania Supreme Court, in defining the participation theory, found that a corporate officer did participate in the commission of a tort when he directed work to proceed when it carried with it an unreasonable risk of injury. C&W argued that its case was dissimilar to Wicks because neither was the joined store manager an "officer" nor did plaintiff allege that he directed other employees to engage in the alleged conduct. Indeed, as C&W artfully argued, the latter was an impossibility in that the store manager was neither working nor present at the time of the alleged accident.

Plaintiff, however, seemingly had an ace-in-the-hole with the case of Becks v. Albertson, Inc. In Beck, as indicated above, the Eastern District Court was presented with the issue of whether defendant store manager was fraudulently joined in the action with defendant corporation in order to defeat diversity. The Court found that plaintiff had stated a colorable claim against the store manager and thus remanded the case to state

court. On its face, one might have assumed that C&W's client was sunk, as the store manage in Beck was not present at the time of the incident, but not so. C&W delved deeper into the Court's findings and rationale, dismantling both. Perhaps hastily, the Court cited the fundamental position of Pennsylvania law that a store **owner** owes a duty of care to the patrons of the store. The Court did not discuss nor did the case law it cited stand for the proposition that a store **manager or employee** could be held individually liable.

The Court in Beck also assumed that the store manager was working on the date of the alleged accident. Moreover, the allegations against the store manager consisted of acts of omission rather than commission. In other words, it appeared that the Court's rationale in finding a colorable claim was directly at odds with the principle of the participation theory. C&W used this apparent inconsistency to its and its client's advantage, arguing that the seemingly iron-clad holding of Beck must be called into question when analyzed against the backdrop of the participation theory. Indeed, in C&W's case, plaintiff failed to specify the alleged actions of the store manager giving rise to liability. What's more, even if plaintiff had done so, same was an impossibility due to the store manager's lack of presence at the time of the alleged accident.

Judge O'Neil, Jr. of the United States District Court for The Eastern District of Pennsylvania, found C&W's argument persuasive and denied plaintiff's Motion for Remand. As a result, C&W created a foothold for future success. C&W will continue to defend such matters with like enthusiasm to make the above success the rule rather than the exception in the law of fraudulent joiner.

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