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Getting out of Oz

"YOUR DEFENDANT IS A SHAM AND YOU'RE FORUM SHOPPING." REMEDYING REMOVALS BASED ON FRAUDULENT JOINDER

Without having any citations for this proposition, I am certain that most, if not all, legal practitioners have experienced having a rug pulled out from underneath their feet. Some may have experienced this unsettling sensation that "we aren't in Kansas anymore" upon having their cases removed from state court and landing in the federal court.

Forum selection is arguably the most important decision an attorney can make at the inception of a case. The forum dictates the rules of the ring, the pacing of litigation, and the jury pool. Now an age-old adage, plaintiffs' attorneys avoid federal court at all costs, and defense attorneys will do anything to get an action out of state court. As prudent practitioners, lawyers generally don't fix what is not broken (but should also evaluate whether a well-worn tool could be better utilized).

What happens when a defense attorney insists that a defendant is a "sham" and not-so-subtly accuses the plaintiff of forum shopping? How can a plaintiff's attorney show that, not only is the defendant not a "sham," but in fact the defense attorney has attempted to inappropriately dismiss the defendant and unilaterally chose the forum of their liking?

In this article, I will provide an overview of the reasons why adversaries prefer different forums and will discuss what a plaintiff's attorney can do to remedy a defense attorney's dogged insistence that an action should be adjudicated in district court. Specifically, in the context of claims brought pursuant to the California Fair Employment and Housing Act (FEHA), I will examine removals premised on an assertion that a non-diverse party has been fraudulently joined, and how to remedy procedural forum selection tactics.

Informed forum selection: Is it better to stay in Kansas?

As the type to question everything, while dutifully following the directives of our wiser and more experienced supervisors and partners, lawyers will undoubtedly ask, "But why?" Why do plaintiff's attorneys feel at home in state court, and defense attorneys frolic care-free in federal court? Why is state court Kansas for plaintiff's attorneys, and federal court Oz?

My limited survey of plaintiff's attorneys has rendered the following results: In state court attorneys (1) can file a peremptory challenge under Civil Code Section 170.6 to reshuffle the deck of judges and pick a different card; (2) can utilize form interrogatories approved by the California Judicial Counsel, in addition to having a greater number of special interrogatories at their disposal; (3) have the full attention of a judge handling only civil cases, instead of a judge juggling both civil and criminal case loads; (4) have a longer time to oppose the inevitable motion for summary judgment, (5) may experience relative leniency toward requests for continuances, and (6) need not win over a unanimous jury.

On the flip side, defense attorneys may believe that federal courts are more efficient, having smaller caseloads and strict timelines. They may generally have more experience with the Federal Rules of Civil Procedure, or less experience with the rules of the many states in which an employer may be sued. Defense attorneys may determine that their client would benefit from picking a jury from a less localized pool, and from the requirement for a unanimous jury verdict.

Whatever determination is made, lawyers will do their darndest to get into a forum that they believe will give them a leg up in the multi-year proceedings to come. Problems may arise, however, when the effort to get to the desired forum is simply not supported by the law. Luckily, in most situations, there is a fix for that.

Removal: We aren't in Kansas anymore

Federal courts have original jurisdiction in all cases involving another state that present a federal question (federal question jurisdiction), and among parties of diverse state or national citizenship with damages exceeding $75,000 (diversity jurisdiction). (See 28 U.S.C. §§ 1330-1332.) Pursuant to title 28 United States Code section 1441, an action that was initially filed in state court can be removed to federal court on the basis of diversity jurisdiction if the amount in controversy exceeds the requisite $75,000 and if each party is a citizen of a different state. (See 28 U.S.C. § 1332(a).)

Hence, a word of caution to practitioners who bring an FEHA case against a nationwide employer (who is most likely a Delaware citizen), and an individual bad actor residing in the same state as the aggrieved plaintiff. FEHA, codified in Government Code sections 12900 et seq., is the California analogue to the Federal Title VII protections against workplace discrimination, harassment, and retaliation. The difference is that FEHA recognizes and offers protection to more categories of individuals who may be wrongfully treated on the basis of their actual or perceived identities, including race, disability, marital status, sex, gender identity or expression, military status, and sexual orientation, among other categories. (See Gov. Code, § 12940.)

In many of these cases, an aggrieved employee may seek remedy for FEHA violations committed not only by their employers, but also by their supervisor or coworkers for workplace harassment. (See Gov. Code, § 12940, subd. (j)(1) [prohibiting employers "or any other person" from harassing an employee, applicant, intern, or volunteer on the basis of a protected category].) Thus, a California plaintiff who sues her Delaware corporate employer and California supervisor *should* properly file their claim in state court due to the lack of complete diversity. (See *Exxon Mobil Corp. v. Allapattah Servs., Inc.* (2005) 545 U.S. 546, 553 ["The presence of parties from the same State on both sides of a case dispels [the concern that a state courts might favor home-state litigants], eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action"], superseded in part by the Class Action Fairness Act of 2005, as stated in *Frisby v. Keith D. Werner & Assocs. Co., LPA* (N.D. Ohio 2009) 669 F.Supp.2d 863, 871 fn. 3.)

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Nevertheless, defense counsel have removed such actions on the basis that the individual home-state defendant was fraudulently joined only to destroy diversity – or in other words is a "sham defendant." (See *Morris v. Princess Cruises, Inc.* (9th Cir. 2001) 236 F.3d 1061, 1067.) The removing party must explain to the district court that he, she, it, or they could tell that the individual resident-defendant was fraudulently joined to the action because "the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." (*Hunter v. Philip Morris USA* (9th Cir. 2009) 582 F.3d 1039, 1042, quoting *McCabe v. Gen. Foods Corp.* (9th Cir. 1987) 811 F.2d 1336, 1339.) Functionally, through removal, a defendant has dismissed the individual harasser and selected the forum of its liking. How can the plaintiff get the individual defendant back in the action, and send the whole case back to proverbial Kansas?

Remand: Clicking your heels back to Kansas

The law favors remand. Thus, if a plaintiff believes that a bad actor has been wrongfully ejected from the suit before your client has his, her, or their day in court, the plaintiff can move to remand the case to state court and have the state court decide, based on the pleadings and evidence, whether the individual should be dismissed. Simply stated, the removal statue is not a "do not pass go" dismissal mechanism. Removal and remand are purely about letting the district court ultimately determine in which court the matter truly belongs.

There is a strong presumption *against* removal jurisdiction. (See *Hunter, supra*, 582 F.3d at 1042; see also, *Gaus v. Miles, Inc.* (9th Cir. 1992) 980 F.3d 564, 566.) Remember that it is always the removing party's burden of establishing that removing the case to federal court was indeed proper and supported by the law. When the removal is premised on a claim that a defendant had been joined solely for the purpose of negating diversity, the removing party has an even heavier burden to bear, and an even higher bar of persuasion to surmount. (See *Hunter, supra*, 582 F.3d at 1044; see also, *Plute v. Roadway Package Sys.* (N.D. Cal. 2001) 141 F.Supp.2d 1005, 1007.) To satisfy its burden, the defendant must show, with *clear and convincing evidence*, that the suit properly belongs in an Article III court. (*Hamilton Materials, Inc. v. Dow Chem. Corp.* (9th Cir. 2007) 494 F.3d 1203, 1206.) Not an easy feat – or at least it ought not to be.

Defendants have two avenues for showing that an individual defendant was simply a tool for eviscerating diversity and allowing plaintiff's attorneys to have their way in state court: (1) The defendant must demonstrate that *actual fraud* had been committed in the pleading of jurisdictional facts, or (2) the defendant must demonstrate that the plaintiff has absolutely no way of establishing a cause of action against the resident defendant, and that inability should be obviously fatal against the backdrop of well-settled law. (*Hunter, supra*, 582 F.3d at 1043, quoting *Smallwood v. Illinois Central R.R. Co.* (5th Cir. 2004) 385 F.3d 568, 573; see also, *Mercado v. Allstate Ins. Co.* (9th Cir. 2003) 340 F.3d 824, 826.) Further, all questions of fact and ambiguities of controlling state law must be resolved in favor of the non-removing party. (*Plute, supra*, 141 F. Supp. 2d at 1008, quoting *Dodson v. Spiliada* (5th Cir. 1992) 951 F.2d 40, 42-43.) However, despite the similarity, do not be misled. The court must not put on its motion-to-dismiss glasses for reviewing motions to remand.

Unlike a motion to dismiss, removals and motions to remand are *not* pleadings motions. They are purely matters of jurisdiction. The Ninth Circuit has found that, although "the fraudulent joinder standard shares some similarities with the analysis under [FRCP] 12(b)(6)" in that they both involve an assessment of the plaintiff's lawsuit, the tests should not be confused for being same. (*GranCare, LLC v. Thrower* (9th Cir. 2018) 889 F.3d 543, 549.) Without mincing words, the Ninth Circuit found, "[a] standard that equates fraudulent joinder with Rule 12(b)(6) conflates a jurisdiction inquiry with adjudication on the merits." (*Ibid.*)

Instead, the fraudulent joinder standard is more similar to the more stringent Rule 12(b)(1) "wholly insubstantial and frivolous standard." (*Ibid.*) For a helpful guiding reference, the Ninth Circuit has upheld removal on the basis of fraudulent joinder in the following situations: (1) the statute of limitations has run on any claim the plaintiff can bring against the resident defendant; (2) a defendant's alleged conduct is privileged under state law; and (3) the action is predicated on a contract to which the defendant was not party. (*Id.* at 548-49, citing *Ritchey v. Upjohn Drug Co.* (9th Cir. 1998) 139 F.3d 1313, 1320, *McCabe, supra*, 811 F.2d at 1339, *United Compt. Sys. Inc. v. AT&T Corp.* (9th Cir. 2002) 289 F.3d 756, 761, *Kruso v. Int'l Tel. & Tel. Corp.* (9th Cir. 1989) 872 F.2d 11416, 1426-27.)

Thus, if there is "*any possibility* that plaintiff will be able to establish liability against the party in question," then the matter is not diverse and ought to be remanded for proper adjudication in state court. (*Blakely v. Bayer Corp.* (C.D. Cal., March 10, 2010) 2010 U.S. Dist. LEXIS 153349, *3-4, original emphasis, citation omitted; see also, *Florence v. Crescent Res., LLC* (11th Cir. 2007) 484 F.3d 1293, 1299.) Courts have explicitly found that defendants will not be able to meet their heavy burdens of persuasion by showing that "the complaint at the time of removal fails to state a claim" against the resident defendant – the defendant must show from the outset that there is absolutely no way that the plaintiff could prevail against the resident defendant on any cause of action. (*Myers, supra*, 2018 U.S. Dist. LEXIS 223738 at *7, quoting *Padilla v. AT&T Corp.* (C.D. Cal. 2009) 697 F. Supp. 2d 1156, 1159; see also, *Kyle v. Envoy Mortg., LLC* (S.D. Cal., Dec. 17, 2018) 2018 U.S. Dist. LEXIS 212199, *15-16, citing *Narayan v. Compass Grp. USA, Inc.* (E.D. Cal. 2018) 284 F. Supp. 3d 1076, 1084.)

In this vein, it is not appropriate for defendants to remove actions on the basis of their affirmative defenses or arguments that challenge the merits of plaintiff's case. (See *Hunter, supra*, 582 F.3d at 1044-45.) Unless a defendant can show "that the plaintiff

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would not be afforded leave to amend his complaint to cure [the] purported deficiency," the action must be remanded to and adjudicated in state court. (*Myers, supra*, 2018 U.S. Dist. LEXIS 223738 at *7, quoting *Padilla supra*, 697 F. Supp. 2d at 1159; see *Albi v. Street & Smith Publications, Inc.* (9th Cir. 1944) 140 F.2d 310, 312 ["A merely defective statement of the plaintiff's action does not warrant removal"]; *Briano v. Conseco Life Ins. Co.* (C.D. Cal. 2000) 126 F. Supp. 2d 1293, 1296 [finding that remand is favored when there is "any possibility that Plaintiff will be able to establish liability against the party in question"].)

Further, the court has discretion to pierce the pleadings if it finds it necessary and appropriate to do so (i.e., if doing so would not require substantial hearings). (See *Smallwood v. Ill. Cent. R.R. Co.* (5th Cir. 2004) 358 F.3d 568, 574; see also, *Hunter, supra*, 582 F.3d at 1044 ["[A] summary inquiry is appropriate only to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant"].) In such an event, the court should only permit discovery – after a showing of necessity – that is "sharply tailored to the question at hand." (*Smallwood, supra*, 358 F.3d at 574.) If even after allowing limited discovery, the court is still unable to make the requisite determination of whether removal was proper, that itself "points to an inability of the removing party to carry its burden." (*Ibid.;* see *Hunter, supra*, 582 F.3d at 1044.)

Thus, to get back to Kansas, with all defendants in tow, the plaintiff's attorney must show the court that there *is in fact a possibility*, however meek or slim, that the plaintiff can establish liability against the non-diverse defendant. If a plaintiff can show that their allegations satisfy the Rule12(b)(6) standard, the plaintiff is able to simultaneously demonstrate that the removing party could in no way meet the more stringent fraudulent joinder standard. Further, even if the plaintiff's initial pleadings are not the most precise, should the plaintiff be able to demonstrate that any deficiencies in inartful pleading can be simply cured through an amendment, the removing party will likely not be able to demonstrate that the plaintiff has *absolutely no possibility* of establishing liability against the resident defendant.

Reimbursement: Get paid for the time you spent in Oz

Plaintiff's attorneys who were sucked into a tornado and landed in federal court can have all expenses for their round-trip back to state court reimbursed by the removing party under certain circumstances pursuant to title 28 United States Code section 1447(c). Section 1447(c) provides: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." A court may determine that reimbursement of costs, expenses, and fees is appropriate "where the removing party lacked an objectively reasonable basis for seeking removal." (*Martin v. Franklin Capital Corp.* (2005) 546 U.S. 132, 141.)

The purpose of such an award is definitively "not a punitive measure," therefore, the plaintiff's attorney need not use his, her, or their limited pages to tell the court how improperly or sanction-worthy the removing party acted. (*MFC Twin Builders, LLC v. Fajardo* (E.D. Cal., Sept. 4, 2012) 2012 U.S. Dist. LEXIS 126201, *9-10, citing *Moore v. Permanente Med. Grp.* (9th Cir. 1992) 981 F.2d 443, 446-47.) Essentially, if the plaintiff's counsel successfully demonstrates that the defendant had no reasonable basis for removal, the court has the discretion to award a reimbursement, not only to remedy the time and effort spent to rectify improper jurisdiction, but also to uphold Congress' "desire to deter removals sought for the purpose of prolonging litigation." (*Ibid.*, quoting *Martin, supra*, 546 U.S. at 140.)

The fraudulent-joinder standard has been well articulated by the Ninth Circuit. If a plaintiff's action is removed for failure to state a claim against a resident individual harasser, the plaintiff should consider seeking reimbursement for the time spent, citing the Ninth Circuit's explicit finding that the removal standard is *not* the same as the Rule 12(b)(6) standard.

Further, FEHA harassment law has also been well articulated in California. If the removing party claims that the in-state individual harasser's conduct is absolutely privileged or for some reason not subject to liability under FEHA, fees may be sought if other courts repeatedly remand cases that were removed on claims of the same liability or reading of FEHA. If defendant's arguments require the court to make factual findings, without a finding that piercing the pleadings is necessary or appropriate, a plaintiff should consider seeking fees to remind the court and the removing party that a removal and remand proceedings should not involve arguments about the merits of plaintiff's claims. Any such argument, as numerous courts have found, must be saved for the appropriate court to determine – once the parties find their way there.

Fundamentally, Congress has determined that a plaintiff need not pay for the round trip he, she, or they took to Oz, if a tornado picked her up and sent her there unwittingly, mistaking her for a different Kansan.

Conclusion

Despite the well-worn and generally accepted adage that plaintiffs prefer state court, many matters are appropriately filed in state court and should remain there. If a plaintiff realizes one day that she, he, or they have been swept up into a dust storm and are "no longer in Kansas" the appropriate standard strongly favors remand and likely the plaintiff will find their way back home with a click of their heels, with all defendants along for full adjudication in the proper forum.

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