HOOSIER LITIGATION BLOG

www.PavlackLawFirm.com

August 12 **2016**

by: Colin E. Flora
Associate Civil Litigation Attorney

Can Federal Appellate Court Enter Sanctions For Actions in State Court?

This week, we return to a discussion from two months ago, in which we examined a case from the Seventh Circuit, *Boyer v. BNSF Railway Company*. In *Boyer*, the Seventh Circuit awarded sanctions against the plaintiffs' counsel under 28 U.S.C. § 1927. We not only return to the topic, but to the case. The catalyst is because there was a request for rehearing on the issue of sanctions and the Seventh Circuit issue its opinion on rehearing earlier this week.

On rehearing, plaintiffs' counsel raised an excellent argument: did the Seventh Circuit have the authority to sanction him under § 1927. Section 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

In order for the argument to make sense, we need to take a look back at what happened to cause the sanction in the first place.

It all started with a putative class action in a Wisconsin federal district court. The plaintiffs lost but raised a new argument on appeal. The argument was deemed

waived and was not adjudicated. Consequently, one of the lawyers from the original case filed a new putative class action was raising that argument. The second case, despite having no connection to Arkansas, was filed in Arkansas state court, removed to Arkansas federal court, and finally transferred to Wisconsin federal court. On appeal, the Seventh Circuit noted a history of shifting arguments in the case, but what ultimately proved to be the key to the award of sanctions was the filing of the case in Arkansas state court when there was no meaning connection to Arkansas. Thus, the primary question argued on rehearing was whether § 1927 could extend a federal court's ability to level sanctions for what is ultimately an action in state court.

Plaintiffs' counsel argued that the "language regarding admission to practice in federal court" confines the power to sanction "to conduct which occurs in federal rather than state court." His argument was not without support. As the court noted:

> It is an interesting question whether the decision to file the case in state court is beyond the scope of section 1927, in view of the fact that the case was removable when filed and in fact was immediately removed by the defendant. *Compare GRiD Sys. Corp. v. John Fluke Mfg. Co.*, 41 F.3d 1318, 1319 (9th Cir. 1994) (per curiam) (section 1927 does not authorize sanctions for filing state court lawsuit, later removed, during pendency of previously-filed federal suit and related arbitration, when "[t]he suit filed in state court [was] an entirely separate action not subject to the sanctioning power of the district court"); *and Smith v. Psychiatric Solutions, Inc.*, 864 F. Supp. 2d 1241, 1269 (N.D. Fla. 2012) (counsel cannot be sanctioned pursuant to section 1927 for conduct in state court prior to removal), *aff'd*, 750 F.3d 1253 (11th Cir. 2014), *with In re Auction Houses Antitrust Litigation*, 2004 WL 2624896, at *8 (S.D.N.Y. Nov. 18, 2004) (section 1927 sanctions imposed on federal class member who, without opting out of class action settlement, instead filed individual suit in state court, compelling defendants to remove state suit and have it transferred to district where class action pending); *and Pentagen Techs. Int'l Ltd. v. United States*, 172 F. Supp. 2d 464, 473–74 (S.D.N.Y. 2001) (section 1927 sanctions imposed for filing of serial lawsuits in both state and federal forums in effort "to evade previous rulings" and resulting in "needless occupation of judicial resources"), *aff'd*, 63 F. App'x 548 (2d Cir. 2003) (unpublished).

For plaintiffs' counsel, a big problem was not the merit of the argument; rather, it was the timing. In the original opinion, the Court noted that dating back to the original class action case, there was a problem with constantly changing

arguments. This seems to be a continuation. Without precisely resolving the question of whether the argument was waived, the court treated it as forfeited, permitting consideration of the argument under the extremely high threshold of plain error. Ultimately, the high burden was not the catalyst for affirming the award of sanctions.

The court emphasized that the sanction was not for behavior in another case or "in the runup to litigation." Instead, it was a sanction for abuse of the judicial process. The court further recognized that even if § 1927 would not permit sanctions for what occurred in state court, "it is not obvious that the burden of having the case transferred from the Eastern District of Arkansas to the Western District of Wisconsin following removal would be beyond the authority conveyed by section 1927 to redress, as obtaining the transfer indubitably did occur in federal court."

In the end, the permissible reach of § 1927 did not matter. The court chose to invoke, as additional support for the decision, its "inherent authority to sanction [plaintiffs' counsel] for willfully abusing the judicial process and/or pursing a bad-faith litigation strategy by initiating th[e] litigation in a patently inappropriate forum." In support, the court cited prior cases from the Seventh Circuit, D.C. Circuit, and the Supreme Court recognizing a "court's inherent power to sanction attorney misconduct extends to conduct that occurred before other tribunals[.]" At the very least, because there was a permissible basis for the sanction, the decision under § 1927 "did not produce a patently unjust result demanding correction despite the forfeiture." Consequently, the sanction award stands.

The takeaway from the case is pretty simple. If an attorney engages in abusive litigation practices, a federal court has extremely broad authority to sanction the attorney for his/her actions. Sitting this far removed from the case, it is hard to say what motivated the filing of the second action in state court. Perhaps, there is an understandable reason, but the Seventh Circuit certainly did not find such a reason, nor did any come through the opinion. Consequently, the case stands as a reminder to be careful in selecting the forum to initiate a case.

Join us again next time for further discussion of developments in the law.

Sources

- *Boyer v. BNSF Ry. Co.*, —F.3d—, Nos. 14-3131 & 14-3182, 2016 U.S. App. LEXIS 10021 (June 1), *on reh'g* (7th Cir. August 9, 2016) (Rovner, J.).
- *GRiD Sys. Corp. v. John Fluke Mfg. Co.*, 41 F.3d 1318 (9th Cir. 1994) (per

curiam)
- *Smith v. Psychiatric Solutions, Inc.*, 864 F. Supp. 2d 1241 (N.D. Fla. 2012), *aff'd*, 750 F.3d 1253 (11th Cir. 2014)
- *In re Auction Houses Antitrust Litigation*, No. 00 Civ. 0648, 2004 U.S. Dist. LEXIS 23351, 2004 WL 2624896 (S.D.N.Y. Nov. 18, 2004)
- *Pentagen Techs. Int'l Ltd. v. United States*, 172 F. Supp. 2d 464 (S.D.N.Y. 2001), *aff'd*, 63 F. App'x 548 (2d Cir. 2003) (unpublished).
- 28 U.S.C. § 1927.
- Colin E. Flora, *A Flooded Bridge Too Far: The Seventh Circuit & Section 1927 Sanctions*, HOOSIER LITIG. BLOG (June 10, 2016).