

Trial Law TIPS

Roy D. Wasson's
TIP #65

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Removal to Federal Court— Post-Removal Joinder of Non-Diverse Defendant Requires Remand

Introduction

Defendants over the past couple of years have started removing more and more cases to federal court. No longer a defensive approach reserved for major product liability cases against foreign manufacturers, federal removal petitions are being filed in many types of cases, from auto negligence, insurance coverage, product liability and more. Even routine slip-and-fall cases against out-of-state businesses like Wal-Mart are being wrestled away from competent and caring state court judges by the removal process, where no Florida citizen is joined as a co-defendant.

In many cases, there is a way to return the lawsuit to the state court from which it was removed, by way of a motion to remand.

One way to obtain such a remand is to join as an additional defendant a non-diverse party. Even after a case has been removed to federal court, joinder of a Florida citizen as a defendant will necessitate remand. Here is the law on the subject.

Leave To Join New Defendants Should Be Freely Given

The federal courts should freely grant leave for plaintiffs to join as party defendants additional parties identified in discovery as potentially liable for the subject incident. Although frequently mischaracterized as a “Motion to Amend,” which is governed by Fed. R. Civ. P. 15, the correct motion to file is one to join new defendants under Rule 21, which “governs the joinder of additional parties.” See *AMP, Inc. v. Methode Electronics, Inc.*, 823 F. Supp. 259, 269 (M.D. PA. 1993). Rule 21 provides in pertinent part as follows: “Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on terms as are just.”

Most courts that have addressed the standard for deciding a motion under Rule 21 have held that “‘the standard for adding or dropping parties under Rule 21’ is the same as the standard for amending the pleadings under Rule 15.” *AMP, Inc., supra*, 823 F. Supp. at 269-70 (quoting *Gibbs v. Titelman*, 369 F. Supp. 38, 53 (E.D. Pa. 1973)). See also, e.g., *Soler v. G&U Inc.*, 86 F.R.D. 524, 527-28 (S.D.N.Y. 1980) (“in deciding whether to allow joinder, the court is guided by ‘the same standard of liberality afforded to motions to amend pleadings under Rule 15’”).

In applying that standard, the Middle District “has previously ruled . . . that absent undue delay, bad faith or repeated failure to cure deficiencies . . . or undue prejudice to the opposing party, the leave sought should be freely given.” *Marco’s Franchising, LLC v. Marco’s Italian Express, Inc.*, 239 F.R.D. 686, 688 (M.D. Fla. 2007). Thus, in a car crash case against an out-of-state company that hired a Florida resident as a driver, joinder of the driver as an additional defendant should be granted. Sometimes you can plead negligent hiring against the management person who hired an incompetent employee. In an insurance coverage case against a foreign insurer, you may have grounds to join as a defendant a Florida insurance agency that is liable to the plaintiff.

Once you have joined such a non-diverse defendant, remand is required.

If Joinder Is Permitted, Remand Is Required

Once the federal court grants a plaintiff leave to join the additional defendant, remand will be required because those defendants are Florida citizens. Their joinder will destroy diversity and defeat the jurisdictional basis upon which the case was removed to federal court. 28 U.S.C. § 1447(e) provides in pertinent part as follows: "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."

The district courts have no jurisdiction to grant joinder of non-diverse defendants and deny remand to state court. "If the court grants the joinder, it must, under 1447(c) and *Thermtron [Products, Inc. v. Hermanstorfer*, 423 U.S. 336 (1976)] remand the case to state court." *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987). *Accord. Ingram v. CSX Transportation, Inc.*, 146 F.3d 858 (11th Cir. 1988).

Thus, if you are unhappy about your case being removed, file a Motion to Join Additional Defendant and Remand. Sometimes defense counsel will allow you to represent in your motion that they do not oppose joinder of a new party, perhaps out of ignorance that the effect of that joinder will be to defeat federal jurisdiction. Be prepared to argue in your motion why you did not originally sue the non-diverse defendant, so the court does not think that your claim against that defendant is bogus. Argue that you will have to sue the new defendant in a separate lawsuit in state court if joinder is denied, which will result in wasted judicial resources and the risk of inconsistent adjudications

Conclusion

It is frustrating to open that envelope from defense counsel containing the Notice of Removal of a case to federal court. Trial lawyers representing injured plaintiffs should be thorough in identifying potential non-diverse defendants to join as parties, thereby necessitating remand. Even if you are unsuccessful in

avoiding removal in the first instance, once you receive the removal notice there are ways to get back into state court, including post-removal joinder of a Florida resident, so . . .

Keep Tryin!

Roy