



THINK ADDING AN IN-STATE DEFENDANT WILL KEEP YOU OUT OF FEDERAL COURT? THINK AGAIN.

Envision a motor vehicle case in which an Illinois resident is injured in Missouri by a Missouri driver employed by a Kansas corporation. Wanting to keep the case in Missouri state court, the plaintiff's attorney names both the Kansas corporation and the Missouri driver. But before the Missouri defendant is served, the plaintiff's lawyer receives a notice of removal.

While this scenario may come as a surprise to some, for others it is all too familiar. As more defense attorneys recognize the availability of this tactic, in part because of recent publications in defense journals,¹ it is a scenario for which plaintiff's attorneys must be prepared.

The basis of this removal rests in the language of the removal statute, 28 U.S.C. § 1441(b), which states in pertinent part:

Any other such action shall be removable only if none of the parties in interest properly joined *and served* as defendants is a citizen of the State in which such action is brought.

As the emphasized language suggests, the key for defendant is to remove the case to federal court *before* the forum defendant is served.²

Whether removal should, from a policy standpoint, be allowed under these circumstances may be a matter for debate. But most federal courts considering the issue on a motion for remand have found that removal is proper.³ And for Missouri practitioners, there is at least a pair of district court orders denying remand under these circumstances.⁴

Fortunately, avoiding this removal tactic is relatively easy. Additionally, there are ways to respond which might make a motion to remand successful.

I. AVOIDANCE

To avoid this type of removal, a plaintiff's lawyer need only do a little planning before filing suit. Whenever a case has both forum and non-forum defendants, simply think of filing suit as a two-step process. First sue the forum (in-state) defendant and obtain service. Then add the non-forum defendant. Because a pleading may be amended once as a matter of course before a responsive pleading is served,⁵ the addition is simple.

It may help to recall the pre-*Linthicum*⁶ days of venue practice, which involved their own two-step. Prior to *Linthicum*, and of course prior to the 2005 revision to the venue statute, a tort action could be filed against an out-of-state defendant in any county. Once on file, Missouri defendants could be added without disturbing the venue. Though it required a little extra work, it was often worth the effort to secure a more advantageous venue for an injured client. Similarly, a little extra work can avoid the removal scenario described above.

II. RESPONDING TO REMOVAL

In some instances, the new two-step might be unavailable, perhaps because a statute of limitations is about to expire. If a defendant removes a case using this tactic, the plaintiff's response will depend on several considerations.

A. MOTION FOR REMAND WITHIN THIRTY DAYS

First, consider whether *any* defendant had been served at the time the case was removed. With the advent of docket monitoring services, it is now quite feasible for a notice of removal to be filed before a sheriff has even attempted service. Where a case is removed by a non-forum defendant before any defendant, himself included, has been served, some courts have ordered remand.⁷ And where the forum defendant has removed before he has been served, courts are even more likely to grant remand.⁸

If the removing defendant was served before filing his notice of removal, the next consideration is whether the forum defendant has been served, and, if so, when. Hopefully, the forum defendant will be served within thirty days of the notice of removal. If so, a motion for remand can be filed within the thirty days normally allowed by 28 U.S.C. §1447(c).

Even in this case, however, there will be challenges. Defendants will certainly argue that the propriety of removal is judged in light of the served parties *at the time of removal*.⁹ The case of *Hinkle v. Norfolk Southern Railway, Co.*, however, makes it clear that "the presence of a forum defendant in a removed action is not a procedural defect, but rather a

jurisdictional defect which may be raised at any time in a proceeding.”¹⁰

In some instances, it will not be possible to obtain service on the forum defendant within thirty days of removal. Nevertheless, it is probably best to move for remand within that time, while continuing attempts at service. If service is had before the court rules, a supplemental filing can alert the court to the service, and point out that *Hinkle* would require remand.

Of course, one cannot predict whether the forum defendant will be served by the time the court rules on the motion for remand. As such, the motion will have to address the fact that the forum defendant has not yet been served. As one might expect, the cases are less helpful in this situation. Should the forum defendant not be served by the time the court rules on the motion, it is highly likely the motion will be denied. (At least until sanity is injected into the area.)

B. MOTION FOR REMAND AFTER THIRTY DAYS

Under 28 U.S.C. §1447(c), a motion for remand on the basis of any defect other than lack of subject matter jurisdiction must be filed within thirty days of the filing of the notice of removal. Under Eighth Circuit law, removal pursuant to 28 U.S.C. §1441(b) is jurisdictional.¹¹ This leads to several beneficial results. First, a district court loses its jurisdiction once a forum defendant is served. Second, 28 U.S.C. §1447(c) does not preclude motions for remand filed more than thirty days after the case is removed.

In harmony with these results is the applicability of 28 U.S.C. §1447(c), which states:

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

As such, even if service is not completed by the time the court rules on the initial motion for remand, efforts to obtain service on the forum should continue.

Note that the Eighth Circuit appears to be the lone appellate court to take this position.¹² When practicing outside the circuit, a motion for remand under these circumstances cannot be filed beyond the thirty days.

C. SERVICE NEVER OBTAINED

In some cases, it becomes clear that the forum defendant will never be served. As an alternative basis

for remand, plaintiffs might consider adding a different forum defendant as a party. Pursuant to 28 U.S.C. §1447(e), if the addition of a defendant would destroy subject matter jurisdiction, “the court may deny joinder, or permit joinder and remand the action to the State court.”¹³ If the sole purpose of the addition is to defeat federal jurisdiction, the court may well deny joinder.¹⁴ But if there are other reasons for adding the new forum defendant, this may be a good avenue back to state court.

Finally, should all else fail, plaintiff can seek a dismissal. Being in federal court, a dismissal would require either a stipulation signed by all parties or an order of the court.¹⁵ Once dismissed, the action can be filed anew in state court using the two-step.

III. CONCLUSION

While there are certainly ways to respond to this type of removal, avoiding it in the first place is the safer and far easier practice. ■

ENDNOTES:

¹ John P. Lavelle, Jr. and Erin E. Kepplinger, *Removal Prior to Service: A New Wrinkle or a Dead End?*, 75 Defense Counsel Journal 177 (April, 2008)

² Note that this result is different from removed cases in which there is a non-diverse party. In those cases, the presence of the non-diverse party, whether or not he is served, precludes federal jurisdiction. *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939).

³ See Wright, Miller & Cooper, *Federal Practice and Procedure* 3d, §3723 at 623, note 76 et seq.

⁴ *Johnson v. Precision Airmotive, LLC*, 2007 WL 4289656 (E.D.Mo. 2007); *Brake v. Reser's Fine Foods, Inc.*, 2009 WL 213013 (E.D.Mo. 2009).

⁵ Supreme Court Rule 55.33(a).

⁶ *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 885 (Mo. Banc 2001)

⁷ *Vivas v. Boeing Co.*, 486 F.Supp.2d 726 (N.D.Ill. 2007); *Holmstrom v. Harad*, 2005 WL 1950672 (N.D.Ill. 2005); *Recognition Communications, Inc. v. American Automobile Assoc.*, 1998 WL 119528 (N.D.Tex. 1998); but see *Hutchins v. Bayer Corp.*, 2009 WL 192468, (D.Del. 2009).

⁸ *Sullivan v. Novartis Pharms. Corp.*, 575 F.Supp.2d 640 (D.N.J. 2008); but see *Frick v. Novartis Pharms. Corp.*, 2006 WL 454360 (D.N.J. 2006).

⁹ *Johnson, supra*.

¹⁰ 2006 WL 2521445, at 2 (E.D.Mo. 2006)

¹¹ *Hinkle, supra*; *Horton v. Conklin*, 431 F.3d 602 (8th Cir. 2006); *Hurt v. Dow Chemical Company*, 963 F.2d 1142 (8th Cir. 1992).

¹² *Lively v. Wild Oats Market, Inc.*, 456 F.3d 933, 936 (9th Cir. 2006).

¹³ 28 U.S.C. §1447(e); see also *Hinkle, supra*.

¹⁴ See *Campbell v. Arch Aluminium & Glass Co., Inc.*, 2009 WL 82065 (E.D.Mo. 2009)(listing factors for court to consider).

¹⁵ Fed. R. Civ. P. 41(a).