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Beating a claim of "fraudulent joinder"

SHOW *ANY POSSIBILITY* OF RECOVERING AGAINST A CALIFORNIA CITIZEN AND YOUR CASE SHOULD LIKELY BE REMANDED BACK TO STATE COURT

You file your action in California Superior Court. The amount in controversy exceeds $75,000. You have an out-of-state entity or person as a defendant. But crucially, you also have a California citizen as a defendant. The case will surely remain in state court. But what's this? A notice of removal at your doorstep. How can this be? And then you see it. "For purposes of this Court's jurisdictional inquiry, [the California citizen's] citizenship may be disregarded because they have been fraudulently joined as a defendant for the sole purpose of defeating federal jurisdiction."

The defendant has alleged that you joined the California citizen as a sham defendant just to keep the case in state court. If that is true, the sham defendant's citizenship can be cast aside, and federal diversity jurisdiction would exist.

When exactly is fraudulent joinder present? By what mechanism does one challenge the assertion that it is present? And how does one defeat that claim? This article examines those questions.

The fraudulent joinder doctrine

When determining whether diversity jurisdiction exists, complete diversity is required, meaning that each plaintiff must be of a different citizenship from each defendant. (*Caterpillar Inc. v. Lewis* (1996) 519 U.S. 61, 68.) Under the fraudulent joinder doctrine, "district courts may disregard the citizenship of a non-diverse defendant who has been fraudulently joined." (*Grancare, LLC v. Thrower by and through Mills* (9th Cir. 2018) 889 F.3d 543, 548.)

Fraudulent joinder does not require a showing of actual fraud. Rather, it is a term of art. (*McCabe v. General Foods Corp.* (9th Cir. 1987) 811 F.2d 1336, 1339.) While fraudulent joinder may occur where there is actual fraud in the pleading of jurisdictional facts, it also may occur where "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, the joinder of the resident defendant is fraudulent." (*Ibid.*; *Grancare*, *supra*, 889 F.3d at p. 548.)

While the phrase "state a cause of action" suggests that a plaintiff will have to satisfy federal pleading requirements, the Ninth Circuit has emphasized that "the test for fraudulent joinder and for failure to state a claim under Rule 12(b)

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(6) are *not* equivalent." (*Grancare*, *supra*, 889 F.3d at 549.) Thus, although a claim may ultimately fail under Federal Rule of Civil Procedure 12(b)(6), it is possible that the defendant was not fraudulently joined. (*Ibid.*) Rather than merely showing the plaintiff has not alleged facts plausibly stating a claim for relief, a defendant must show that there is no "possibility that a state court would find that the complaint states a cause of action against any of the resident defendants[.]" (*Id.* at p. 548 [internal quotation marks and citations omitted].) That a court would grant a motion to dismiss the claim is insufficient to establish fraudulent joinder. (*Id.* at p. 550.)

Defendants asserting fraudulent joinder bear a "heavy burden." (*Id.* at p. 548.) Indeed, there is a presumption *against* fraudulent joinder. (*Hamilton Materials, Inc. v. Dow Chemical Corp.* (9th Cir. 2007) 494 F.3d 1203, 1206.) Further, numerous district courts have described the showing that plaintiffs are required to make as follows: "'Merely a "glimmer of hope" that plaintiff can establish [a] claim is sufficient to preclude application of [the] fraudulent joinder doctrine.'" (*Marin v. FCA US LLC* (C.D. Cal., Nov. 9, 2021, No. 2:21-CV-04067-AB-PDX) 2021 WL 5232652, at *3, quoting *Gonzalez v. J.S. Paluch Co., Inc.* (C.D. Cal., Jan. 7, 2013, No. CV 12-08696 DDP FMOX) 2013 WL 100210, at *1.) Courts also have stated: "[T]he Court need only make a summary assessment of whether there is any possibility that the plaintiff can state a claim against the defendant. This is because 'the inability to make the requisite decision in a summary manner itself points to an inability of the removing party to carry its burden.'" (*Ibid.*, quoting *Hunter v. Philip Morris USA* (9th Cir. 2009) 582 F.3d 1039, 1044.)

The Ninth Circuit has found fraudulent joinder to be present in the following scenarios: "We have upheld rulings of fraudulent joinder where a defendant demonstrates that a plaintiff is barred by the statute of limitations from bringing claims against that defendant. (See *Ritchey*, 139 F.3d at 1320; *Hamilton Materials, Inc. v. Dow Chem. Corp.* (9th Cir. 2007) 494 F.3d 1203, 1206.) We have also upheld such rulings where a defendant presents extraordinarily strong evidence or arguments that a plaintiff could not possibly prevail on her claims against the allegedly fraudulently joined defendant. (See *McCabe v. Gen. Foods Corp.* (9th Cir. 1987) 811 F.2d 1336, 1339 [defendant's conduct was privileged under state law]; *United Comput. Sys. Inc. v. AT&T Corp.* (9th Cir. 2002) 298 F.3d 756, 761 [plaintiff's claims against alleged sham defendant were all predicated on a contract to which the defendant was not a party]; *Kruso v. Int'l Tel. & Tel. Corp.* (9th Cir. 1989) 872 F.2d 1416, 1426-27 (same)." (*Grancare*, *supra*, 889 F.3d at p. 548).)

How to challenge an assertion of fraudulent joinder

So, a defendant just removed the case to federal court, alleging that you fraudulently joined a non-diverse defendant. How do you challenge that?

To begin, it is worth noting that the district court may act even before you do. "Federal courts 'jealously' guard their own jurisdiction and, where appropriate, will dismiss a case for lack of subject matter jurisdiction even if the issue is not raised by the parties." (*RDF Media Ltd. v. Fox Broadcasting Co.* (C.D. Cal. 2005) 372 F.Supp.2d 556, 560.) To protect its jurisdiction, district courts will err towards remand. (See, e.g., *Padilla v. AT&T Corp.* (C.D. Cal. 2009) 697 F.Supp.2d 1156, 1158; *Harris v. Bankers Life and Cas. Co.* (9th Cir. 2005) 425 F.3d 689, 698.) To this end, it is very possible that district courts will issue orders to show cause re subject matter jurisdiction after they have seen a removal based on fraudulent joinder, and remand the case after concluding that the removing defendants have not met their heavy burden of showing fraudulent joinder. (See, e.g., *LCAP Advisors, LLC v. Penrith Group, Inc.* (C.D. Cal., Apr. 11, 2011, No. SACV 11-380 AG MLGX) 2011 WL 1375572; *EVEMeta, LLC v. Siemens Convergence Creators Holding GmbH* (C.D. Cal., Sept. 28, 2017, No. CV176246DMGJEMX) 2017 WL 4351748; *Davis v. Frank* (E.D. Cal., Jan. 19, 2022, No. 221CV00383MCEJDP) 2022 WL 168436 [rejecting assertion that non-diverse *plaintiffs* were fraudulently joined].) (But of course, it is still possible for plaintiffs to brief the issue. After the defendant files a response to the order to show cause, a plaintiff may file a reply. (*EVEMeta*, *supra*, 2017 Wl 4341748, at *1, fn. 2).)

Even without an order to show cause from the court, you can also file a motion to remand to argue that the defendant did not meet the heavy burden of showing fraudulent joinder and establishing diversity jurisdiction. (See, e.g., *Knutson v. Allis-Chalmers Corp.* (D. Nev. 2005) 358 F.Supp.2d 983, 986.) Title 28 United States Code section 1447(c) provides: "A motion to remand the case on the basis of any defect *other than lack of subject matter* jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Because an argument that the defendant failed to establish fraudulent joinder is an objection to the district court's subject matter jurisdiction, it can be made any time before final judgment. (See *ibid.*; *Davis v. FCA US LLC* (E.D. Cal., Aug. 26, 2020, No. 2:20-CV-00799-KJM-AC) 2020 WL 5036459, at *3 [district court considers motion to remand based on argument that the defendant did not establish fraudulent joinder even though motion was filed more than 30 days after the defendants filed their notice removal]; *Marteney v. Eastman Outdoors, Inc.* (D. Nev., Aug. 26, 2014, No. 2:14-CV-351 JCM PAL) 2014 WL 4231366, at *2-3 [same].)

Note, however, that motions to remand on the basis of a procedural defect (such as an untimely removal), on the other hand, must be made within 30 days of removal. (28 U.S.C., § 1447(c).) If there is both a procedural defect and an argument to be made that a California defendant is not a sham defendant, then it is likely most efficient to address both

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in the same motion. In that scenario, the motion should be made within the 30-day deadline that governs motions based on a procedural defect.

Some illustrations of cases where courts found there was no fraudulent joinder

Having addressed what a fraudulent joinder is and how one might challenge it, here are some examples where district courts found an absence of fraudulent joinder in the personal injury/employment context.

In *Leroy West v. Costco Wholesale Corporation* (C.D. Cal., Nov. 30, 2020, No. LACV2004265JAKFFMX) 2020 WL 7023777, the plaintiff sued Costco in California state court for negligence and premises liability after slipping on a liquid substance in a Costco store. Costco removed the case to federal court on the basis of diversity jurisdiction. After, plaintiff sought leave to add the store manager, a California citizen, as a defendant and also requested remand. Costco opposed, arguing that the manager was a sham defendant. The district court rejected this argument, explaining that the store manager may be individually liable for both negligence and premises liability. In its ruling, the district court quoted another district court which decided a similar issue on similar facts for the following proposition: "Long-settled California law provides that '[i]f a tortious act has been committed by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not of course exonerate the agent from liability.' *Perkins v. Blauth*, 163 Cal. 782, 787 (1912); see also *PMC, Inc. v. Kadisha*, 78 Cal.App.4th 1368, 1381 (2000) ("[A] n agent is liable for her or his own acts, regardless whether the principal is also liable."). Based on this theory, Lee, as the Costco store manager, may be held liable separate and apart from Costco's liability." (*Ibid.*, quoting *Gallegos v. Costco Wholesale Corporation* (C.D. Cal., June 2, 2020, No. CV203250DMGGJSX) 2020 WL 2945514, at *3, fn. 3.) The district court then held that the allegations in the case before it were sufficient, as the plaintiff alleged that the store manager had a duty to keep the floor of the store safe, the manager failed to warn of a puddle on the floor or to cordon off the area of the floor where the puddle was, and that failure caused the plaintiff's injuries. (*Ibid.*)

In *Gwynn v. Altria Group, Inc.* (S.D. Cal. 2017) 263 F.Supp.3d 1029, the wife and children of Hall of Fame baseball player Tony Gwynn sued after Gwynn died of cancer caused by his addiction and prolonged use of tobacco products. They sued tobacco companies, marketers, retailers, distributors, among others. Relevant here, the distributor defendants were California defendants who would destroy diversity jurisdiction. Even so, the defendants removed the case, asserting that the distributor defendants were fraudulently joined. According to the defendants, the distributor defendants were immune under Civil Code section 1714.45, which provides immunity in a "product liability action" to the manufacturer or seller of a "consumer product intended for personal consumption" that "is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community." The plaintiffs moved to remand, arguing that the immunity did not apply because the products consumed by Gwynn were heavily adulterated with chemicals and additives, and thus exposed him to risks beyond those generally inherent in tobacco. Relying on the California Supreme Court's decision in *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 859 the district court concluded that the plaintiffs had a viable case against the distributor defendants and accordingly remanded the case.

In *Lagarde v. Automatic Data Processing* (C.D. Cal., Aug. 4, 2008, No. SACV080648AGANX) 2008 WL 11339928, the plaintiff sued his employer and some individual managerial employees for unlawful discrimination, harassment, and retaliation in the workplace. The entity employer removed the case to federal court, arguing that the citizenship of the non-diverse managers should be disregarded because they were sham defendants. The district court rejected this argument. Citing the California Supreme Court's decision in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, the court first explained that managerial employees can be held liable for harassment. The court then analyzed only the "potential viability" of the plaintiff's allegations and concluded that the plaintiff's allegations demonstrated that a reasonable possibility of recovery existed against the non-diverse defendants and accordingly remanded the case.

Conclusion

It may be discouraging to have your case haled into federal court even though the California defendant was properly joined. Worse yet, you're essentially accused of fraud (though as mentioned, it's a term of art). However, as the cases just discussed illustrate, this "allegation" is somewhat easy to overcome. As long as you can show that you have *any possibility* of recovering against the California citizen, the case should be remanded back to state court. Defendants will have to meet a high bar before they dictate where you try your case. The fraudulent joinder doctrine, as serious as it may sound, does nothing to change the fact that the plaintiffs in any civil litigations are "masters of the complaint." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1202.) That principle applies with equal force to who you have decided to sue and your forum of choice.

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