Professional Perspective

Fraudulent Joinder: Strategies for Removal to Federal Court

Michelle Ramirez, Morgan Branch & Claire Lee, Sidley Austin LLP

Bloomberg Law

Fraudulent Joinder: Strategies for Removal to Federal Court

Contributed by Michelle Ramirez, Morgan Branch & Claire Lee, Sidley Austin

Selecting a jurisdiction is a critical litigation decision—and can be outcome-determinative. Plaintiffs' counsel deploy myriad tactics to keep their cases in the jurisdiction they deem most advantageous. This includes plaintiffs' counsel's seeming interest to keep cases in state, as opposed to federal, court. One particular tactic to effectuate this plan is nicknamed "fraudulent joinder," which involves improperly joining non-diverse "throw away" defendants—such as sales representatives, insurers, or individual employees—for the sole, strategic purpose of destroying diversity and keeping a litigation in the selected state court.

But "fraudulent joinder" is a misnomer: It does not—and should not—require the heightened showing of fraud. Indeed, a number of courts have recognized that "improper joinder" is preferred over the term "fraudulent joinder." See, e.g., *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 n.1 (5th Cir. 2004); *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469, 473 n.1 (5th Cir. 2022).

Instead, recent cases have highlighted how, when faced with improper joinder, defendants may pierce pleadings with extraneous evidence, leverage conclusory allegations, and utilize other methods to effectively remove cases to federal court.

Recognizing the use of improper joinder, knowing the case trends, and harnessing strategies to mitigate against it can be the difference that results in removal to federal court. This article provides strategic guidance to defense attorneys for how to best position a matter for successful removal to federal court when they encounter a case of improper joinder.

Improper Joinder to Avoid Federal Court

Federal courts are courts of limited jurisdiction, which means that federal power extends to only specific subject matters, such as cases involving violations of the US Constitution or federal laws and claims against the government. A federal court may also exercise jurisdiction over civil cases asserting state law claims as long as there is "diversity" among the parties, i.e., when all plaintiffs and defendants are citizens of different states, and the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332. One seemingly simple way to destroy diversity jurisdiction and curb federal power is to name a non-diverse defendant—with sometimes limited ties to the litigation—among otherwise diverse defendants, for the sole purpose of defeating a motion for removal (i.e., improper joinder). Similarly, a plaintiff may attempt to defeat a defendant's right to remove a case to federal court by naming even a diverse in-state defendant. See 28 U.S.C. § 1441(b)(2) ("[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.")

Plaintiffs have improperly joined non-diverse and/or in-state defendants in a range of cases, including insurance, breach of contract, fraud, tort, and other commercial litigation claims. In insurance cases, for example, non-diverse insurance agents have been improperly joined to keep the case in state court when an insurer was allegedly unwilling to provide insurance coverage to an out-of-state policyholder. *Windy City Limousine Co. v. Cincinnati Fin. Corp.*, No. 20-cv-04901, 2021 BL 392611 (N.D. Ill. Oct. 14, 2021).

Similarly, in breach of contract cases, plaintiffs have improperly joined non-diverse and/or in-state contracting employee-agents of diverse corporate defendants to avoid diversity jurisdiction. See, e.g., *Custom Classic Autos. & Collision Repair, Inc. v. Axalta Coating Sys., LLC*, No. 20 CV 5079, 2020 BL 482325 (N.D. Ill. Dec. 11, 2020).

Even non-diverse and/or in-state parent corporations have been sued for the actions of its diverse subsidiary for the sole purpose of keeping the case in state court. See *Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir. 1992); *Higley v. Cessna Aircraft Co.*, No. CV 10-3345-GHK, 2010 BL 387933 (C.D. Cal. July 21, 2010).

And in the tort and product liability context, plaintiffs will often join non-diverse and/or in-state sales representatives, distributors, or company employees, with minimal or no involvement in the underlying tort claims, in order to keep a suit against an otherwise diverse corporation or manufacturer in state court. For instance, in *Engelman v. Hogan*, the plaintiff improperly joined a non-diverse store employee, who was not present when the alleged tort occurred, asserting tort liability when a customer fell in the store where he worked. See 2022 WL 159733 (N.D. Ill. Jan. 18, 2022).

Similarly, plaintiff in *Lundy v. Cliburn Truck Lines, Inc.* included a non-diverse distributor for shipping and delivering alleged carcinogens to a convenience store where the plaintiff worked. See 397 F. Supp. 2d 823 (S.D. Miss. 2005). And in *Hall v. OrthoMidwest, Inc.*, plaintiff joined the non-diverse orthopedic device distributor of the device he claimed injured him. See 541 F. Supp. 3d 802 (N.D. Ohio 2021). Regardless of the type of litigation, there are specific, concrete strategies to employ when seeking federal removal in the face of a potential improper joinder.

Three Strategies for Countering Improper Joinder

1. Provide limited, extraneous evidence in the form of a sworn declaration.

To support their removal, defendants may consider filing a declaration from the non-diverse, improperly joined party with discrete facts establishing that joinder is improper. This type of evidence can be outcome-determinative in removal decisions.

For example, in *Elrod v. Bayer Corp*., the plaintiff filed suit in state court against a diverse defendant, the medical device manufacturer, as well as a sales representative who resided in the jurisdiction, asserting that the sales representative knowingly furnished allegedly false information to a healthcare provider treating the plaintiff. *See* No. 19 cv 06048, 2020 BL 278751 (N.D. Ill. July 27, 2020). The defendant removed the case to federal court on the basis of diversity jurisdiction and improper joinder. The court agreed with the defendant that the sales representative was improperly joined on the basis that the claim against the sales representative had "no reasonable possibility of success" because there is no duty, as a matter of law, for a sales representative to "independently substantiate" information furnished by their employer.

Critical to the court's decision was an affidavit submitted by the sales representative noting that to the best of her knowledge the information her employer furnished was correct, she had no independent knowledge of any risks of the device, and she had no independent knowledge to test the veracity of the sales and marketing materials.

While the choice to permit evidence beyond the pleadings is discretionary, every appellate court except the US Court of Appeals for the Sixth Circuit has clearly stated that courts may look beyond the pleadings when analyzing improper joinder. See Charles A. Wright & Arthur R. Miller, 13F Fed. Prac. & Proc. Juris. § 3641.1 (3d ed. 2022 update) (collecting cases). And even in the Sixth Circuit, at least two district courts have said the same. See *Musial v. PTC All. Corp.*, No. 5:08CV-45R., 2008 BL 135495 (W.D. Ky. June 25, 2008); *Miller v. PPG Indus., Inc.*, 237 F. Supp. 2d 756 (W.D. Ky. 2002).

Courts generally are more willing to look beyond the pleadings if a declaration is limited to jurisdictional facts, discrete facts relevant to the propriety of joinder that plaintiffs misstated or omitted, or when there is no chance of liability against the non-diverse defendant based on the black letter law. See, e.g., *Lundy*, 397 F. Supp. 2d at 829; *Engelman*, 2022 WL 159733 at *1 n.1; *Jordan v. Moran Foods*, 2020 WL 2063939, at *2–3 (S.D. Ill. April 29, 2020).

On the other hand, courts appear less willing to consider evidence outside the pleadings when the declaration appears to contain potentially disputed facts. In addition, while a court may consider an uncontradicted declaration of jurisdictional facts, declarations that require the court to determine credibility or weigh evidence are disfavored. For example, in *Dillon v. Naman, Howell, Smith & Lee, PLLC*, the court disregarded an affidavit submitted by the non-diverse defendant because the affidavit asserted facts regarding the ultimate issue—i.e., whether the non-diverse defendant committed professional negligence. See No. 18-CV-00470, 2018 BL 208125 (N.D. Ill. June 12, 2018). See also, e.g., *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 393–94 (5th Cir. 2000); *Momans v. St. John's Nw. Military Acad., Inc.*, 2000 WL 33976543, at *3-4 (N.D. Ill. Apr. 20, 2000). Finally, providing a declaration can open the door for a competing affidavit, see *Smith v. Phillip Morris USA Inc.*, No. 18 C 06397, 2019 BL 372797 (N.D. Ill. Sept. 30, 2019), or potentially a deposition or additional discovery.

Practitioners and their defendant-clients should consider:

- Whether there are discrete facts that would establish improper joinder
- Whether non-liability is black letter law
- How courts in the jurisdiction consider evidence outside the pleadings

2. Take advantage of conclusory allegations.

Even without a supporting declaration, defendants may still succeed on federal removal if the allegations purporting to justify joinder of the non-diverse party are suspect or conclusory. For example, in another recent case, *Owens v. Bos. Sci. Corp.*, the defendant removed the matter to federal court under the premise that the sales representative had been improperly joined. See 2022 WL 17177331, *4 (E.D. Mo. Nov. 23, 2022). The federal court agreed, dismissing the claims against the sales representative and maintaining the case in federal court on the basis that the theories of liability against the sales representative were based solely on conclusory allegation that "strain[ed] credulity."

However, courts are not always willing to pierce the pleadings, as in *Polanco-Mitarotonda v. Conagra Brands, Inc.*, 2022 WL 17324342 (D.N.J. Nov. 29, 2022), where a plaintiff sued a manufacturer of cooking spray and a non-diverse employee of the store where she bought the spray. Despite evidence showing that the employee was not working at the store at the time the product was manufactured or when the plaintiff was allegedly injured, a federal court found that the joinder was proper and remanded the case to state court on the basis that it was unwilling to "engage in a merits analysis."

In practice, removal based on conclusory allegations often depends on whether the state or federal pleading standard applies. For example, many states employ more lenient notice pleading standards that could allow a claim to survive, and thus an improper joinder argument to fail, than the federal pleading standard. *In re Regions Morgan Keegan Sec., Derivative, & ERISA Litig.*, No. 2:10-cv-02260-SHM, 2013 BL 143636 (W.D. Tenn. May 31, 2013); *Kimball v. Better Bus. Bureau of W. Fla.*, 613 F. App'x 821, 822–25 (11th Cir. 2015).

Which pleading standard applies can make the difference, like in *Lundy v. Cliburn Truck Lines, Inc.* where the court remanded the case back to state court finding no improper joinder under the state pleading standard, but noting that "[a]pplication of the federal pleading standard would, in this case, produce the opposite result." 397 F. Supp. 2d 823 (S.D. Miss. 2005).

Defendants should pay close attention to the pleading standard in the state and federal jurisdictions. And since the appropriate standard for evaluating whether the pleadings support a claim against the non-diverse defendant (i.e., whether the state or federal pleading standard controls), is an open question in many jurisdictions, this is a place for creative argument. *See Custom Classic Autos. & Collision Repair, Inc.*, No. 20 CV 5079, 2020 BL 482325 (explaining that it is an open question in the Seventh Circuit); but see *Int'l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd.*, 818 F.3d 193, 202 (5th Cir. 2016) (the Fifth Circuit applies the federal standard); *Kimball*, 613 F. App'x at 825 (the Eleventh Circuit applies the state standard).

3. Pre-Service (i.e., "Snap") removal where an in-state defendant is improperly joined. Defendants may also consider deploying pre-service removal, also known as "snap removal," which allows a defendant to remove a case before in-state defendants, who would otherwise prevent removal, are served. Frequently, plaintiffs use the related tactic of naming an in-state defendant to defeat removal pursuant to Title 28 of the U.S. Code, Section 1441(b)(2), which provides that "[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." (emphasis added). So, in addition to joining non-diverse defendants, plaintiffs will join in-state defendants, regardless of diversity, to defeat removal. But if a party is not served, then, a defendant can promptly remove to federal court regardless of diversity.

But "snap" removals have generated mixed reviews among circuit court judges, resulting in disagreement between circuits, circuit splits, and even proposed legislation. See Removal Jurisdiction Clarification Act of 2020, H.R. 5801, 116th Cong. (2020). The weight of appellate authority currently supports such removals. The US Courts of Appeals for the Second, see *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705–06 (2d Cir. 2019), Third, see *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152–54 (3d Cir. 2018), and Fifth, *see Texas Brine Co., LLC v. Am. Arb. Ass'n, Inc.*, 955 F.3d 482, 485–87 (5th Cir. 2020) Circuits have explicitly approved snap removal, and the Sixth has done so in dicta. See *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001). The Eleventh Circuit has rejected it, albeit only in dicta. *See Goodwin v. Reynolds*, 757 F.3d 1216, 1220–22 (11th Cir. 2014).

At the district court level, there is a split in authority—even in the same jurisdiction. See, e.g., *Deutsche Bank Nat'l Tr. Co. v. Chicago Title Ins. Co.*, 2022 WL 2819844, at *3–5 (D. Nev. July 18, 2022) (determining that pre-serve removal is improper); *In re Jean B. Mcgill Revocable Living Tr.*, No. 16-CV-707-GKF-TLW, 2017 BL 3747 (N.D. Okla. Jan. 6, 2017) (The Court "does not believe that Congress intended to trade one form of procedural gamesmanship—fraudulent joinder—for another—snap removal."); *Grandinetti v. Uber Techs., Inc.*, 476 F. Supp. 3d 747, 754–56 (N.D. Ill. 2020) (permitting snap removal and collecting cases); *In re Abbott Lab'y Preterm Infant Nutrition Prods. Liab. Litig.*, No. 3026, 2022 BL 217546 (N.D. Ill. June 23, 2022) ("The court concludes that § 1441(b)(2) does not permit snap removal, either on its own statutory terms or under the doctrine of absurdity."); *Al-Ameri v. The Johns Hopkins Hosp.*, No. GLR-15-1163, 2015 BL 443527 (D. Md. June 24, 2015) ("Because Defendant had not been served at the time of removal, it is not barred by § 1441(b)(2) from removing the matter to this Court under diversity jurisdiction."); *Kirst on Behalf of Nominal Def. Novavax, Inc. v. Erck*, No. TDC-22-0024, 2022 BL 255511 (D. Md. July 21, 2022) (rejecting snap removal).

Because these pre-service removals require early detection of lawsuits being filed in advance of a "federal jurisdiction busting" defendant being served, practitioners and their defendant-clients should be prepared to quickly file a notice of removal to federal court as soon as a complaint is served to take advantage of snap removal benefits. In doing so, defendants should be mindful of whether the relevant federal jurisdiction approves or disapproves of the strategy.

Conclusion

Awareness of these strategic options, and the related case trends, can assist defendants in taking the "fraud" out of fraudulent joinder. Faced with improper joinder, practitioners should consider whether any of these three tactics may increase their client-defendants' chances of landing in federal court, while at the same time weighing the risks of doing so.