The Long And Weinstein Road To Fraudulent Joinder

Friday, August 26, 2011

We'd thought, because that's what we'd seen, that subject-matter jurisdiction/fraudulent joinder issues in would-be diversity cases in federal court are to be decided early in the litigation. Turns out that's not necessarily so – at least according to the Second Circuit's recent decision in a Zyprexa case, Brown v. Eli Lilly & Co., ___ F.3d ___, 2011 WL 3625105, slip op. (2d Cir. Aug. 18, 2011).

Brown was originally filed in Mississippi state court, and the plaintiff purported to bring negligent discharge claims against two local hospitals – along with the usual Zyprexa allegations – in order to destroy diversity and keep the case out of federal court.

The procedural posture (how the case got where it was) can only be described as "convoluted."

Brown was originally filed in Mississippi state court in October, 2007. Before removal, both hospitals filed dispositive motions in state court on statutory issues unique to: (1) malpractice claims, and (2) Mississippi community hospitals.

Brown was removed to federal court in January, 2008. That's more than 30 days after suit was filed, which is usually a no-no, but apparently the plaintiff didn't notice, so timeliness of removal was waived. Fraudulent joinder of the hospitals was alleged, tracking the hospitals' pending motions.

A couple of months later, in rather leisurely fashion, the plaintiff moved to remand.

Later, in August, 2008, the MDL got involved and the case was transferred to the Zyprexa MDL – with all of the various motions still pending (nobody – plaintiff, defendants, or the court – seemed to have pressed things much during this seven-month period).

The Zyprexa MDL judge, of course, is Hon. Jack Weinberg, who rarely does things the same way as any other judge. All these preliminaries are recounted at 2011 WL 3625105, *2-3.

In October, 2008, Judge Weinberg acted on the motion for remand. One hospital was indubitably fraudulently joined, but as to the other the facts were unclear. 2011 WL 3625105, at *3. Most judges would have granted remand in that situation, holding that there was at least a "plausible" basis for a claim – but not Judge Weinstein. Instead, he ordered jurisdictional discovery, and ruled:

"Upon completion of discovery, [the defendant hospital] may renew its motion for summary judgment and [defendant drug manufacturer] may renew its motion to declare joinder of [defendant hospital] fraudulent for removal purposes."

Id. at *3 (quoting district court order).

That's quite unusual, but unusual is not the same as error.

Here's what happened next:

In November, 2008, Judge Weinstein granted summary judgment in favor of the non-community hospital, on grounds of the statute of limitations and failure to comply with expert certification requirements. 2011 WL 3625105, at *4. That judgment was certified (Rule 54(b)) as a final, appealable order in January, 2009. Plaintiff appealed, but when the sufficiency of the certification was questioned, withdrew the appeal by stipulation a few months later. Id. The stipulation, entered by the Second Circuit clerk, purported to allow a later appeal, once the entire case had been disposed of. Id.

In that sentence, as will be seen, the operative word is "purported."

Meanwhile, back at the Weinstein ranch, the other hospital completed discovery and renewed its motion to dismiss. The court ruled in April 2009 that the plaintiff didn't have the right kind of expert required by the relevant Mississippi statute. 2011 WL 3625105, at *5. In the same order, Judge Weinstein ruled that, in light of its grant of the other hospital's motion, joinder was fraudulent as to all non-diverse defendants, and the case against the diverse drug manufacturer properly remained in federal court. Id.

The judgment against this second hospital was also certified as final on May 29, 2011. Plaintiff appealed that one on August 5, 2009 – more than 30 days later – another no-no. Id.

In that appeal, Plaintiff ostensibly appealed against both hospitals, but since the order in question involved only the second one, the appeal as to the first hospital was more or less voluntarily dismissed. Plaintiff had blown the appeal deadline against the second hospital, so that appeal was also dismissed. All this occurred in December, 2009. Brown, 2011 WL 3625105, at *5-6.

Meanwhile, back at the Weinstein ranch, Lilly (the pharmaceutical defendant) moved for summary judgment because, once again, the plaintiff blew a deadline – this time for the submission of a case-specific expert. Judge Weinstein eventually granted that motion, on a date not stated. Plaintiff appealed again, this time managing to do so in a timely fashion, and "purported to appeal every Order and Judgment entered in favor" of any and all the defendants. Id. at *7.

Again, the operative word is "purported."

Thus, the Second Circuit was forced to sort out a procedural morass.

First, the appellate court held that the plaintiff's procedural missteps cost him both of his appeals against the hospitals. Those orders had both been certified as final appealable orders. The appeal as to the second hospital was too late – filed beyond the 30-day window. That's open and shut. Brown, 2011 WL 3625105, at *7. The earlier appeal as to the first hospital, however, had been withdrawn, pursuant to a stipulation entered by the clerk, supposedly preserving later appellate rights. Oops. Too bad, the clerk doesn't have that power:

"Apparently assuming that the judgment was a nullity, an incorrect assumption, the parties withdrew the appeal. . . . Until a panel of this Court determines otherwise, a judgment such as the one subject of the stipulation, reciting that there is no just reason for delay and certifying final judgment pursuant to Rule 54(b), is final for all purposes. Accordingly, the certified judgment in favor of [the first hospital] . . . stands as a final judgment and, the appeal from it having been voluntarily dismissed, the [current] Notice of Appeal . . . is untimely, and we are without jurisdiction."

Id. at *8. Ouch. Even we feel a little sorry for the plaintiff on that one, since the error was as much the clerk's as anyone's. Subsidiary moral of story: don't rely on a court clerk's say-so in

agreeing to dismiss an appeal. Until the court says a Rule 54(b) judgment is not properly appealable, assume it is.

That left the pharmaceutical defendant, and the far more interesting issue of how fraudulent joinder is to be determined. Can the trial court order discovery, extensive briefing, and only then decide the question? The Second Circuit said yes – so if you've got a District Judge that's not a knee-jerk remander, you can litigate the merits of fraudulent joinder in depth. The jurisdictional "defect" (if that's what it is) is **curable**.

"[I]f a jurisdictional defect exists at some time prior to a district court's entry of judgment, the court's judgment is still valid if the jurisdictional defect is cured before final judgment is entered. . . . [A] district court's error in failing to remand an improperly removed case [is] not fatal to the ensuing adjudication where federal jurisdiction existed when judgment was entered."

Brown, 2011 WL 3625105, at 9.

Thus, a District Judge, faced with a knotty and fact-bound issue of fraudulent joinder, can keep the case, order discovery and briefing, and conclude months or years later that the plaintiff's claim was bogus – thereby curing any initial jurisdictional defect. Even if "complete diversity [is] lacking," when "the non-diverse defendant had been dismissed with prejudice from the action before entry of judgment," then diversity is properly created and the court had jurisdiction to decide the entire case. Id.

"While it is true that the existence of federal subject matter jurisdiction over an action removed from state court to federal court is normally to be determined as of the time of removal, ***the critical issue is whether there was complete diversity at any time before the entry of judgment****. Although the better practice is to verify jurisdiction in a diversity action early on, especially where complex issues of state law are presented, the elimination of non-diverse defendants prior to judgment saves the action from dismissal for lack of jurisdiction."*

Id. at *10 (emphasis added).

Then, in a yawner, Brown affirmed dismissal of the pharmaceutical claims due to the plaintiff's failure to name an expert. 2011 WL 3625105, at *10-11

We're sure that, to non-lawyers (any who managed to read this entire post), this whole discussion seems arcane and technical – and we don't deny it. To lawyers, and courts, however, rules are important. Sometimes, as here, they provide their own means of winning cases – particularly when one of the parties is inattentive and/or fails to meet deadlines.

In our product liability/mass tort line of work, we regularly remove cases on grounds of fraudulent joinder. Thus, to us, and to our fellows in the defense bar, Brown and its jurisdictional rationale are of great interest. Plaintiffs demanding remand frequently try to stampede district courts to act precipitously and remand at the first suggestion of there being a disputable factual or legal issue. A lot of judges are only too happy to go along, since remands reduce their caseload.

But not all judges.

If a judge is inclined to give careful thought to a fraudulent joinder removal, and to resolve factual and legal issues, Brown provides the legal framework that allows the court to do so. Just make sure to pick off the non-diverse defendants first, so any inchoate jurisdictional defect is cured before attacking the core, pharmaceutical claims.