



FEDERAL JURISDICTION BASED ON REMOVAL: A 50-STATE SURVEY

A Report of the Pharmaceutical Subcommittee
of the Products Liability Committee

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining “Parties in Interest”

The U.S. District Court for the District of Maryland has concluded that the “real party in interest” requirement set forth in Federal Rule of Civil Procedure 17(a) means that “[e]very action shall be prosecuted in the name of the party who, by the substantive law, has the right to be enforced.”¹ In other words, the real party in interest is the party that has the right to bring and control the lawsuit, and not necessarily the party that may benefit financially from the suit.² In the subrogation context, a subrogee becomes a real party in interest and, if it pays the entire loss, stands in the shoes of the subrogor and thereby becomes the sole real party in interest.³

2. Presence of “Doe” Defendants

The District of Maryland has taken the position that a “Doe” defendant will not be permitted to destroy diversity and preclude removal. The court recently commented that, while all defendants must give timely notice of removal, this requirement does not extend to “ ‘John

¹ Potomac Elec. Power Co. v. The Babcock & Wilcox Co., 54 F.R.D. 486, 489 (D. Md. 1972) (citation omitted).

² South Down Liquors, Inc. v. Hayes, 323 Md. 4, 7-8, 590 A.2d 161, 162-63 (1991) (citations omitted) (comparing Maryland Rule 2-201 to its federal counterpart, F.R.C.P. 17(a)).

³ U.S. v. Sherwood Distilling Co., 235 F. Supp. 776, 781 (D. Md. 1964).

Doe' defendants whose identities are unknown.”⁴ “Exceptions [to the requirement that each defendant timely file a notice of removal] exist for nominal defendants or defendants over whom the state court has no acquired jurisdiction, who need not consent to the removal.”⁵

3. Diversity for Putative Class Actions

Determination of diversity in the class action context may be in a state of flux in the District of Maryland and the Fourth Circuit. The Fourth Circuit has observed that in federal class actions based on diversity jurisdiction, only the named plaintiffs, and not all plaintiffs, must have citizenship that is diverse from that of the defendants.⁶ However, recent amendments to 15 U.S.C. § 1332 may have relaxed class action diversity requirements in Maryland federal court cases. According to the Class Action Fairness Act of 2005 (“CAFA”), federal jurisdiction exists over a class action where any named or unnamed class member’s citizenship is distinct from that of any defendant.⁷ This warrants monitoring, because while the Fourth Circuit and the District of Maryland have not determined the CAFA’s affect on diversity, at least one circuit court has held that CAFA supercedes *Snyder v. Harris*,⁸ on which the *Central Wesleyan College* decision relies.⁹

⁴ *Nozick v. Davidson Hotel Co.*, Civ. No. CCB-03-2988, 2004 U.S. Dist. LEXIS 101, *4-*5 (D. Md. Jan. 6, 2004) (citing *Green v. America Online (AOL)*, 318 F.3d 465, 470 (3d Cir. 2003)).

⁵ *Id.* at *5 (citing *Egle Nursing Home, Inc. v. Erie Ins. Group*, 981 F. Supp. 932, 933 (D. Md. 1997)).

⁶ *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 186 n.3 (4th Cir. 1993) (citations omitted).

⁷ 15 U.S.C. § 1332(d) (2005) (cited in *Chavis v. Fidelity Warranty Servs., Inc.*, 415 F. Supp. 2d 620, 625 (D.S.C. 2006)).

⁸ 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969).

⁹ *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1194 n.24 (11th Cir. 2007).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To satisfy the requirements of diversity jurisdiction, a defendant must also show that the amount in controversy *exceeds* \$75,000.¹⁰¹¹ In a class action suit, absent a “common and undivided interest” uniting the class members, the defendant has the burden of showing that each class member’s claim exceeds the amount in controversy.¹² A court may not include in the jurisdictional amount a plaintiff’s potential recovery of punitive damages and legal fees or available equitable relief, but these awards cannot be aggregated for each claimant.¹³

2. Application When a Specific Dollar Amount is Not Pled

Where a plaintiff does not claim a specific dollar amount, the defendant carries the burden of showing that the claim exceeds the jurisdictional amount. “When . . . the plaintiff’s complaint does not specify a particular amount of damages, the removing defendant must prove by a preponderance of the evidence that plaintiff’s claims meet the amount in controversy requirement.”¹⁴

3. Amount in Controversy Where Equitable Relief is Sought

There appears to be some ambiguity in cases decided by the District of Maryland regarding satisfaction of the amount in controversy in cases where equitable relief is sought. The amount in controversy for federal jurisdiction is measured by the claim’s value to either the

¹⁰ The CAFA has amended the amount in controversy requirement so that “district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000[.]” 28 U.S.C. § 1332(d)(2) (2005).

¹¹ *McKenzie v. Ocwen Fed. Bank FSB*, 306 F. Supp. 2d 543, 547 (D. Md. 2004) (citing 28 U.S.C. § 1332(a) (2005)) (emphasis added).

¹² *Mattingly v. Hughes Elec. Corp.*, 107 F. Supp. 2d 694, 696 (D. Md. 2000) (citation omitted); *see also* *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 124 (4th Cir. 2001) (Motz, J., dissenting) (citation omitted).

¹³ *Mattingly*, 107 F. Supp. 2d at 697-98.

¹⁴ *Id.* at 696 (citations omitted).

plaintiff or defendant. *In re Microsoft Corp. Antitrust Litig.*,¹⁵ Therefore, the amount in controversy threshold can be met by the aggregate cost of compliance to the defendant where multiple plaintiffs have requested injunctive relief.¹⁶ However, the District of Maryland has also held that the amount in controversy requirement was not met by equitable claims because the claims could not be aggregated.¹⁷ The District of Maryland has recently clarified that to measure the amount in controversy from the defendant's cost of compliance perspective, the plaintiffs must "unite to enforce a single title or right in which they have a common and undivided interest."¹⁸

4. Defeating Removal by Amending Relief Sought

The District of Maryland and the Fourth Circuit have differed over whether diversity can be defeated after removal by a reduction in the jurisdictional amount. According to the district court, the diversity determination occurs at the time of filing.¹⁹ Therefore, "even if 'the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.'"²⁰ But the Fourth Circuit has stated that a court has discretion to remand if the amount is reduced below the threshold and the amount claimed in the complaint was pled in good faith.²¹

¹⁵ 127 F. Supp. 2d 702, 718 (D. Md. 2001) (superceded on other grounds) (citing *Government Employees Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964)).

¹⁶ *Id.* (citation omitted).

¹⁷ See *Mattingly*, 107 F. Supp. 2d at 698 (citation omitted); *Gilman v. Wheat, First Secs., Inc.*, 896 F. Supp. 507, 511 (D. Md. 1995).

¹⁸ *Peek v. Microsoft Corp.*, Civ. No. JFM-05-474, 2005 U.S. Dist. LEXIS 10935, *2-3 (D. Md. Jun. 3, 2005) (citation omitted).

¹⁹ *Gardner v. AMF Bowling Ctrs., Inc.*, 271 F. Supp. 2d 732, 733 (D. Md. 2003) (citation omitted).

²⁰ *Id.* (quoting *St. Paul Mercury Indem. Co v. Red Cab Co.*, 303 U.S. 283, 292, 58 S. Ct. 586, 82 L. Ed. 845 (1938)) (other citation omitted).

²¹ *Shanaghan v. Cahill*, 58 F.3d 106, 112 (4th Cir. 1995) (citations omitted).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The thirty-day removal period is triggered by an initial pleading that shows the grounds for removal on its face.²² When the grounds for removal are obscured, omitted, or misstated, the period starts when the grounds are revealed in subsequent documents exchanged in the case by the parties.²³ Because receipt of a complaint notifies a defendant of the grounds for removal, proper service is not necessary to meet the “service or otherwise” requirement of 28 U.S.C. § 1446(b).²⁴ Section 1446(b)’s “other paper” requirement refers to “documents generated within the state court litigation.”²⁵

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The Fourth Circuit has adopted a two-part test to determine whether joinder of a defendant was fraudulent: the party seeking removal must show “that either (1) there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or (2) there has been outright fraud in the plaintiff’s pleading of jurisdictional facts.”²⁶

B. Evidence of Fraudulent Joinder

A court may look beyond the pleadings and may “consider the entire record[] and determine the basis of joinder by any means available.”²⁷ In a recent opinion, the Fourth Circuit asserted that affidavits and deposition testimony could be relied upon to demonstrate the

²² *Lovern v. General Motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997).

²³ *Id.*

²⁴ *Schwartz Bros., Inc. v. Striped Horse Records*, 745 F. Supp. 338, 340 (D. Md. 1990).

²⁵ *Pack v. AC and S, Inc.*, 838 F. Supp. 1099, 1101 (D. Md. 1993) (citations omitted).

²⁶ *Riverdale Baptist Church v. Certainteed Corp.*, 349 F. Supp. 2d 943, 947 (D. Md. 2004) (citing *Mays v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999)) (internal citation omitted).

²⁷ *Riverdale Baptist Church*, 349 F. Supp. 2d at 947 (quoting *Mays*, 198 F.3d at 464) (internal citation omitted).

fraudulent joinder of a defendant.²⁸ However, in the context of state law-based statutes of limitation, federal courts “should make ‘only a limited piercing of the pleadings’ for fraudulent joinder . . .”²⁹

III. VOLUNTARY/INVOLUNTARY RULE

A. “Voluntary” Dismissal

A plaintiff has three opportunities to voluntarily dismiss a claim. First, a plaintiff may seek voluntary dismissal by filing “a notice of dismissal at any time before the adverse party files an answer.”³⁰ Second, a plaintiff may enter into a stipulation with all other parties to execute a voluntary dismissal after an answer is filed.³¹ Third, a plaintiff may move the court to enter a voluntary dismissal.³²

B. Exceptions

Logically, fraudulent joinder is an exception to the voluntary/involuntary rule in Maryland.³³ While Maryland has extended a “sealed container” defense to retailers under limited circumstances, the statute affording the defense contains a provision that prevents the creation of diversity through both a reinstatement clause and a requirement that the retailer remain a party to the suit throughout the litigation.³⁴

²⁸ *Boss v. Nissan N. Am., Inc.*, 228 Fed. Appx. 331, 336 (4th Cir. 2007) (citations omitted).

²⁹ *McGinty v. Player*, 396 F. Supp. 2d 593, 598 (D. Md. 2005) (quoting *Riverdale Baptist Church*, 349 F. Supp. 2d at 950).

³⁰ MD. RULE 2-506(a).

³¹ *Id.*

³² MD. RULE 2-506(b).

³³ See *Riverdale Baptist Church*, 349 F. Supp. 2d at 946; see also *Mays*, 198 F.3d at 461.

³⁴ MD. CODE ANN., CFS. & JUD. PROC. § 5-405(c) (2002).

IV. WAIVER OF THE RIGHT OF REMOVAL

A. Waiver by Defending

A defendant can waive its right to removal by undertaking to defend itself in state court. “[A] defendant’s absolute right to removal can be waived by a defendant provided that the defendant’s intent to waive is ‘clear and unequivocal [sic].’”³⁵ Such a waiver should only be found in “extreme situations.”³⁶ Waiver does not necessarily result from filing an answer to a complaint in state court before the claim is removed, but will arise from the filing of motions seeking dispositive relief.³⁷

B. Waiver by Contract

In most instances, a contractual waiver of removal will bind a defendant. A defendant may waive its right to removal by giving contractual consent to the plaintiff’s forum selection.³⁸ However, waiver through such a clause must be “clear and unequivocal.”³⁹

³⁵ *Johnson v. The Celotex Corp.*, 701 F. Supp. 553, 554 (D. Md. 1988) (quoting *Mancari v. AC & S Co., Inc.*, 683 F. Supp. 91, 94 (D. Del. 1988)) (other citation omitted).

³⁶ *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991) (citation omitted); *see also Gist v. Eagle-Picher Indus., Inc.*, Civ. No. JFM 88-604, 1988 U.S. Dist. LEXIS 18296, *5-*7 (D. Md. Mar. 4, 1988).

³⁷ *See Gist*, 1988 U.S. Dist. LEXIS 18296 at *5.

³⁸ *Black & Decker (U.S.) Inc. v. Twin City Fire Ins. Co.*, Civ. No. HAR 92-3352, 1993 U.S. Dist. LEXIS 2838, *9-*10 (D. Md. Feb. 9, 1993) (citations omitted).

³⁹ *Id.* at *9 (citations omitted).