

LITIGATION MANAGEMENT: DRIVING GREAT RESULTS

DON'T LITIGATE IF YOU DON'T KNOW ALL THE RULES

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Creative Avenues to Federal Jurisdiction

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Evaluate & React Early

1. Do you have counter-claims?
2. Was jury demanded? If not, why?
3. Is venue proper?
4. Are there any unique Affirmative Defenses?
5. Arbitration Provision?
6. Removal, Removal, Removal?????

Two Removal Options

1. Removal With a Resident Defendant?
 1. Perhaps, but you must act quickly.
 2. Quick action could avoid application of Forum Defendant Rule.
2. Removal After a Codefendant Bankruptcy?
 1. Again, perhaps. Need to quickly balance many factors.

**Removal Despite the
“Forum Defendant Rule”**

Hypothetical:

1. Two Georgia Residents Bring a Products Liability Suit in Macon County, Alabama Circuit Court arising out of an accident they had on I-85.
2. Plaintiffs sue SafeCarCo, the vehicle’s manufacturer, and Billy Ray Smith, who allegedly caused the Plaintiffs’ crash.
3. SafeCarCo is a Delaware Corporation with its principal place of business in California. Billy Ray is a resident of Montgomery County, Alabama.
4. The accident occurred in Macon County, Alabama.
5. Is the case properly removable by SafeCarCo?

Answer

Yes, as long as SafeCarCo removes the case before Smith - the forum defendant - is “properly joined and served.”

28 U.S.C. § 1441(b)

- An action removed under 28 U.S.C. § 1332 (diversity) “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.”
- Known as the “Forum Defendant Rule”

Purpose of the “Forum Defendant Rule”

- “Th[e] ‘forum defendant’ rule reflects the belief that [federal] diversity jurisdiction is unnecessary because there is less reason to fear state court prejudice against the defendants if one or more of them is from the forum state.”
 - Spencer v. U.S. Dist. Court for Northern District of California, 393 F.3d 867, 870 (9th Cir. 2004) (quotation omitted)

“Forum Defendant Rule” Does Not Apply if Forum Defendant is “Not Properly Joined and Served”

- In other words, the presence of a forum defendant (Smith) who has not been served does not prevent removal (by SafeCarCo) and may be ignored when determining whether a case is removable.
- Beware: You still must have complete diversity of citizenship between the parties.

Federal Case Law:

- "Where there is complete diversity of citizenship . . . the inclusion of an *unserved* resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b)"
 - McCall v. Scott, 239 F.3d 808, 813, n. 2 (6th Cir. 2001)
- "The Plain language of Section 1441(b) indicates that an action may be removed unless a *properly joined and served* defendant is a resident of State in which the action was initiated"
 - Maple Leaf Bakery v. Raychem Corp., 1999 WL 1101326, *1 (N.D. Ill. 1999)
- "Where, as here, diversity does exist between the parties, an unserved resident defendant may be ignored in determining removability under 28 U.S.C. § 1441(b)."
 - Ott v. Consolidated Freightways Corp., 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002)
- "The statute is clear. The presence of unserved resident defendants does not defeat removal where complete diversity exists."
 - Wensil v. F.I. Dupont De Nemour & Co., 792 F. Supp. 447, 449 (D. S.C. 1992)
- "...[C]ourts have held, virtually uniformly, that . . . an unserved resident defendant may be ignored in determining removability."
 - Stan Winston Creatures, Inc. v. Toys "R" Us, Inc., 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003)

**Rationale Behind
"Joined and Served" Requirement**

- "The purpose of the "joined and served" requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve. Defendants are entitled to act to remove a case based on the circumstances at the time they are sued, and are not required to guess whether a named resident defendant will ever be sued."
 - Stan Winston Creatures, Inc. v. Toys "R" Us, Inc., 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003)

Time is of the Essence

- You must remove the case before the forum defendant is served.
- This could come down to days, hours, or even minutes.
- Use of the online case reporting services is big help here.

Hurdles?

- Do you have to wait until you are served to remove?
 - §1446(b)'s Answer: "The notice of removal . . . shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim"
 - "We read 1446(b) and its 'through service or otherwise' language as consciously reflecting a desire on the part of Congress to require that an action be commenced against a defendant before removal, but not that the defendant have been served."
 - Delgado v. Shell Oil Co., 231 F. 3d 165, 177 (5th Cir. 2000)

Hurdles?

- Can the Plaintiff amend the complaint after removal to add a non-diverse party, thus stripping the district court of its subject matter jurisdiction?
 - § 1447 (e)'s Answer: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State Court."

Hurdles?

- Later Served Co-Defendant Moves to Remand?
 - § 1448's Answer: "This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case."

Hurdles?

- In cases where you have multiple defendants, how do you comply with the “unanimity of consent” rule, when:
 - (a) You can’t determine if your (non forum) co-defendants have been served as of the time you remove?
 - (b) You don’t have time to get the consent of your co-defendants prior to removal?

“Related To” Bankruptcy Jurisdiction through your codefendant

Hypothetical

January 1, 2007 In Alabama state court, Plaintiff files a lawsuit against two defendants and alleges only state-law causes of action.

Residency Plaintiff: Alabama
 Defendant 1: Alabama
 Defendant 2: New York and Delaware

January 1, 2009 Defendant 2 files for bankruptcy in the Southern District of New York.

Can Defendant 1, an Alabama resident, remove the case to federal court in Alabama (even if case pending for more than one year)?

Answer

Probably, but whether it can keep it in federal court will depend on a variety of factors.

Bankruptcy Removal Jurisdiction

General Rule: A co-defendant's bankruptcy may create otherwise unavailable federal jurisdiction.

28 U.S.C. § 1452(a): "A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."

28 U.S.C. § 1334(b): "[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

“Related to” Jurisdiction

“The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.”

In re Pacor, Inc., 743 F.2d 984 (3d Cir. 1984).

“An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.”

In re Walker, 51 F.3d 562 (5th Cir. 1995).

Procedural Hurdles

- Equitable Remand – 28 U.S.C. § 1452(b)
- Permissive Abstention – 28 U.S.C. § 1334(c)(1)
- Mandatory Abstention – 28 U.S.C. § 1334(c)(2)

Procedural Hurdles: Equitable Remand

28 U.S.C. § 1452(b)

“The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.”

Representative Factors

- 1)forum non conveniens;
- 2)whether the entire action should be tried in the same court;
- 3)whether a state court is better able to resolve the state-law questions;
- 4)expertise of a particular court;
- 5)judicial economy;
- 6)prejudice to the involuntarily removed party;
- 7)comity; and
- 8)the lessened possibility of an inconsistent result.

Procedural Hurdles: Permissive Abstention

28 U.S.C. § 1334(c)(1)

"Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."

Representative Factors

- 1)the effect of abstention on the efficient administration of the bankruptcy estate;
- 2)the extent to which state-law issues predominate over bankruptcy issues;
- 3)the difficulty or unsettled nature of the applicable law;
- 4)the presence of a related proceeding commenced in state court or other non-bankruptcy court;
- 5)the alternative basis for bankruptcy jurisdiction;
- 6)the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- 7)the substance rather than form of the an asserted "core" proceeding;
- 8)the feasibility of severing state-law claims from core bankruptcy matters;
- 9)the burden of the bankruptcy court' s docket;
- 10)the likelihood that commencing the case in the bankruptcy court involves forum shopping;
- 11)the existence of a right to a jury trial;
- 12)the presence in the proceeding of non-debtor parties.

Procedural Hurdles: Mandatory Abstention

28 U.S.C. § 1334(c)(2)

"Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

Statutory Elements

- 1)The proceeding is based on a state-law claim that, although related to a title 11 case, does not arise under title 11 or out of a title 11 case.
- 2)The proceeding could not have been commenced in federal court but for the bankruptcy.
- 3)The state court can adjudicate timely the cause of action.

Transferring the Case to the "Home Court"

"Home Court" The bankruptcy court in which the bankruptcy is pending.

The Conduit Court Theory If the local bankruptcy court determines that (1) jurisdiction pursuant to § 1334 exists and (2) the removal notice is properly and timely filed, then that court transfers the case to the "home court" to determine questions of remand and abstention.

Competing Theory The local bankruptcy court may decide the questions of remand and abstention without first transferring the case to the "home court."

Basis for Transfer

28 U.S.C. § 1412 "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."

28 U.S.C. § 1404(a) "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Note: Courts have split over whether § 1412 or § 1404(a) governs the transfer inquiry for a proceeding "related to" a bankruptcy case.

The distinction is critical - only one requires the transferee venue to be one in which the case "might have been brought" initially.

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Product Liability

Employment Law

Consumer Fraud and
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Business Litigation

Chandler joined Lightfoot in 1999, after graduating with honors from Washington and Lee Law School. Chandler's practice is varied, though a great deal of his time is spent defending products liability actions. Although the national trend has been toward fewer trials of complex, high exposure cases, Chandler has tried numerous cases to jury verdict, including contract disputes, wrongful death and catastrophic injury cases. Additionally, he has tried numerous bench trials and arbitrations on a variety of issues. Chandler has also handled employment cases, warranty disputes, and general business litigation.

EDUCATIONJ.D., Washington & Lee
University School of
Law, 1999, cum laude.B.S., University of
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Over the years, Chandler has represented companies from a variety of industries -- from automotive to aerial lifts; agricultural equipment to heavy trucks; construction equipment to power tools. He represents several clients on a regional and national basis, and he has handled matters throughout the Southeast and beyond.

ADMITTED

Alabama, 1999

While in law school, Chandler was a member of the Washington & Lee Law Review. Since graduating, Chandler has been admitted to all state courts in Alabama as well as the United States court of Appeals for the Eleventh Circuit and all United States District Courts in Alabama. He also is a member of the Birmingham Bar Association, the Alabama State Bar Associate, the American Bar Association, the Alabama Defense Lawyers Association and the Defense Research Institute. He recently completed a three year run as co-chairman of the Alabama Defense Lawyers Association's Trial Academy, a program designed to teach younger attorneys valuable trial skills.

Outside of his law practice, Chandler is a proud husband and father, and he is a member of St. Mary's-on-the-Highland's Episcopal Church.

