

July 30, 2008

Eleventh Circuit: Removal is Each Defendant's Right; Time Runs from Each Defendant's Service

In multiple-defendant cases, federal courts disagree on when the 30-day period for removal begins to run if the defendants are served on different dates. Is it when the first defendant or the last defendant is served? If the time runs when the first defendant is served, then a clever plaintiff can potentially thwart removal by serving a token, inattentive or cooperative defendant and then allowing 30 days to pass before serving the primary target defendant. A July 29, 2008, Eleventh Circuit decision, however, comes down on the side of the last-served rule. *Bailey ex. rel. Estate of Beal v. Janssen Pharmaceutica, Inc.*, No. 07-12258, ___F.3d___, 2008 WL 2894742 (11th Cir. July 29, 2008).

Bailey was a wrongful death action that was removed pursuant to 28 U.S.C. § 1446(b) by the last-served defendant more than 30 days after service on the other defendants. The plaintiff moved to remand the case, claiming untimely removal, but the district court denied the motion and then later dismissed the complaint. The plaintiff appealed and challenged the denial of the remand motion.

The Eleventh Circuit acknowledged the question was one of first impression for the court. The court noted the circuit split over whether each defendant has a right to seek removal within 30 days of receipt of service or whether the time period for all defendants runs from the service date on the first-served defendant. While the Sixth and Eighth Circuits have adopted the last-served rule, the Fifth and perhaps the Fourth utilize the first-served rule.¹ The court discerned a trend in the case law, however, toward the last-served rule. The court also found that “both common sense and considerations of equity favor the last-served defendant rule.” The court rejected an argument that selecting the last-served rule would be inconsistent with its ordinarily strict construction of the removal statutes, citing *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), which, the court noted, endorsed a more relaxed construction of the removal statutes. The court concluded that *Murphy Brothers* supported the last-served rule by holding that a defendant has no obligation to participate in removal prior to receipt of formal service of process.

Note that the first- or last-served controversy is a by-product of the so-called rule of unanimity for conventional removal: all defendants must join or consent to removal. The Class Action Fairness Act abolishes this rule for removable class actions. 28 U.S.C § 1453(b).



¹ Compare *Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (adopting last-served rule) and *Brierly v. Aluisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999) (adopting last-served rule) with *Getty Oil Corp., Div. of Texaco, Inc. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988) (applying first-served rule) and *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986) (applying first-served rule but noting “[e]xceptional circumstances might permit removal even when a later-joined defendant petitions more than precisely thirty days after the first defendant is served”) and *McKinney v. Bd. Of Trustee of Md. Comty. Coll.*, 955 F.2d 924, 926-28 (4th Cir. 1992) (noting in dicta the applicability of first-filed rule where no timely removal petition is filed by first-served defendants but holding last-served defendants have 30 days after service to join in a removal petition timely filed by first-served defendants).

If you would like a copy of Bailey or have any questions about this alert, please feel free to contact any of the attorneys in our Litigation group, including the following:

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