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When it Comes to Removal, Timing is Everything

Delalla v. Hanover Insurance, 10-3933 & 11-1532, 2011 U.S. App. (3d Cir. Oct. 12, 2011)

An attorney representing a defendant who has been sued in state court, even though federal jurisdiction exists, will typically consider whether to remove the action to federal court. Sometimes, however, the decision to remove the case to federal court is made only after the expiration of the 30-day removal deadline in 28 U.S.C. §§ 1441 and 1446, a deadline that cannot be extended by consent or court order. *Cook v. Traveler Cos.*, 904 F. Supp. 841, 842 (N.D. Ill. 1995). A recent decision from the Third Circuit Court of Appeals, however, provides guidance as how to effectively extend the removal deadline in multi-defendant actions.

In *Delalla v. Hanover Insurance*, No. 10-3933, 2011 U.S. App. LEXIS 20651 (3d Cir. Oct. 12, 2011), the Third Circuit determined that, under the federal removal statute, in an action with multiple defendants, each defendant individually has 30 days from the date of service of process to file a notice of removal

(the “later-served” rule), rather than 30 days from the date the first defendant is served (the “first-served” rule). The Third Circuit’s adoption of the “later-served” rule is significant for at least two reasons. First, it allows an earlier-served defendant to join in a notice of removal filed by a later-served defendant, even though the 30-day removal period for the earlier-served defendant has lapsed. Second, it brings the Third Circuit in line with the majority of the Circuits that have addressed this issue – specifically, the Sixth, Eighth, Ninth and Eleventh Circuits – and further widens the Circuit split regarding what Congress intended by the plain text of the removal statute. Notably, neither the United States Supreme Court nor the First, Second, Seventh, or Tenth Circuits have considered the issue. *See, e.g., Abdullah v. Am. Prod. Co., Inc.*, 661 F. Supp. 2d 84, 85 (D. Mass. 2009) (noting the First Circuit has not yet endorsed either the first or last-served defendant rule); *Lead I JV, LP v. N. Fork Bank*, 2009 U.S. Dist. LEXIS 19777, at *10-11 (E.D.N.Y. Mar. 11, 2009) (noting that multi-defendant removal deadline has not be addressed by the Supreme Court or the Second Circuit); *Save-A-Life Found., Inc. v. Heimlich*, 601 F. Supp. 2d 1005, 1008 (N.D. Ill. 2009) (noting neither the Supreme Court nor the Seventh Circuit has addressed the multi-defendant removal deadline); *Day Imaging, Inc. v.*

Color Labs Enter., L.L.C., 2009 U.S. Dist. LEXIS 122268, at *4 (D. Colo. Dec. 11, 2009) (noting the Tenth Circuit has not decided whether to adopt the first-served or last-served defendant rule).

Facts

Nicole M. Delalla and NMD Marketing Inc. (collectively, “NMD”) were sued for trademark infringement. NMD held a liability insurance policy issued by an insurer (“Insurer”), which retained a law firm (“Law Firm”) to represent NMD. The Law Firm negotiated a settlement of the trademark dispute, and thereafter was sued by NMD in state court for legal malpractice. The Insurer was named in the



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suit. Thereafter, more than 30 days after the Insurer was served with process, but less than 30 days after the Law Firm was served, the Law Firm filed a notice of removal (“Notice”) to the District Court for the District of New Jersey. The Insurer joined in the Notice.

NMD moved to remand the action to state court, alleging that the Notice was untimely because it was filed more than 30 days after the Insurer was served. The District Court, applying the “later-served” rule, denied the motion and held that the Law Firm had timely filed its notice. The action was transferred to the Eastern District of Pennsylvania, where it was ultimately dismissed with prejudice. NMD then appealed, asserting, among other things, that the denial of the remand motion was error. On appeal, the Third Circuit framed the question as follows: “Does the first-served defendant’s 30-day clock run for all subsequently served defen-



dants (the first-served rule), or does each defendant get his own 30 days to remove after being served (the later-served rule)?” It decided that the “later-served” rule was correct and that the remand motion was properly denied, joining the majority of circuit courts that have considered the issue.

By the time the Third Circuit issued its decision, the Fourth and Fifth Circuits had already adopted variations of the “first-served” rule, where removal must occur within 30 days of service on the first-served defendant, while the Sixth, Eighth, Ninth, and Eleventh Circuits had adopted the “later-served” rule under which “each defendant individually has 30 days to file a notice of removal beginning when the particular defendant is served.” *Destfino v. Reiswig*, 630 F.3d 952(79 U.S.L.W. 1965 (9th Cir. 2011)).

The Third Circuit favored the “later-served” rule “for reasons grounded in statutory construction, equity and common sense,” finding that the later-served rule represents the best reading of 28 U.S.C. § 1446(b) and affords more equitable treatment of later-served defendants. The Court, relying heavily on

the text of the statute, observed that 28 U.S.C. § 1446(a) provides that a “defendant or defendants” may file a notice of removal. Section 1446(b), which sets out the 30-day limitation, uses the singular and provides that “[t]he notice of removal ... shall be filed within 30 days after the receipt by the defendant.”

The Court found that the text of § 1446 points toward the later-served rule because the sections must be read together: section 1446(a) specifically contemplates the filing of multiple notices of removal, while § 1446(b) pertains to an individual defendant’s notice of removal. It also concluded that the “later-served” rule was more equitable, as: (1) “[u]nder the later-served rule, each defendant has an equal amount of time in which to decide whether or not to file a notice of removal,” and (2) “under the first-served rule, the possibility exists that a later-served defendant would have had to file a notice of removal before being served with a complaint.” The Court was also concerned that, in a first-served scenario, a plaintiff could avoid a notice of removal by delaying service on the defendant most likely to seek removal.

Lastly, the Court found that the U.S. Supreme Court implicitly rejected the policy that removal statutes be strictly construed. (See *Murphy Brothers Inc. v. Michetti Pipe Stringing Inc.*, 526 U.S. 344 [1999], which held that under 28 U.S.C. § 1446(b) a defendant’s time to remove a case is not triggered until a defendant is formally served with process). The Court reasoned that given the Supreme Court’s abandonment of the policy of strict construction, the plain language of § 1446, and the fairness concerns at issue, the “later-served” rule was the proper interpretation of Congress’ intent as reflected by the plain text of the removal statute.

Consequently, for those attorneys contemplating removal to federal court after the expiration of the 30-day removal deadline in 28 U.S.C. §§ 1441 and 1446, Delalla provides concrete guidance as how to effectively extend the removal deadline in multi-defendant actions.

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