Once More With Feeling - Removal Before Service

Wednesday, November 16, 2011

God only knows how many times we've posted on the topic of removal before service, because we can't count that high. We did take a look through our "removal" topic tag and figured out that our last post about this subject was back in May. Well, a reader recently sent us a new decision, so we've found an occasion to bring up this old saw again.

Briefly, for you newbies, what's the big deal with removal before service? First, "removal" in this context refers to the process for getting cases out of state court (generally thought of – by both sides – as more plaintiff-friendly), and getting them into federal court (conversely considered more defense friendly).

Plaintiffs do all sorts of things to get cases into their preferred state-court forums (fori? foræ?). One of them is to take advantage of the so-called "forum defendant" exception to federal diversity (that is, the plaintiff and defendant are citizens of different states) jurisdiction. That exception allows a diverse plaintiff (say, from North Carolina) to sue a defendant (say, a large drug company) in the defendant's home state. This trick is employed when the defendant has the misfortune of being located in a state (say, Pennsylvania, New Jersey, or California) that also contains a judicial hellhole favored by the plaintiff's bar.

Well, the "forum defendant" exception is purely statutory, and the statute, 28 U.S.C. §1441(b), provides that only defendants "properly joined and served" at the time of removal count as forum defendants. Defendants recently figured out (all right, we admit, we helped a little bit) that if the case could be removed ASAP, before the plaintiff had time to serve the forum defendant – the forum defendant no longer defeated the removal of an otherwise diverse case under the best reading of the statute, because it hadn't been "served" as the statute requires.

In removal before service cases, the opposing arguments are: On the defense side – even if Congress probably didn't intend (or even think about) this twist, the plain language of the statute provides that removal before service trumps the forum defendant rule. On the plaintiff's side – even though we took advantage of the forum defendant loophole to have a plaintiff from Upper Dogpatch bring suit in the defendant's home hellhole, it's too much "gamesmanship" to allow defendants to take advantage of their removal before service loophole to our loophole.

Anyway, we've painted the scene. So here's what's just happened. In Christison v. Biogen Idec, Inc., No. C 11-4382 RS, slip op. (N.D. Cal. Nov. 14, 2011), a plaintiff from Utah (not usually thought of as a judicial hellhole) chose to sue several non-Utah defendants, including Elan, a California corporation in California state court (a full-fledged judicial hellhole). The defendants (or at least Biogen) got wise to the suit and got it out of Dodge within a week of its being filed – before plaintiff could serve process on Elan. Id. at 2.

Plaintiff argued gamesmanship. Defendants argued plain meaning. The court came down solidly on the side of Congress meaning what it says – and that Congress can change it if they didn't:

"There is no dispute, however, that Elan had not been served with summons and complaint at the time that defendant Biogen Idec, Inc. filed the operative notice of removal. The plain language of the removal statute permits removal where no defendant who has been "properly joined and **served**" is a resident of the forum. 28 U.S.C. §1441(b) (emphasis added). . . . [T]he mere absence of . . . delay here does not warrant adopting a judge-made rule departing from statutory text. Not only does it remain true that Congress can amend the statute if there in fact is a significant problem with "gamesmanship" . . . plaintiff could have avoided the issue, of which his counsel undoubtedly was aware, by ensuring that he served Elan prior to giving Biogen notice of the filing."

Christison, slip op. at 1-2 (following Carreon v. Alza Corp., 2010 WL 539392 (N.D. Cal. Feb. 9, 2010), which we cited in our last removal before service post) (emphasis original).

Thanks to reader Joe Blute of Mintz Levin for sending along this case. By the way, as part of this post, we also searched for other good removal before service decisions since our last post in May and found nothing useful. If you're out there sitting on something good, please – like Joe Blute – send it along to us.