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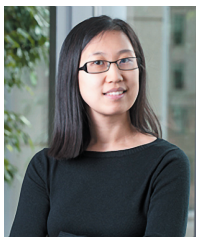
REMOVAL

CLASS ACTIONS

The U.S. Supreme Court's Jan. 14, 2014, ruling in *Mississippi v. AU Optronics* is the latest in a series of significant removal decisions issued since 2013, particularly under the Class Action Fairness Act, Arnold & Porter partner Steven G. Reade, an experienced pharmaceutical and products liability litigator, and associates Anna K. Thompson and Sean P. Hennessy say in this BNA Insight. The authors review key developments concerning removal, including the amount-in-controversy, parens patriae actions, fraudulent joinder, misjoinder and removal before service. ''With parties continuing to jockey for venue advantages,'' they predict ''continued evolution of actions removed under diversity'' in 2014.

At a Fair Remove: Key Trends in the Search for a Favorable Venue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Location, location, location! As with homes and restaurants, in litigation, location is everything. Generally, plaintiffs tend to prefer state courts and defendants federal courts. Not surprisingly, then, when plaintiffs file their actions, they think about procedural devices to prevent removal. And the first thing defendants consider is how to get the heck out of Dodge and into a federal venue.

Federal courts in 2013 tiptoed around the jurisdictional line—a bit wary about expanding federal jurisdiction but willing to do so to stem abuses. Removal under the Class Action Fairness Act (''CAFA'') was the year's hot removal topic. Notably, the Supreme Court issued its first opinion addressing CAFA, extinguishing attempts to avoid removal by stipulating around the amount-in-controversy and possibly signaling a broader intolerance for gamesmanship. In November 2013, the Supreme Court heard oral argument on whether parens patriae suits are removable under CAFA—and, on Jan. 14, 2014, unanimously rejected such a removal under CAFA's ''mass action'' provision. In addition to CAFA removal, several courts interpreted Section 1446's removal deadlines to promote fairness and discourage blatant manipulation. Other courts have disregarded the citizenship of non-diverse parties when there is no good reason for their joinder. Briefing also has been teed up before the Ninth Circuit, and we eagerly await

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the first decision by a court of appeals on whether Section 1441 and Congress's recent amendments to the removal statutes permit removal before service on a forum defendant.

CAFA Removal

CAFA provides federal jurisdiction over putative ''class actions,''[1] if a matter ''exceeds the sum or value of $5,000,000'' and there is minimal diversity.[2] CAFA also provides federal jurisdiction over ''mass actions,'' civil actions where ''monetary relief 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.''[3] 2013 saw significant CAFA developments, setting the stage for substantial activity in this area of removal law in 2014.

Amount-in-Controversy

The biggest development of 2013 came in *Standard Fire Insurance Co. v. Knowles*,[4] where the Supreme Court issued its first opinion addressing CAFA and unanimously rejected use of precertification stipulations on behalf of the named plaintiffs and putative class to limit damages below CAFA's amount-in-controversy. The Court reasoned: ''[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before they are certified[,]''[5] and treating such stipulations as binding would ''run directly counter to CAFA's primary objective [of] ensuring 'Federal court consideration of interstate cases of national importance.' ''[6]

The Court further observed that remand would allow ''the subdivision of a $100 million action into 21 just-below-$5-million state-court actions,'' which ''squarely conflict[s] with the statute's objective.''[7] The Court thus stamped out a common strategy by plaintiffs to avoid the jurisdictional amount, and signaled a broader intolerance for evasions of CAFA's remedial purpose.

In the wake of *Standard Fire*, several courts of appeals appeared willing to look beyond the four corners of pleadings to find jurisdiction. In *Rodriguez v. AT&T Mobility Services LLC*,[8] concluding its prior precedent[9] was ''clearly irreconcilable'' with *Standard Fire*, the Ninth Circuit lowered the standard for satisfying CAFA's amount-in-controversy. A removing party only needs to demonstrate the requisite amount-in-controversy by a preponderance of the evidence (not by a ''legal certainty'').[10]

Similarly, aligning itself with the Seventh and Ninth Circuits, the Eighth Circuit in *Raskas v. Johnson & Johnson*,[11] lowered the removal bar by concluding that a defendant does not need to prove damages will in fact exceed the jurisdictional threshold; it only needs to demonstrate that the fact-finder ''might legally conclude'' that damages exceed $5 million.[12]

Parens Patriae Actions

2013 also saw significant developments concerning the removability under CAFA of parens patriae cases brought by states in their sovereign capacity. In *Purdue Pharma L.P. v. Commonwealth of Kentucky*,[13] the Second Circuit rejected defendants' attempt to remove a parens patriae action as a CAFA ''class action.''[14] The Second Circuit joined ''every Circuit to consider this precise issue,'' including the Fourth, Fifth, Seventh, and Ninth Circuits.[15]

The big question therefore became whether such cases are removable as CAFA ''mass actions.'' In *Mississippi v. AU Optronics*, the Fifth Circuit—in conflict with the Fourth, Seventh and Ninth Circuits—had held that Mississippi's parens patriae action against several manufacturers was a removable ''mass action'' because the ''real parties in interest include not only the State, but also individual consumers . . . .''[16] That decision barely made it to the New Year. On Jan. 14, 2014, the Supreme Court unanimously reversed the Fifth Circuit and held that, because ''the State of Mississippi is the only named plaintiff in the instant action,'' the suit does not satisfy the ''plain text'' of CAFA's ''mass action'' provision.[17] The Court concluded that ''the [statutory] term 'plaintiffs' refers to actual named parties as op-

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[1] CAFA defines a ''class action'' as ''any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.'' 28 U.S.C. § 1332(d)(1)(B).

[2] 28 U.S.C. § 1332(d)(2), (d)(2)(A), (d)(5)(B).

[3] 28 U.S.C. § 1332(d)(11)(B)(i).

[4] 133 S. Ct. 1345 (2013).

[5] *Id.* at 1349.

[6] *Id.* at 1350 (quoting Class Action Fairness Act of 2005, Pub. L. 109-2, § 2(b)(2), 119 Stat. 5).

[7] *Id.*

[8] 728 F.3d 975 (9th Cir. 2013).

[9] *Lowdermilk v. US Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007).

[10] 728 F.3d at 980-81. *See also Watkins v. Vital Pharm., Inc.*, 720 F.3d 1179, 1181 (9th Cir. 2013) (undisputed declaration that nationwide product sales exceeded $5 million satisfied preponderance of the evidence standard).

[11] 719 F.3d 884 (8th Cir. 2013).

[12] *Id.* at 887. The Court also rejected the district court's conclusion that defendants must proffer a formula or methodology for calculating damages. *Id.* at 888.

[13] 704 F.3d 208 (2d Cir. 2013).

[14] *Id.* at 212.

[15] *Id.*

[16] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 800 (5th Cir. 2012). Following its own precedent, *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008), the Fifth Circuit applied a ''claim-by-claim'' analysis to Mississippi's lawsuit. See *AU Optronics*, 701 F.3d at 799-800.

[17] *Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036, 2014 BL 9152, 571 U.S. __, slip op. at 1 (2014)

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posed to unnamed real parties in interest.''[18] And the Court rejected the argument that it should look behind the pleadings to find jurisdiction, finding ''Congress did not intend the background inquiry to apply to the mass action provision.''[19] With this decision, the Court has dealt a blow to the removal of parens patriae suits under CAFA.

Other 'Mass Action' Removals

2013 also saw courts issue significant decisions interpreting what constitutes a proposal by plaintiffs to try cases jointly under CAFA's ''mass action'' provision.[20] Even in the face of obvious attempts to evade federal jurisdiction, courts have been reluctant to find removable mass actions absent a clear request to consolidate cases for trial.

In *Romo v. Teva Pharmaceuticals USA, Inc.*,[21] 1,500 plaintiffs in 41 separate lawsuits petitioned for state coordination of their actions. Defendants removed as a mass action, viewing the coordination request as a proposal for a joint trial. A divided Ninth Circuit disagreed: Plaintiffs' petition for coordination ''for all purposes'' focused on pretrial matters and was not a proposal to try the cases jointly.[22] Arguably at odds with the Supreme Court's rationale in *Standard Fire*, the Court noted that ''plaintiffs can structure actions in cases involving more than one hundred potential claimants so as to avoid federal jurisdiction under CAFA.''[23]

The Eleventh Circuit reached a similar result in *Scimone v. Carnival Corp.*,[24] even in the face of plaintiffs' clear chicanery. Following a cruise accident, plaintiffs initially filed a single complaint but later dismissed and re-filed two separate complaints each with fewer than 100 plaintiffs. Defendants removed as a mass action—arguing that by initially filing a single complaint plaintiffs implicitly proposed a joint trial—but the Court held that ''the plain language of CAFA'' requires an actual proposal, which neither plaintiffs nor the court had made.[25]

The Eighth Circuit reached the opposite result in *Atwell v. Boston Scientific Corp.*,[26] holding that plaintiffs' motions to assign three cases ''to a single Judge for purposes of discovery and trial'' constituted a proposal for the actions to be tried jointly.[27] Unlike *Romo*, the court found that plaintiffs' intent was clear—a joint assignment in which the ''inevitable result'' would be the cases are ''tried jointly.''[28] Thus, whether a request to coordinate or consolidate multiple actions will confer CAFA jurisdiction appears to depend on the nature of the particular state procedures invoked—or may simply be in the eye of the beholder. In any event, this issue appears to be ripe (or ripening) for eventual Supreme Court review.

CAFA's Statutory Exceptions

Courts also issued decisions clarifying CAFA's statutory exceptions that will certainly impact removal strategy. In *Gold v. N.Y. Life Insurance Co.*,[29] the Second Circuit concluded that CAFA's home state exception[30] is not jurisdictional and thus waived if not raised within a reasonable time.[31] The Ninth Circuit held the same for CAFA's local controversy exception.[32] In *Vodenichar v. Halcón Energy Properties, Inc.*,[33] the Third Circuit clarified when the home state and local controversy exceptions apply.[34] Finally, in *Abraham v. St. Croix Renaissance Group, L.L.L.P*,[35] the Third Circuit adopted a broad reading of the ''single event or occurrence exception'' to CAFA's ''mass action'' provision, holding continuous activity over a sustained period of time satisfied the statutory definition.[36]

2014 is likely to see continued tensions between plaintiffs' artful pleading around CAFA and courts' refusal to permit such maneuvering by looking beyond the pleadings and considering the statute's broad remedial purpose. Defendants enter 2014 armed with a potent new weapon—*Standard Fire*—which arguably should be read broadly to discourage artificial structuring of cases to avoid federal jurisdiction, but at the same time, defendants may need to defend against the Court's reluctance to look beyond the pleadings in *AU Optronics*.

Timing of Removal

Section 1446(b) requires defendants to remove ''within 30 days after the receipt by the defendant . . . of a copy of the initial pleading . . . [or] if the case stated in the initial pleading is not removable, [ ] within thirty days after receipt by the defendant . . . of a copy 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.''[37] Additionally, in

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[18] *Id.* at 10.

[19] *Id.* at 12.

[20] 28 U.S.C. § 1332(d)(11)(B)(i) (a mass action is any civil action where ''monetary relief 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 . . . .'') (emphasis added).

[21] 731 F.3d 918 (9th Cir. 2013).

[22] *Id.* at 923.

[23] *Id.* at 922. The Ninth Circuit distinguished this case from the Seventh Circuit's decision in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), where plaintiffs explicitly and expressly requested consolidation (rather than coordination) of the cases *through trial* ''thereby removing any question of [plaintiffs'] intent.'' *Romo*, 731 F.3d at 923.

[24] 720 F.3d 876 (11th Cir. 2013).

[25] *Id.* at 878-79.

[26] Nos. 13-8031, 13-8032, 13-8033, 2013 BL 317909 (8th Cir. Nov. 18, 2013).

[27] *Id.* at *3.

[28] *Id.* at *6.

[29] 730 F.3d 137 (2d Cir. 2013). In so holding, the Second Circuit joined the Seventh and Eight Circuits.

[30] The home state exception applies when two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed. 28 U.S.C. § 1332(d)(4)(B).

[31] *Gold*, 730 F.3d at 142.

[32] *See Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 869 (9th Cir. 2013) (holding CAFA's local controversy exception, 28 U.S.C. § 1332(d)(4)(A), is not jurisdictional).

[33] 733 F.3d 497 (3d Cir. 2013).

[34] *Id.* at 505 (''In short, courts tasked with determining whether a defendant is a 'primary defendant' under CAFA['s home state exception] should assume liability will be found and determine whether the defendant is the 'real target' of the plaintiffs' accusations.'').

[35] 719 F.3d 270 (3d Cir. 2013).

[36] *Id.* at 276.

[37] 28 U.S.C. § 1446(b).

diversity actions, a defendant may not remove after one year of the commencement of the action.[38] In December 2011, Congress passed the Federal Courts Jurisdiction and Venue Clarification Act of 2011,[39] which added a bad faith exception to the one-year limitation on diversity removals.

In 2013, courts addressing the timing of removals generally interpreted Section 1446 to promote fairness. For example, in *Roth v. CHA Hollywood Medical Center LP*,[40] the case was not removable on its face. The defendants, however, conducted their own investigation and removed under CAFA outside of the thirty-day timeframes outlined in Section 1446.[41] The Ninth Circuit addressed ''whether the two thirty-day periods described in § 1446(b)(1) and (b)(3) are the only periods during which the defendant may remove, or if they are merely periods during which a defendant must remove if one of the thirty-day time limits is triggered.''[42]

Although Section 1446(b) provides deadlines for defendants who are put on notice of the removability of the action by plaintiffs, a defendant may otherwise remove a case based on the fruits of its own investigation outside of the thirty days provided in the statute.[43] This is because a plaintiff should not ''be able to prevent or delay removal by failing to reveal information showing removability and then objecting to removal when the defendant has discovered that information on its own.''[44]

Similarly, both the Seventh and Ninth Circuits held that the thirty-day removal clock is triggered by a defendant's receipt of a pleading or other paper that ''affirmatively and unambiguously'' reveals that the case is or has become removable.[45] These courts reasoned: ''[W]e don't charge defendants with notice of removability until they've received a paper that gives them enough information to remove. This principle helps avoid a 'Catch-22' for defendants desirous of a federal forum. By leaving the window for removal open, it forces plaintiffs to assume the costs associated with their own indeterminate pleadings.''[46]

District courts also have applied these same fairness principles to permit removal when there is perceived gamesmanship by the plaintiffs. In *Franklin v. Codman & Shurtleff Inc.*,[47] plaintiffs performed a procedural dance. The complaint as filed was removable based on diversity, but after removal, the plaintiffs added a non-diverse defendant.[48] The action was remanded, the plaintiffs dismissed the non-diverse defendant after the one-year removal limit, and the defendants then re-removed.[49] Under the plain language of Section 1446, the court denied remand because the one-year provision only applied to actions that were not initially removable—and the original complaint alleged complete diversity.[50]

In *DeLeon v. Tey*,[51] the plaintiffs brought a products action against a device manufacturer, but also added a malpractice action against a non-diverse doctor.[52] More than one year after the case was originally filed in county court, but less than one year before transfer of the case to state district court, the defendant removed.[53] The federal court concluded that under state rules on commencement of actions, the action was timely filed.[54] Nevertheless, the court went on to find bad faith.[55] ''[Plaintiff's] pleadings say they allege wrongdoing, but their evidence does not make good on that allegation. . . . [The doctor] possesses a strong legal argument which could either dispose of the claim against him altogether or leave Plaintiffs with an uphill fight. And yet he has not used this argument. . . . Why [he] remains in the case can be explained only one way; he remains silent in collusion with Plaintiffs to prevent removal to this Court. . . .[T]hese parties have acted in bad faith.''[56]

Fraudulent Joinder

In actions removed pursuant to Section 1332, the fraudulent joinder theory is an exception to the complete diversity requirement. Generally speaking,a court may disregard the citizenship of a non-diverse defendant if there is no reasonable basis in fact or colorable ground supporting a claim against the non-diverse defendant.[57] Despite the high standard for establishing fraudulent joinder, some courts have been willing to expand the doctrine. In *Burns v. Medtronic, Inc.*,[58] the Central District of California applied pleading standards to the fraudulent joinder analysis. There, plaintiffs brought a products action against a manufacturer and also joined a non-diverse doctor who helped develop the medical device.[59] Because the complaint contained only sparse factual allegations against the doctor, the court found ''[t]hese claims [to be] insufficient

[38] 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.'').

[39] Pub. L. 112-63, 125 Stat. 758.

[40] 720 F.3d 1121 (9th Cir. 2013).

[41] *Id.* at 1123. The one-year limitation under Section 1446(c)(1) does not apply to actions removed under CAFA. 28 U.S.C. § 1453(b).

[42] *Id*. at 1124.

[43] *Id.* at 1125.

[44] *Id. See also Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1139 (9th Cir.2013).

[45] *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013).

[46] *Kuxhausen*, 707 F.3d at 1141 (internal quotation marks and citation omitted).

[47] No. 3:12–CV–4994–D, 2013 BL 114032 (N.D. Tex. Apr. 30, 2013).

[48] *Id.* at *1.

[49] *Id.*

[50] *Id.* at *2.

[51] No. 7:13-CV-439, slip op. (S.D. Tex. Dec. 4, 2013).

[52] *Id.* at 1-2.

[53] *Id.* at 3.

[54] *Id.* at 4.

[55] *Id.*

[56] *Id.* at 7-8.

[57] The standard for fraudulent joinder differs slightly in each circuit. *Compare Hogan v. Raymond Corp.*, ___ F. App'x ___, 2013 BL 221727, at *3 (3d Cir. Aug. 20, 2013) (adopting the ''no reasonable basis in fact or colorable ground'' against the non-diverse defendant standard); *with Dutcher v. Matheson*, 733 F.3d 980, 988 (10th Cir. 2013) (''To establish fraudulent joinder, the removing party must demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.'') (internal quotation marks and alterations omitted).

[58] No. 2:13–cv–06093–SVW–Ex (C.D. Cal. Oct. 8, 2013).

[59] *Id.*

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to support a claim against [the doctor]'' and was therefore fraudulently joined.[60]

Even in declining to expand the fraudulent joinder doctrine, courts are increasingly cognizant of potential abuses by plaintiffs. In *Morris v. Nuzzo*,[61] the parties were completely diverse,[62] but because one defendant resided in the forum state, Section 1441(b)'s forum defendant rule prevented removal.[63] The defendants argued that the forum defendant had been fraudulently joined.[64] Recognizing that the fraudulent joinder doctrine typically applied to ignore the citizenship of a non-diverse defendant,[65] the question the Seventh Circuit considered was whether the doctrine should be applied more broadly to the forum defendant rule.[66] The court addressed the potential for artifice by plaintiffs—''a plaintiff could potentially use the forum defendant rule as a 'device' to defeat removal where an out-of-state defendant would otherwise have that right''[67]—but ultimately deferred ruling on the issue.[68]

Fraudulent Misjoinder

The fraudulent misjoinder doctrine permits a court to ignore the citizenship of non-diverse parties if there is no procedural basis to join them in one action.[69] In 1996, the Eleventh Circuit first articulated fraudulent misjoinder in *Tapscott v. MS Dealer Service Corp*.[70] While some courts have been reluctant to adopt the fraudulent misjoinder doctrine,[71] many nevertheless have expressed ''frustrations concerning plaintiffs' joinder of seemingly unrelated claims in an apparent attempt to avoid [federal jurisdiction].''[72] And as 2013 illustrated, more courts are willing to apply fraudulent misjoinder—particularly in the context of pharmaceutical products liability actions coordinated in a multidistrict litigation.

Courts most frequently apply the fraudulent misjoinder doctrine in pharmaceutical actions joining plaintiffs who have no connection to each other except that they ingested the same drug. In a multi-plaintiff action involving fifty-four unrelated individuals, for example, the Eastern District of New York in *In re Propecia (Finasteride) Products Liability Litigation*[73] severed the non-diverse plaintiffs. The court concluded:

> The application of the [fraudulent misjoinder] doctrine in the context of toxic tort litigation consolidated pursuant to the MDL statute . . . is clearer and serves the purposes of that law. The MDL procedure is designed to direct judicial resources and the parties' pretrial litigation efforts more efficiently . . . . If plaintiffs can escape the MDL by joining multiple, unconnected and non-diverse parties in a state court of their choice, they defeat the purposes of the MDL and deny defendants their right to removal. [74]

While fraudulent joinder is most often applied to plaintiffs, in *In re Stryker Rejuvenate & ABG II Hip Implant Products Liability Litigation*,[75] the District of Minnesota applied fraudulent misjoinder to sever a non-diverse *defendant*. There, the plaintiff brought a malpractice action against the hospital where he received an artificial hip and separate causes of action against the device manufacturer.[76] The manufacturer removed, arguing that the non-diverse hospital defendants were misjoined. The court overseeing the multidistrict litigation agreed because the claims did not involve common questions of law *and* fact, as required by Rule 20:

> [The] medical negligence [ ] claims . . . require evidence regarding Plaintiff's care, treatment, and services provided by the Hospital Defendants . . . . Plaintiff's claims against [the device manufacturer], on the other hand . . . require evidence as to the development, manufacture, and testing of such devices . . . . Any liability that may be found against either [the device manufacturer] or the Hospital Defendants would not be a basis for liability as to the other. However, separate liability as to each could be separately found.[77]

Removal Before Service

Section 1441(b)'s ''forum defendant rule'' provides that ''[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.''[78] Under the plain reading of the statute, the forum defendant rule does not apply before service on forum defendants. For years, however, courts have been split on whether to apply the statute's plain language to uphold removal-before-service on a forum defendant.

Congress's passage of the Federal Courts Jurisdiction and Venue Clarification Act[79] made sweeping changes to the language of Section 1441's removal and remand procedures, but retained the ''properly joined and

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[60] *Id. But see Ullah v. BAC Home Loans Servicing LP*, ___ F. App'x ___, 2013 BL 213347 (11th Cir. Aug. 16, 2013) (per curiam) (although applying state notice pleading standards to the fraudulent joinder analysis, finding that the allegations in the complaint satisfied this standard).

[61] 718 F.3d 660 (7th Cir. 2013).

[62] *Id.* at 663.

[63] 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.'').

[64] *Morris*, 718 F.3d at 663-64.

[65] *Id.* at 666.

[66] *Id.* at 666-67. Also an issue of first impression in the circuit, the Seventh Circuit also held that ''choice of law decisions can be made as part of the fraudulent joinder analysis where the choice of law decision is dispositive to the outcome, and where the removing defendant bears the same 'heavy burden' to make the choice of law showing.'' *Id.* at 672 (citation omitted).

[67] *Id* at 670.

[68] *Id.* at 671.

[69] *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot*, 204 F.3d 1069 (11th Cir. 2000).

[70] 77 F.3d 1353.

[71] *See, e.g., Larson v. Abbott Labs.*, No. ELH-13-00554, 2013 BL 306596, at *13 (D. Md. Nov. 5, 2013) (refusing to ''enter this doctrinal thicket''); *Abel v. SmithKline Beecham Corp.*, No. 13-cv-780-DRH-DGW, 2013 BL 301384, at *2 (S.D. Ill. Oct. 30, 2013) (unwilling to adopt the doctrine until it is ''endorsed by the Seventh Circuit or Supreme Court'').

[72] *Abel*, 2013 BL 301384, at *2.

[73] Nos. 12-MD-2331, 12-CV-2049 (E.D.N.Y. May 17, 2013).

[74] *Id.* (citations omitted).

[75] MDL No. 13-2441, No. 13-1811 (D. Minn. Dec. 12, 2013).

[76] *Id.*

[77] *Id.* at 4.

[78] 28 U.S.C. § 1441(b) (emphasis added).

[79] Pub. L. 112-63, 125 Stat. 758.

served'' language.[80] 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[,]''[81] removing defendants have argued that the congressional amendments approved of the cases adopting the plain language approach to pre-service removals.

Although no federal appellate court has yet ruled on the propriety of pre-service removal on a forum defendant, the Ninth Circuit recently granted interlocutory appeal on the issue and the parties completed briefing in 2013.[82] Several dozen other district courts have also addressed pre-service removal. The courts remain divided on the issue, but among the courts that have considered the effect (if any) of the 2011 congressional amendments, a slight majority has favored a plain reading of Section 1441 to permit removal.[83]

Conclusion

This past year saw significant removal decisions, particularly under CAFA. With parties continuing to jockey for venue advantages, we expect to see more developments in CAFA removals in 2014, as well as the continued evolution of actions removed under diversity.

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[80] Pub. L 112-63, § 103 (''A civil action . . . 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.'') (emphasis added).

[81] *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quotation marks and 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.'').

[82] *Regal Stone Ltd. & Fleet Mgmt. Ltd. v. Longs Drug Stores Cal., LLC*, No. 12-80117 (9th Cir.).

[83] *See, e.g., Johnson v. Emerson Elec. Co.*, No. 4:13-CV-1240-JAR, 2013 BL 266989 (E.D. Mo. Sept. 30, 2013); *Linder v. Medtronic, Inc.*, No. 4:13–CV–1240–JAR (W.D. Tenn. Sept. 30, 2013); *United Steel Supply, LLC v. Buller*, No. 3:13-CV-00362-H, 2013 BL 192125 (W.D. Ky. July 19, 2013). *But see, e.g., R&N Check Corp. v. Bottomline Techs., Inc.*, No. 13–cv–118–SM, 2013 BL 317244 (D.N.H. Nov. 15, 2013); *Campbell v. Hampton Roads Bankshares, Inc.*, 925 F. Supp. 2d 800 (E.D. Va. 2013); *FTS Int'l Servs., LLC v. Caldwell-Baker Co.*, No. 13–2039–JWL, 2013 BL 82673 (D. Kan. Mar. 27, 2013).

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