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TWO RECENT CASES LIMIT DEFENDANT'S RIGHTS TO FEDERAL REMOVAL

It is widely considered a tactical advantage for a defendant in Virginia to remove a case to federal court. While the prerequisites for removal to Federal Court are relatively straightforward and are set forth in 28 USC §1441 et seq, there is a wealth of case law interpreting the finer points of removal which can muddy the waters of a seemingly cut and dry process. In broad terms, there are two grounds for removal: diversity and federal question. Recently, the Virginia Federal Courts published two opinions that limit how and when a case can be removed to federal court.

The first case, Culkin v. CNH America, LLC, et al. (E.D.Va. 1:08cv1066), speaks to the rule that pursuant to 28 U.S.C. §1446, removal must take place within one (1) year of the "commencement" of the suit. The term "commencement" has recently been interpreted by the Eastern District of Virginia as meaning the date on which the suit was filed, as opposed to the date on which the suit was served. Rule 3:5 of the Supreme Court of Virginia controls the service deadlines at the state level by giving Plaintiff one (1) year from the date of fil-

ing to effect service of process on a defendant at the state level. (See also Code of Virginia §8.01-275.1) In Culkin v. CNH America, LLC, et al., Plaintiff originally filed suit in the Loudoun County Circuit Court on August 30, 2007. On October 6, 2008, one of the defendants was dismissed due to the plaintiff's failure to serve the defendant after one year. The dismissal of the defendant created complete diversity of the parties, and on October 9, 2008, a notice of removal was filed. Following the filing of the removal pleadings, Plaintiff filed an Amended Complaint with the Loudoun County Circuit Court on October 31, 2008 adding a Virginia resident as a defendant. By opinion, the Court provided an insightful review of 28 U.S.C. §1332. First, 28 U.S.C. §1332 requires a party seeking removal to file a notice of removal within thirty (30) days of receipt of a pleading making the case removable. Second, 28 U.S.C. §1446 (b) requires the party seeking removal to do so within "1 year after commencement of the action" where federal subject matter jurisdiction is based on diversity. To determine when a suit commences, the Court looked to the law of the Virginia. According to Rule 3:2, a suit is commenced in Virginia when the suit is filed with the Clerk of the Court. Since suit was originally filed on August 30, 2007 and the matter was removed on October 9, 2008, the Court found that the removal was not filed within "1 year after commencement."

In remanding the case to state

court, the District Court in Culkin declined to adopt the position that the one (1) year commencement period was equitably tolled. While the Defendant argued that equitable tolling was proper since Plaintiff stripped them of their ability to remove the case by delaying service of process at the State Level, the District Court decided not to adopt equitable tolling as a general rule in this Circuit. In support of this position, the District Court also noted that the party added to the suit in the Amended Complaint filed on October 31, 2008 who destroyed diversity was a necessary party. Accordingly, a Defendant who is a resident of a state and seeks to remove to federal court is prohibited from doing so pursuant to 28 U.S.C. §1441(b).

Removal gets slightly more complicated when there are multiple defendants. For a removal to be proper, there must be written, express consent from the other defendants pursuant to 28 U.S.C. § 1447(c). This has been interpreted by the Eastern District of Virginia to mean that a defendant must file a separate pleading within thirty (30) days of removal with the Court expressly consenting to the removal initiated by a co-defendant. If such consent is not filed with the Court by a non-removing defendant, the matter is ripe for remand.

Recently, this procedural aspect was upheld by the Eastern District of Virginia in the case of Crockett v. General Motor Corp. (E.D.Va. 3:08-cv 469) In Crockett,



Plaintiff filed suit in Circuit Court for the City of Richmond on June 12, 2008. The complaint named five defendants. One of the five defendants was General Motors, who was served with the suit on June 20, 2008. On July 18, 2008, the remaining four defendants were served with the suit. One of these four (4) defendants filed removal pleadings on July 25, 2008 based on diversity jurisdiction grounds. Plaintiff filed a Motion to Remand in the District Court stating that the removal was not proper pursuant to 28 U.S.C. §1446(b) and 1447(c) because General Motors had neither consented to the removal as required by 28 U.S.C. §1447(c) or filed a removal within the thirty (30) day time period proscribed by 28 U.S.C. §1446(b). The District Court agreed with Plaintiff and in remanding the matter to the Cir-

cuit Court for the City of Richmond, reiterated the principles applied to removal with multiple defendants. They are: (1) each defendant must file or join a notice of removal within thirty (30) days of receiving process; (2) all defendants must consent to removal; and (3) the failure of the first served defendant to file a legally sufficient notice of removal within thirty (30) days of receiving service generally precludes removal by later-served defendants. The third element is noteworthy, because if the first-served defendant elects not to remove the case, such decision is binding upon the subsequently-served defendants and precludes their attempts to remove. In this case, General Motor's decision not to remove the case to federal court was binding on the subsequently served co-defendants.

With these rulings in mind, it is

critical that strategy decisions be made as soon as notice of suit is received. If removal is critical to the defense strategy, a defendant may want to consider waiving service and entering an appearance by filing removal papers. At the same time, it is critical to reach out to co-defendants and attempt to gain a consensus on removal before the actions of one defendant foreclose opportunities to the other defendants.



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