Bloomberg BNA

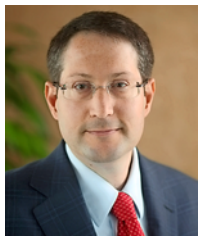
Product Safety & Liability Reporter™

JURISDICTION

REMOVAL

Opportunities to remove an action—or to remove it a second time after an unsuccessful removal—can present themselves at any time during the litigation, attorneys Daniel S. Pariser and Anna K. Thompson say. The authors discuss recent ''true stories'' of successful removals that were accomplished long after the complaint was filed, and offer strategic lessons from those cases.

If At First You Don't Succeed: True Stories of Persistent Removals



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A critical question that defense lawyers face whenever a plaintiff files a complaint in state court is whether to remove the case to federal court. Particularly in product liability and personal injury cases, it is no secret that plaintiffs prefer to be in state court and often artfully craft their complaints to thwart removal.

But removal does not only matter at the beginning of a case. Even if an action is not initially removable, or if an initial removal fails, defendants should not shrug their shoulders and then forget about federal jurisdiction. Opportunities to remove an action — or to remove it a second time after an unsuccessful removal — can present themselves at any time during the litigation. Defense lawyers should stay constantly vigilant for these later removal opportunities. This article recounts some recent ''true stories'' of successful removals accomplished long after the complaint was filed, and discusses important strategic lessons to be learned from those cases.

Removal Basics

To set the stage, a refresher on basic removal principles is in order. To remove an action from state court, the federal court must first have subject matter jurisdiction. In general, federal courts may hear cases (1) involving federal questions, or (2) where the parties are completely diverse and the amount-in-controversy ex-

 ISSN 0092-7732

ceeds $75,000. 28 U.S.C. § § 1331, 1332. For diversity actions, the forum defendant rule acts as an additional barrier to removal even when the parties are completely diverse. That rule prohibits removal if ''any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.'' 28 U.S.C. § 1441(b)(2).

The removing defendant must also comply with certain deadlines. Removal must be accomplished ''within 30 days after the receipt . . . of the initial pleading,'' or if the action is not initially removable, ''within thirty days after receipt . . . of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.'' 28 U.S.C. § 1446(b). In diversity actions, Section 1446(c) also provides an outer limit for removal: a defendant usually may not remove more than one year after the action commences. *See* 28 U.S.C. § 1446(c)(1) (''A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.'').

In 2005, Congress expanded federal jurisdiction to include putative ''class actions'' and ''mass actions.'' Under the Class Action Fairness Act (''CAFA''), a mass action is a civil action where the ''claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact.'' 28 U.S.C. § 1332(d)(11)(B)(i). CAFA jurisdiction is proper if the matter ''exceeds the sum or value of $5,000,000'' and there is minimal diversity, *i.e.*, where any one of the plaintiffs is diverse from any one of the defendants. 28 U.S.C. § 1332(d)(2), (d)(2)(A), (d)(5)(B).

Examples from the Front Lines

Fraudulent Joinder and Misjoinder

One common tactic that plaintiffs' counsel use to block removal is the joinder of non-diverse co-defendants — such as local doctors, sales representatives, or distributors — along with the main target defendant. Some plaintiffs' counsel have no genuine intent to pursue these claims to judgment, but name the nominal defendant only as a means to stay in state court. The fraudulent joinder theory permits a court to disregard the citizenship of such a ''jurisdiction-spoiler'' if there is no reasonable basis for the claim against the non-diverse defendant or if there is no good faith intention to prosecute the claims against it. *See, e.g.*, *Hogan v. Raymond Corp.*, 536 F. App'x 207, 210 (3d Cir. 2013); *Dutcher v. Matheson*, 733 F.3d 980, 988 (10th Cir. 2013). The fraudulent joinder standard is a high one, however, and defendants often find it difficult to prove fraudulent joinder at the beginning of a case before any factual record exists. Defense counsel must therefore stay attuned to how the course of litigation against the nominal co-defendant unfolds and look for chances to argue fraudulent joinder based on later developments.

For example, in *In re Avandia Marketing, Sales Practices & Products Liability Litigation*, thousands of plaintiffs filed suit in California state court alleging injuries from the drug Avandia. MDL No. 1871, 2014 BL 142856 (E.D. Pa. May 15, 2014). Among other devices to defeat removal, the plaintiffs named as a defendant the California wholesale distributor of Avandia to seize on the forum defendant rule. *Id.* at *1, 2. The drug manufacturer removed the cases initially, but the judge overseeing the multidistrict litigation remanded the cases after finding a colorable basis under California law to hold a distributor liable. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 624 F. Supp. 2d 396, 399 (E.D. Pa. 2009).

Following remand, litigation in state court proceeded for the next several years. *In re Avandia*, 2014 BL 142856, at *3. Yet during that time, the evidence mounted that plaintiffs were not pursuing their claims against the distributor. For example, plaintiffs never bothered to serve basic discovery against the distributor. *Id.* So when the same plaintiffs' counsel filed more Avandia cases naming the same distributor, the drug manufacturer removed those cases. *Id.*

This time, defendants argued that the California distributor was fraudulently joined because the discovery record showed that plaintiffs had no real intention of prosecuting their claims against the distributor. *Id*. The multidistrict litigation court affirmed jurisdiction for this second removal, concluding that the cases were ''mature enough for the Court to find a lack of genuine intent to proceed with claims against [the non-diverse distributor]. The court may thus disregard [the distributor] for purposes of determining whether the Court has jurisdiction.'' *Id.* at *4.

Crockett v. R.J. Reynolds Tobacco Co. illustrates a different path to federal court after an unsuccessful first attempt to remove on fraudulent joinder grounds. 436 F.3d 529, 533 (5th Cir. 2006). In that case, plaintiffs brought product liability claims against tobacco manufacturers and medical negligence claims against the decedent-smoker's local doctors relating to her death from cancer. *Id.* at 531. The manufacturers removed, arguing that the non-diverse doctors were fraudulently joined. *Id.* The federal court disagreed and remanded the action for lack of diversity. *Id.*

Back in state court, defendants' counsel did not give up the fight. Instead, they argued to the state court that the product liability claims against manufacturers and the malpractice claims against the non-diverse doctors should be tried separately because the burdens of proof necessary to establish liability for each claim are ''totally different.'' *Id.* at 533. The state court agreed, and severed the claims over plaintiffs' objection. The manufacturers then re-removed the action based on diversity. *Id.*

According to plaintiffs, the second removal was still improper because a court order — and not plaintiffs' own voluntary act — had created diversity. *Id.* at 532. Indeed, the ''voluntary-involuntary rule'' typically bars removal when a court order, entered over objection, creates diversity rather than plaintiffs' voluntary decision. *Id.* (citing *Weems v. Louis Dreyfus Corp.*, 380 F.3d 545, 547 (5th Cir. 1967)). The Fifth Circuit, however, created an exception to the voluntary-involuntary rule for misjoined claims and upheld removal. *Id*. at 532-33. The court agreed that the medical negligence claims against the doctors were sufficiently different from the product liability claims against the manufacturers to justify a finding of improper joinder. *Id.* at 533. And it reasoned that an exception to the voluntary-involuntary rule would serve the ''salutary purpose'' of preventing

   ISSN 0092-7732

plaintiffs from blocking removal by joining defendants that should not be parties. *See also, e.g.*, *In re Johnson & Johnson Cases*, No. 2:15-cv-05311-JGB (SPx), 2015 BL 276082, at *5-6 (C.D. Cal. Aug. 24, 2015) (state court severed actions, thereby creating diversity; federal district court held that the voluntary-involuntary rule did not apply). *But see, e.g.*, *Vogel v. Merck & Co.*, 476 F. Supp. 2d 996, 1005-06 (S.D. Ill. 2007) (''Just as the Court will not recognize the [fraudulent misjoinder] doctrine directly, by permitting removal on the basis of supposed misjoinder of claims, so the Court will not recognize the doctrine indirectly, by acknowledging it as an exception to the voluntary-involuntary rule.'') (citations omitted).

While the means to a subsequent removal differed in *Avandia* and *Crockett*, these cases show that persistence in removal efforts can pay off. Counsel must be aware of whether the factual record supplies a basis for new fraudulent joinder arguments as the litigation progresses. And in some instances, the defendant may even ask the state court to take action — such as severance — that could render a case removable.

The One-Year Limit to Diversity Removals

One key rule to remember in removal practice is that, at least ordinarily, defendants cannot remove a case on diversity grounds later than one year after commencement of the action. 28 U.S.C. § 1446(c)(1). It is important to keep this limitation in mind and attempt, if at all possible, to effect removal prior to the statutory period elapsing. At the same time, defendants should not abandon all hope of removal once the one-year point has passed. In 2011, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act (''FCJVCA''), which added an exception to the one-year limit when a plaintiff has acted in ''bad faith'' to prevent removal. *Id.*

A straightforward example of this exception is *Woods v. Georgia Pacific, LLC*, No. 14-CV-1062, 2015 BL 98522 (W.D. Ark. Apr. 7, 2015), *adopting* Rep. & Rec., 2015 BL 98530 (W.D. Ark. Mar. 16, 2015). In that case, plaintiff filed a complaint in state court, but did not include information about his citizenship or residence. 2015 BL 98530, at *1. Three months later, plaintiff served the complaint on defendant. *Id.* For the next nine months, defendant contacted plaintiff in order to ascertain his citizenship. *Id.* Plaintiff finally responded, but only after the one-year removal deadline had run. *Id.* Defendant then removed, arguing that plaintiff wrongfully withheld information about his diverse citizenship. *Id.* The court agreed that plaintiff's actions constituted bad faith under Section 1446, and upheld federal jurisdiction. *Id.* at *2.

Another case, *DeLeon v. Tey*, also demonstrates the importance of keeping jurisdiction in mind even after the one-year limit has passed. No. 7:13-CV-439, slip op. (S.D. Tex. Dec. 4, 2013). In that case, plaintiffs filed a lawsuit in a Texas county court alleging product liability claims against a medical device manufacturer and malpractice against a non-diverse doctor. *Id.* at *1-2. Defendants initially removed the case arguing that the doctor was improperly joined. *Id.* at *2. Concluding that the claims arose from the same transaction, the federal district court declined to sever the claims and remanded the action. *Id.* The case then proceeded through discovery in state court.

When the expert disclosure deadline finally arrived, however, plaintiffs' expert report focused almost exclusively on the product liability claims and mentioned the doctor's conduct only in a single conclusory sentence. *Id.* at *6. Though more than one year had passed since plaintiffs filed the initial complaint, defendants re-removed the case. *Id.* at *1.

Although the federal action was assigned to the same district court that had initially remanded it, defendants fared better on this second attempt. The district court emphatically denied plaintiffs' remand motion based on two alternative holdings. It first held that the action did not really commence for removal purposes until after it was transferred from the county court (where plaintiffs initially filed it) to a state district court (which was required after plaintiffs alleged additional damages exceeding the county court's jurisdictional maximum). *Id.* at *4. Using this later commencement date, one year had not yet elapsed. *Id.*

Second, the court held that plaintiffs had acted in bad faith because their expert evidence ''[did] not make good'' on the allegation that the doctor engaged in wrongdoing. *Id.* at *7. And the court stated that the doctor had inexplicably failed to raise a potentially dispositive statute of limitations defense, leading to the inevitable conclusion that the doctor ''remain[ed] silent in collusion with Plaintiffs to prevent removal to this Court.'' *Id.* at *8. Thus, defendants may persuade even a court seemingly hostile to fraudulent joinder arguments once a clearer record develops.

Another strategy some plaintiffs have employed to avoid removal is to omit the amount-in-controversy from the complaint, or even to disclaim damages in excess of the $75,000 jurisdictional minimum, only to make a higher demand after one year has passed. *See, e.g.*, *Jordan v. Lowery*, No. CIV-13-183-RAW, 2013 BL 183598 (E.D. Okla. July, 10, 2013) (complaint sought less than $75,000, but one year later, plaintiff made a settlement demand of $100,000). The FCJVCA amendments to Section 1446 now prohibit this practice: ''If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith.'' 28 U.S.C. § 1446(c)(3)(B). For example, in *Cameron v. Teeberry Logistics, LLC*, the complaint expressly alleged that ''the amount in issue . . . does not come close to exceeding $75,000.00'' to avoid removal. 920 F. Supp. 2d 1309, 1310 (N.D. Ga. 2013). But four days after the one-year period had expired, plaintiff sent a demand letter asking for a $575,000 settlement. *Id.* at 1311. The court held that plaintiff acted in bad faith and upheld removal. *Id.* at 1316. *But see, e.g.*, *Alvarez v. Areas USA LAX, LLC*, No. CV 15-5033-JFW (PLAx), 2015 BL 276492, at *3 (C.D. Cal. Aug. 26, 2015) (no bad faith when plaintiff ''never stated that he was seeking less than $75,000'').

The ''bad faith'' exception remains a narrow one that courts seldom invoke. For that reason, defendants should certainly try to remove before the statutory deadline elapses if there is a basis to do so. At the same time, if plaintiff's own bad faith tactics led to the delay, it is never too late to remove (or re-remove) a case.

CAFA Removals of Mass Actions

In response to Congress's expansion of federal jurisdiction in CAFA, plaintiffs in mass tort litigations have carefully structured their complaints to avoid mass ac-

tion removal. Plaintiffs' counsel have principally accomplished this by dividing their mass filings into several complaints, each of which contains a few plaintiffs shy of one hundred. In this way, plaintiffs seek to avoid CAFA's ''mass action'' provision allowing removal when plaintiffs propose a joint trial involving one hundred or more plaintiffs. 28 U.S.C. § 1332(d)(11)(B)(i).

Defendants have on several occasions attempted to immediately remove actions gerrymandered in this way. *See, e.g.*, *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009). Yet to date, courts have permitted plaintiffs to slice-and-dice their inventory filings to avoid the 100-plaintiff limit without automatically triggering CAFA's mass action provision. *See, e.g.*, *Anderson*, 610 F.3d 390; *Tanoh*, 561 F.3d 945. The courts have reasoned that plaintiffs are masters of their complaints, and no proposal to try more than one hundred plaintiffs together exists when they have divided their cases into smaller chunks.

While plaintiffs may be able to avoid removal right-off-the-bat by chopping up their inventory into fewer-than-100-plaintiff pieces, a watchful defendant might just defeat this tactic. An increasing number of circuit courts have upheld CAFA removals when — at some later point in the proceedings — plaintiffs take actions or make statements which constitute an explicit or implicit request to try more than one hundred plaintiffs jointly.

Corber v. Xanodyne Pharmaceuticals, Inc. provides such an example. 771 F.3d 1218 (9th Cir. 2014). In that case, plaintiffs filed twenty-six separate lawsuits in California state court alleging personal injuries from the prescription drugs Darvocet and Darvon. *Id.* at 1221. Each case had fewer than one hundred plaintiffs, but taken together, the number of cases far exceeded the 100-plaintiff CAFA threshold. Because plaintiffs had broken up the filings into numerous smaller cases, they were not immediately removable.

That changed, however, when plaintiffs petitioned for statewide coordination of the cases. In their coordination papers, plaintiffs asked for the cases to be transferred ''before one judge 'hearing all of the actions ***for all purposes***.' '' *Id.* at 1221-22 (emphasis added). Based on these representations, defendants removed the actions under the CAFA mass action provision, arguing that the coordination petition was an implicit proposal to try more than one hundred plaintiffs jointly. *Id.*

The district court concluded that the petition to coordinate the cases ''for all purposes'' did not constitute a joint proposal for trial. *Id.* A three-judge panel affirmed. *Id.* at 1222. But the Ninth Circuit, sitting *en banc*, reversed:

> [T]he petitions say that Plaintiffs seek coordination ''for all purposes.'' ''All purposes'' must include the purposes of trial. . . . [T]he specific reasons given for coordination also support the conclusion that a joint trial was requested. For example, Plaintiffs listed potential issues in support of their petitions that would be addressed only through some form of joint trial, such as the danger of inconsistent judgments and conflicting determinations of liability.

Id. at 1223-24.

Other Courts of Appeals have similarly affirmed removals when plaintiffs' counsel made statements that constituted proposals to try more than one hundred plaintiffs jointly. In *In re Abbott Laboratories, Inc.*, the Seventh Circuit upheld CAFA jurisdiction, concluding that plaintiffs' request for state-wide coordination ''through trial'' and ''not solely for pretrial proceedings'' constituted an implicit proposal for joint trial under the mass action provision. 698 F.3d 568, 573 (7th Cir. 2012). Similarly, in *Atwell v. Boston Scientific Corp.*, the Eighth Circuit upheld CAFA jurisdiction when plaintiffs filed motions proposing that the state court assign the cases to ''a single Judge for purposes of discovery and trial.'' 740 F.3d 1160, 1163-65 (8th Cir. 2013).

Courts will very finely parse the language of plaintiffs' statements to see whether or not they constitute a proposal for a joint trial, however. In *Briggs v. Merck Sharp & Dohme*, for example, a Ninth Circuit panel remanded a CAFA removal that appeared at first blush to be similar to the removal the *en banc* court sustained in *Corber*. 796 F.3d 1038 (9th Cir. 2015). In *Briggs*, hundreds of plaintiffs filed five product liability lawsuits in state court — each complaint with fewer than one hundred plaintiffs. *Id.* at 1042. The manufacturing defendant removed the cases purely on diversity grounds, arguing that the non-diverse defendant was fraudulently joined and that the non-diverse plaintiffs should be severed. *Id.* at 1044. At the remand hearing, plaintiffs' counsel represented that if remanded, the cases would be transferred to the statewide coordinated proceeding ''***for all purposes*** and be coordinated [informally with the federal MDL].'' *Id.* (emphasis added). The district court found no diversity jurisdiction and remanded. *Id.*

The manufacturing defendant then re-removed the cases under CAFA, arguing (among other things) that plaintiff's counsel's statement *during the earlier remand hearing* was a proposal to try the cases jointly. *Id.* at 1045. The district judge denied remand, citing *Corber*. The Ninth Circuit panel, however, disagreed. This was not the same ''implicit proposal'' to try the cases jointly as in *Corber*. At best, the court held, plaintiffs merely requested to remand the cases ''with the prospect of consolidation with the [state coordinating proceeding].'' *Id.* at 1048.

The lesson here is that defendants facing large statewide litigations should be on alert for any statements made by plaintiffs that may constitute a proposal for joint trial, including those made in requests for coordination or for multiple-plaintiff or bellwether trials. Courts will look carefully at the precise circumstances of the cases and language plaintiffs' counsel uses to decide whether such a statement constitutes a request to try cases jointly. And careful judgment will be needed to decide whether or not removal is warranted. Such opportunities can only be identified if counsel keep their eyes wide open for removal opportunities.

Wrap-Up

Plaintiffs are the master of their complaints. But by understanding plaintiffs' jurisdictional strategies, knowing the removal procedures, and keeping a watchful eye, defendants may be able to remove an action long after the complaint is filed.

Do plaintiff's lackluster efforts at prosecuting a claim against a non-diverse defendant open the door to a new fraudulent joinder theory? Is there an opportunity in state court to sever the jurisdiction-destroying claims? Does plaintiff's conduct immediately after the one-year removal deadline elapses give rise to an inference of bad faith justifying removal? Have there been state-

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ments or actions suggesting that plaintiffs' counsel proposes to try more than one hundred plaintiffs jointly in mass tort litigation?

These true stories of removal successes show the value of keeping such questions front of mind.