Removal Prior to Service Still Viable Under the New Removal Statutes

Product Liability Advisory

February 2012 by James Nelson

The recent enactment of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (Act) will require form removal petitions be dusted off and updated. The Act became effective on January 6, 2012, and in addition to renumbering and adding subsections to 28 U.S.C. Sections 1441 and 1446 (among others), it contains important new additions. The one-year time limit on removing cases now contains an exception where the "plaintiff has acted in bad faith preventing the defendant from removing." 28 U.S.C. Section 1446(c)(1). What constitutes such circumstances is sure to be ripe for litigation. Additionally, new provisions concerning proof of the amount in controversy, including the removing party's burden of proof, have been added. See 28 U.S.C. Section 1446(c)(2).

While the Act has brought some clarification, an important provision for litigators representing corporate defendants was left intact, especially in less than favorable jurisdictions. The provision concerning a defendant's ability to remove an action, which otherwise would not be removable due to the presence of a local resident defendant remains as previously drafted in Section 1441(b)(2).

The issue of a defendant's ability to remove an action prior to service involving a local defendant was litigated prior to the Act, and begged for statutory reform according to the plaintiff's bar. The scenario usually involved an action against a non-resident corporate defendant and a local defendant. In the medical device context, imagine these entities being the non-resident manufacturer and the local hospital or sales representative. The corporate defendant learns of the new filing and prior to service on any defendant, files a removal notice. Nothing bars removal prior to service, and Section 1441(b)(2) permits this so long as

the local defendant has not been "properly joined and served" at the time the removal petition was filed. Over the plaintiff's objection in *Carreon v. Alza Corp*., 2009 WL 539392 (N.D. Cal. Feb. 9, 2010), the District Court denied the plaintiff's motion to remand, finding nothing wrong with this strategy consistent with the literal language of Section 1441(b). The Court acknowledged the result may encourage potential gamesmanship as the plaintiff argued, but it noted that nothing precluded Congress from amending the statute if a significant problem arises. While it took the plaintiff in *Carreon* more than two months to serve the local defendant, in *Christison v. Biogen Idec*, No. 3:2011-cv- 04382, N.D. Cal., the defendant filed its removal notice within a week of the complaint filing. The *Christison* court likewise rejected the plaintiff's arguments of gamesmanship in favor of the language of the statute. The majority of other courts have also sided with the removing defendant in denying motions to remand under these circumstances.

This strategy, left unaffected by the Act, is apparently not a significant problem, nor the real gamesmanship plaintiffs complain of when faced with these situations. At least that is Congress' view for now.

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