What's Up With Removal Before Service?

Thursday, May 26, 2011

It was one of our biggest issues in the blog's first couple of years – whether a defendant's removal of a case before service on: (1) the forum defendant where an out-of-state defendant is sued in its own state's court, or (2) anybody (including the removing defendant), would result in the unserved forum defendant not counting for removal/remand purposes. Application of plain statutory language meant that, in products cases where defendants had the bad fortune of residing in a jurisdiction considered pro-plaintiff, out-of-state plaintiffs could not keep sharp-eyed defendants from defeating the forum defendant rule by removing as soon as they learned of an action.

We played a role in popularizing the tactic, blogging about it here, here, here, here, here, here, here, here, here, here, and here. Trying to organize our multiple posts, we put up a comprehensive post that tried to round up every removal-before-service decision we could find (at least the ones taking the position we liked) back in October, 2009.

But since then – over a year and a half – we've said nothing about removal before service. It's not like we haven't covered other removal issues…. Heck we discussed two removal issues just this past week, but we hadn't gone back to the well of pre-service removal.

Well, a reader recently emailed us and asked why.

We didn't have a good reason, except maybe indolence (or Herrmann retiring). So we thought we'd take a stroll down Memory Lane and see what, if anything, has happened on that front since our last big post back in late 2009.

What we've found is that the dispute still simmers. Our side says, follow the "plain language" of 28 U.S.C. §1441(b), which states that only defendants "properly joined and served" at the time of removal count as forum defendants. The other side urges that the statutory language should be ignored in favor or either some version of "intent" or the assertion that removal before service is some sort of high-tech game that the courts don't have to put up with because it produces an "absurd" result.

There's law going both ways – the dispute itself certainly hasn't gone away. In fact, the most recent case we've seen, Hawkins v. Cottrell, Inc., ___ F. Supp.2d ___, 2011 WL 1898867 (N.D. Ga. May 19, 2011), observed that "the federal district courts have been inundated with a flood of cases addressing this issue." Id. at *3. We'd like to think we contributed to that in some small way.

Hawkins, however, came up with a weird (or at least novel) reading of §1441(b) – that somebody had to be properly served before removal, or else the "none of the defendants properly joined and served" language" (the court thought) made sense. Id. at *6. It didn't seem to matter that scores, if not hundreds, of other cases had found before service to be proper (or if improper, not on this ground). Rather, the court held that its "reading of the statute necessarily restricts removal to cases where at least one defendant has been served." Id. at *5.

The Hawkins court reached its admittedly novel result by splitting hairs. It relied on a state law (in Georgia) that an action can be "commenced" but not yet "pending" for purposes of removal. Id. at *7. How that would apply to states like Pennsylvania (where plaintiffs can start litigation with a bare summons without filing a complaint), or New York (where there's a 10-day grace period after service before an action is considered filed) is unclear. Actually, though, Hawkins was just the absurd results rationale masquerading as straight statutory interpretation, since it relies upon the same old "Congress couldn't have foreseen the technology" argument to reach its result, just moved to another part in the argument:

[T]he Court implicitly assumed that service of process would always occur prior to removal. The only reason removal is even possible prior to service is due to the advent of electronic case filing and waiver of service rules that could not have been foreseen when the current removal statute was enacted. Id. at *6 (discussing and attempting to analogize to Murphy Brothers, Inc., v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999)). Basically the Hawkins court was dead set against reading §1441(b) as written and determined to remand no matter what.

But yes, Hawkins definitely demonstrates that the controversy remains. Our Westlaw search – "1441(b)" within the same paragraph as "properly joined" limited to cases after our last comprehensive post – found a bunch of other cases.

We don't do plaintiffs' research for them, so they'll have to find the relatively few "purpose"/"absurdity" cases for themselves, but we're happy to provide a list of the recent cases (since our last compilation) holding that removal before the forum defendant is served is proper and creates diversity jurisdiction. Here they are:

California: Allen v. Eli Lilly & Co., 2010 WL 3489366, at *2 (S.D. Cal. Sept. 2, 2010) ("clear language" of statute allows removal before service of forum defendants); Carreon v. Alza Corp., 2010 WL 539392, at *2 (N.D. Cal. Feb. 9, 2010) (following plain meaning, finding nothing absurd about the result); Timmons v. Linvatec Corp., 2010 WL 2402918, at *1 (C.D. Cal. Jan. 24, 2010) (removal before service allowed forum defendant to be ignored),

reconsideration denied, 2010 WL 2402924, at *1 (C.D. Cal. March 9, 2010) ("the plain language of the statute states that it only applies when the local defendants have been 'properly joined and served'"); Haseko Homes, Inc. v. Underwriters Insurance Co., 2010 WL 358531, at *2 (S.D. Cal. Jan. 22, 2010) (removal proper where forum defendant not served; defendant may remove before being served).

Georgia: Gibson v. Wal-Mart Stores East, LP, 2010 WL 419393, at *2-4 (M.D. Jan. 28, 2010) (removal before service allowed forum defendant to be ignored; distinguishing cases where diversity is lacking).

Hawai'i: Watanabe v. Lankford, 684 F. Supp.2d 1210, 1218-19 (D. Haw. 2010) (following plain meaning, finding nothing absurd about the result).

Illinois: In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Relevant Products Liability Litigation, 2010 WL 3937414, at *11 (S.D. Ill. Oct. 4, 2010) ("[T]his action was removed before the forum defendant was served. This fact, standing alone, is a sufficient ground for denying Plaintiff's motion to remand.").

Louisiana: Billiot v. Canal Indemnity Co., 2010 WL 4975622, at *2 (W.D. La. Nov. 8, 2010) (removal before service allowed forum defendant to be ignored); Stewart v. Auguillard Construction Co., 2009 WL 5175217, at *3-4 (E.D. La. Dec. 18, 2009) (following plain meaning, finding nothing absurd about the result; forum defendant rule not resurrected by post-removal service).

Maryland: Robertson v. Iuliano, 2011 WL 476520, at *3 (D. Md. Feb. 4, 2011) (following plain meaning, finding nothing absurd about the result).

Missouri: Terry v. J.D. Streett & Co., 2010 WL 3829201, at *2 (E.D. Mo. Sept. 23, 2010) (following plain meaning, finding nothing absurd about the result); Wallace v. Tindall, 2009 WL 4432030, at *3-4 (W.D. Mo. Nov. 30, 2009) (improper service allowed forum defendant to be ignored).

Nevada: Lamy v. United Parcel Service, Inc., 2010 WL 1257931, at *2 (D. Nev. March 27, 2010) (removal before service allowed forum defendant to be ignored).

New Jersey: Bivins v. Novartis Pharmaceuticals Corp., 2010 WL 1463035, at *1 (D.N.J. April 12, 2010) (forum defendant rule not resurrected by post-removal service).

North Carolina: Chace v. Bryant, 2010 WL 4496800, at *2 (E.D.N.C. Nov. 1, 2010) (removal

before service allowed forum defendant to be ignored).

Texas: Evans v. Rare Coin Wholesalers, Inc., 2010 WL 595653, at *2 (E.D. Tex. Jan. 28, 2010) (removal before service allowed forum defendant to be ignored).

West Virginia: Leonard v. Mylan, Inc., 718 F. Supp.2d 741, 743 n.2 (S.D. W.Va. 2010) (recognizing removal before service as proper; plaintiffs did not seek remand)

A few observations. First, in some of these cases the removing defendant was actually served first, and took advantage of the plaintiff's delay in serving the would-be forum defendant. In others the removing defendants learned about the litigation, in one way or another, before anyone had been served. We don't think the distinction matters because the statute doesn't distinguish between the two situations. Obviously, the Hawkins court (but not much else) does.

Second, we note with some satisfaction that more than half of the cases we're seeing on removal before service don't involve drugs and devices. We're glad to see other defendants jumping on the bandwagon. When everybody relies upon removal before service, it gets harder for the other side to characterize it as some sort of procedural gimmick that shouldn't be allowed.

Third, we also came across a useful law review article on the subject, M. Curry, "Plaintiff's Motion To Remand Denied: Arguing For Pre-Service Removal Under The Plain Language Of The Forum-Defendant Rule," 58 Clev. St. L. Rev. 907 (2010), which marshals the arguments in favor of pre-service removal, and critiques that arguments against.

We also found a decision that demonstrates how removal before service can have collateral benefits, although a screw-up by the other side is necessary. In In re Trasylol Products Liability Litigation, 2011 WL 830287 (S.D. Fla. March 8, 2011), the defendant successfully removed some cases before service, and (we assume) won the removal before service argument as remand was denied. After that, the plaintiffs apparently fell asleep at the switch. After losing the remand motion, they never bothered to complete service against anybody. After time passed (enough for the statute of limitations to run), the defendant pounced on this error, and moved to dismiss – again successfully. Removal before service didn't in any way prevent these plaintiffs from doing what any competent plaintiff should do, and complete service after removal:

[I]t is undisputed that Plaintiffs have never perfected service. . . . The issue thus boils down to whether [defendant] has waived the defense of lack of personal jurisdiction by its conduct of this litigation. I find that [it] has not. While [the] strategy of removing this case to federal court

before service could be perfected certainly rises to the level of "legal gamesmanship," it does not constitute "overt wrongdoing," an attempt to "avoid service," or a general appearance in the case sufficient to forfeit the defense.
2011 WL 830287, at *6. Dismissal for failure to perfect service is not something one wishes to discuss with ones client.

Thus, in courts that follow the plain meaning of §1441(b) in removal before service cases, smart defendants should be making sure that the plaintiffs in fact do complete service. Plaintiffs have 120 days to do this under Rule 4(m). After that, it's open season for dismissal. However, even smarter defendants, as in Trasylol, make sure to wait until after the statute of limitations has run.

But we have to say that plaintiffs aren't the only ones who do dumb things. Removal before service can **only** be used to obtain jurisdiction in a truly diverse case – one that could have been brought in federal court in the first instance. Hair-trigger removal **only** provides a way around the forum defendant rule (that even diverse cases aren't removable where the defendant is sued in its home court), but **not** around a fundamental lack of diversity. Removal before service of a non-diverse case (where the plaintiff and at least one of the defendants are citizens of the same state) can't create federal jurisdiction. E.g., Jennings-Frye v. NYK Logistics Americas Inc., 2011 WL 642653, at *3-4 (C.D. Cal. Feb. 11, 2011) ("case law is clear that a defendant who is a citizen of plaintiff's state destroys complete diversity, regardless of whether that defendant was properly served prior to removal"); Smith v. Federal Express Corp., 2010 WL 3634347, at *3 (E.D. Mich. Sept. 14, 2010) ("including the unserved defendant, destroys diversity and eliminates this Court's jurisdiction"); O'Brien v. Cessna Aircraft Co., 2010 WL 4721189, at *15 (D. Neb. July 21, 2010) ("Diversity of citizenship among the parties is determined . . . regardless of whether each party has been served at the time of removal").

This is pretty basic 1-L civil procedure, so we don't recommend removing a non-diverse case just because the plaintiff hasn't gotten around to serving the non-diverse defendant. For one thing, it could lead to fee-shifting sanctions, and telling a client it has to pay the other side's lawyers is also something unpleasant. But more fundamentally, even if the plaintiff is asleep at the switch, it's not a good idea to remove a non-diverse case. There's no subject matter jurisdiction, and subject matter jurisdiction can be challenged at any time. That means that a defendant removing a non-diverse case for lack of service on a non-diverse defendant could end up spending a lot of time and effort litigating a case to a favorable result, and have everything taken away when the plaintiff finally wakes up (or a court *sua sponte* raises subject matter jurisdiction).

Overall, we'd have to say based on our review, that removal before service is alive and well, and that the good guys – the "plain meaning" argument – seem to have the upper hand at the moment. The dispute is likely to continue for some time, because remand orders are not appealable, and removal by definition takes place at the outset of the case. Even if somebody were inclined to challenge a successful removal long on appeal long after the fact, that's still in the future.