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New Ammunition Supports Removal Before Service

--By Daniel Pariser and Paige Sharpe, Arnold & Porter LLP

Law360, New York (October 03, 2012, 2:10 PM ET) -- District courts, for years, had come down on both sides of a significant question impacting defendants' right to remove cases to federal court: whether there is an exception to the "forum defendant rule" when removal is accomplished before the forum defendant is served with process (in shorthand, "removal before service").

Last year, Congress amended the removal statutes but chose to leave unchanged the statutory language that defendants had invoked to remove cases prior to service of the forum defendant. Defendants have therefore successfully argued in recent cases that Congress' preservation of that provision constitutes an implicit endorsement of the removal before service theory. Particularly in light of this new ammunition supporting removal, defendants should be vigilant about opportunities to remove prior to service.

Background

A defendant typically can remove a case to federal court when complete diversity of citizenship exists between the plaintiff, and all defendants and the amount-in-controversy requirement is satisfied. The forum defendant rule, however, is a statutory exception that prohibits removal — even when there is complete diversity — when the plaintiff sues in any defendant's "home" state. See 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of [diversity] jurisdiction ... may not be removed 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.").

But the statute provides that only defendants "properly joined and served" at the time of removal count as forum defendants. By the plain language of the forum defendant rule, then, defendants have avoided this statutory bar by removing before the forum defendant has been served with process.

The Historical Split of Authority

For years, courts fell into two camps in interpreting the removal statute in this situation. The courts sustaining removal held that the clear and unambiguous language of § 1441(b)(2) prohibits removal only after a forum defendant has been served.

See, e.g., North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263, 1270 (M.D. Fla. 2009) (removal before service "is not so absurd as to warrant reliance on 'murky' or non-existent legislative history in the face of an otherwise perfectly clear and unambiguous statute"); City of Ann Arbor Emps.' Ret. Sys. v. Gecht, No. C-06-7453 EMC at *8 (N.D. Cal. Mar. 9, 2007) ("[T]he language of § 1441(b) is clear, and a court may depart from the plain language of a statute only under 'rare and exceptional circumstances'") (citations omitted).

By contrast, other district courts remanded removal before service cases, reasoning that they must look past the statute's plain language to effectuate presumed congressional intent. These courts were concerned that applying the statute's plain language would create an arbitrary system in which jurisdiction depends on a "race to the courthouse," as plaintiffs seek to serve local defendants before their complaint is detected and a removal petition filed.

See, e.g., Sullivan v. Novartis Pharm. Corp., 575 F. Supp. 2d 640, 646 (D.N.J. 2008) ("[T]he court is confident ... that Congress did not add the 'properly joined and served' language in order to reward defendants for conducting and winning a race, which serves no conceivable public policy goal, to file a notice of removal before the plaintiffs can serve process."); Standing v. Watson Pharm. Inc., No. CV09-0527 DOC(ANx), at *5 (C.D. Cal. Mar. 26, 2009) (removal before service "is improper because it promotes gamesmanship by defendants and likely deprives plaintiffs of a meaningful opportunity to effectuate service").

Congress' Amendments to the Removal Statutes

In December 2011, Congress passed the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011). The act amended various jurisdiction and venue statutes, including the removal and remand procedures in 28 U.S.C. § 1441, but notably left intact the "properly joined and served" language in § 1441(b), Pub. L. No. 112-63, § 103, which defendants had invoked to remove cases before forum defendants were served.

That has significant implications for removal before service because Congress is "'presumed to be aware of [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239-40 (2009) (citation omitted); see also Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.").

Defendants may, therefore, argue that the passage of legislation without changes to the key phrase "properly joined and served" confirms that the plain language of the statute should govern — after all, Congress could have remedied any perceived problem with removing before service of a forum defendant but chose not to do so. If the implications of following the statute's plain language were so absurd, the argument goes, then, surely Congress would have put a stop to the practice.

Post-FCJVCA Case Law

Defendants made just this statutory construction argument — and prevailed — in Regal Stone Ltd. v. Long Drug Stores, California, L.L.C., __ F. Supp. 2d __ (N.D. Cal. Mar. 2, 2012). Plaintiffs in Regal Stone sued several out-of-state and one in-state defendant in California state court but delayed serving the complaint while a motion to seal confidential documents was pending. Id. at *1. More than seven months after the case began, an out-of-state defendant removed the case to federal court. Id.

Because the FCJVCA was enacted before a ruling on the plaintiffs' motion to remand, the court requested supplemental briefing on how the act should affect the court's reading of the removal statute. Id. at *3. The court agreed with the defendants' argument regarding the retention of the "properly joined and served" language: "where Congress amends part of a statute and leaves another part unchanged, a court must interpret Congress's inaction as satisfaction with the unamended portion or at least tolerance of its inadequacies. The Court is therefore bound to take Congress's preservation of §1441's 'properly joined and served' language as an endorsement." Id. at *4 (internal citation omitted).

Accordingly, the court denied the motion to remand. Id. at *5. The Regal Stone decision was certified for interlocutory appeal earlier this year, and briefing is scheduled to close by early December. Regal Stone, appeal docketed, No. 12-16567 (9th Cir. July 12, 2012).

Other post-FCJVCA cases have followed Regal Stone, sustaining removal before service on similar grounds. See, e.g., Munchel v. Wyeth LLC, Civil Action No. 12–906–LPS, at *4 (D. Del. Sept. 11, 2012) (denying remand and stating that "by retaining the 'properly joined and served language,' the amendment [of § 1441] reinforces the conclusion that Congress intended for the plain language of the statute to be followed"). Cf. Valido-Shade v. Wyeth, LLC, __ F. Supp. 2d __, at*1 n.3, 3 (E.D. Pa. July 11, 2012) (noting the amendment of the statute in denying remand and stating that any "remedy lies with Congress which, subject to constitutional limitations, controls the scope of this court's subject matter jurisdiction and any right of removal").

In contrast, cases that have rejected removal before service arguments after enactment of the FCJVCA have not grappled with this statutory interpretation issue. For example, in granting remand in Perfect Output of Kansas City LLC v. Ricoh Americas Corp., No.: 12–0189–CV–W–SOW (W.D. Mo. July 17, 2012), the court commented that the FCJVCA applied, but only stated in a footnote "that the changes to Section 1441(b) do not impact the Court's analysis on the relevant issue." Id. at *1 n.2.

The court thus recognized that the act did not change the pertinent statutory language, but it did not consider the implications of Congress' decision to keep intact the key statutory phrase "properly joined and served."

In sum, defendants considering removal of cases to federal court should not overlook opportunities to remove cases quickly after the filing of a complaint and before a forum defendant is served with process. Passage of the FCJVCA and recent case law provide significant support for the theory.

Daniel Pariser is a partner and Paige Sharpe is an associate in Arnold & Porter's Washington, D.C., office.