Do Not Get Hometowned: Take Your Case to Federal Court

By Stuart Chanen and Aaron Chandler

One of the most frustrating things for a business is being sued in a state other than where the business is located, particularly where the litigation is in state court. It is likely that neither the business nor its regular counsel know the local rules or customs of the jurisdiction, know the other attorneys involved, or know the judge assigned. The business will have to locate the right attorney in that other state, who knows his or her way not only around that particular courthouse but also the issues involved in the litigation.

For businesses that find themselves in such a position, one of the very first questions to ask is: Can the case be removed to federal court (and, if so, should I do so)? There are likely several good reasons why a case should be removed to federal court. First, to the extent judges and juries—even if subconsciously—tend to favor hometown, local litigants over out-of-staters, there is much less of a home court advantage in the federal system. Second,

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while each state has its own rules of procedure, the federal rules are uniform across the country. Thus, any advantage opposing counsel might have in state court due to his or her familiarity with the state rules is taken away when the case is removed to federal court. Third, discovery is limited in federal court, which can help to streamline the legal process and help the case move along more quickly. Indeed, depending on the jurisdiction, the federal court may be intent on moving its cases along faster.

Under 28 U.S.C. § 1446, defendants have the right to remove a suit from state court to federal court in certain circumstances. Complete diversity must exist among the parties, which means that no single plaintiff can be a citizen of the same state as any defendant. For example, if a defendant is a Delaware company with its principal place of business in North Carolina and is sued in state court by an Illinois company with its principal place of business in Illinois, and there are no other parties, the Delaware company defendant could remove the case to federal court if the other requirements of section 1446 (set forth below) are also met. If, however, the plaintiff is a Delaware company with its principal place of business in Illinois, the Delaware company could not remove the case under section 1446, because both the plaintiff and the defendant are Delaware companies and diversity is lacking. Similarly, if an Illinois company sued five defendants—four from North Carolina and one from Illinois—removal would not be available under section 1446 because the one defendant from Illinois "destroys" diversity for all five defendants.

In addition to establishing complete diversity, a removing party must also establish that the amount in controversy exceeds $75,000, sometimes referred to as the federal "jurisdictional amount." Stated simply (and the amount in controversy isn't always a simple determination), even where complete diversity exists, but the plaintiff seeks less than the jurisdictional amount, the case cannot be removed to federal court by any defendant under section 1446.

Finally, once the summons and complaint have been properly served, a defendant has only 30 days to file its notice of removal to have the case transferred to federal court. As straightforward as this deadline may seem, it is more complicated when the lawsuit involves more than one defendant. In multi-defendant cases, the defendants must be unanimous in their decision to remove the action from state court to federal court. More problematic is the situation that arises when one defendant is served more than 30 days after a codefendant was served. Does the 30-day clock start ticking all over again when the second (or third, or fourth) defendant is served? Or are later-served defendants bound by the first-served defendant's decision not to remove the case (meaning that the case stays in state court), simply because that defendant was the second (or third, or fourth) to be served?

Faced with this dilemma, courts have created the pragmatic, though not particularly fair, "first-served defendant" rule. Under this rule, defendants served more than 30 days after the first defendant is served are simply out of luck—they have no say on the matter of removal if the case was not removed within 30 days after the first defendant was served. This is true even if the later-served defendant could convince the first-served defendant to change its mind, and join in an effort to remove the case. Under the first-served defendant rule, once the first defendant is served and 30 days have passed, the time for removal—for all defendants—has also passed, and the case will stay in state court. Although not unanimous, the first-served defendant rule is generally followed in the various federal circuits.[1]

In a February 2009, decision, however, a U.S. District Court for the Northern District of Illinois rejected the first-served defendant rule. In *Save-A-Life Foundation, Inc. v. Heimlich*,[2] the plaintiff sued three individuals in Illinois state court asserting various state law claims. The three defendants were each citizens of states other than Illinois. The plaintiff served two defendants, who initially did not attempt to remove the case to federal court under section 1446. More than 16 months after the case was initially filed, and months after the first two defendants were served, the plaintiff served the third defendant. By the time the third defendant had been served, the time for the first two defendants to remove the case to federal court had long since passed. After securing consent from the first two defendants, the third defendant filed a notice removing the case from state court to federal court under section 1446.

The plaintiff moved to remand the case back to state court, claiming that the deadline had passed for the third defendant to remove the case to federal court. In making this argument, the plaintiff relied on the long line of cases establishing the first-served defendant rule.[3] The court, however, rejected the first-served defendant rule and denied the plaintiff's motion to remand. In doing so, the court in *Heimlich* noted that "each defendant in a case is entitled to remove an action from state court to federal court, regardless of whether earlier-served defendants declined to do so, so long as all defendants consent to removal."[4] The court also emphasized that "[r]ecently . . . the Sixth, Eighth, and Eleventh Circuits have rejected the first-served defendant rule."[5] *Heimlich* found that these more recent decisions offer "compelling reasons" for rejecting the first-served defendant rule.[6] First,

> a rule allowing each defendant the opportunity to remove an action, regardless of when other defendants had been served, was more equitable . . . because it does not render a later-served defendant's right to removal subject to the actions of earlier-served defendants and the frequent vagaries involved in the timing of service of process.

Second, "rejection of the first-served defendant rule was consistent with the plain language" of section 1446. Third, rejection of the first-served defendant rule is consistent with the two objectives most often offered by courts to justify the rule in the first place, that is, the requirement of unanimity among removing defendants and "the principle that federal court jurisdiction and the removal statute are to be construed narrowly."[7]

The court quoted the U.S. Supreme Court's opinion in *Murphy*

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Bros., Inc. v. Michetti Pipe Stringing, Inc. for the proposition that "[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified in the action, and brought under a court's authority, by formal process."[8] Noting that the Seventh Circuit has not explicitly accepted or rejected the first-served defendant rule, *Heimlich* pointed out that, in dicta, the Seventh Circuit has taken note of the implications of the Supreme Court's holding in *Murphy Brothers*. More specifically, the Seventh Circuit observed that "[n]either the language of nor the purposes behind the time limits contained in [section 1446] could possibly support a reading that the limits run against defendants *who are unaware of the pending claim*."[9] *Heimlich* interpreted this language to mean that *Murphy Brothers* rejects the first-served defendant rule, stating: "all defendants, regardless of when they are served, are entitled to remove an action from state to federal court if a proper basis exists for doing so."[10]

Prior to *Heimlich*, recent opinions addressing the first-served defendant rule were pretty evenly divided. Indeed, referring to Wright and Miller's *Federal Practice & Procedure* and Moore's *Federal Practice*, *Heimlich* notes that "the two leading treatises on civil practice in the federal courts are divided as to the appropriateness of the first-served defendant rule."[11] That said, although recent district court rulings have more often than not followed the rule, three circuits have ruled against the first-served defendant rule (with just one recent circuit court opinion following the rule).[12]

Heimlich not only identifies but also reinforces a trend "away from the first-served defendant rule."[13] This is good news for any defendant sued in the state courts of a foreign jurisdiction in a multi-defendant case, who wants to remove the case to federal court. The recent *Heimlich* opinion may very well supply out-of-state defendants with the extra time needed to convince codefendants to successfully remove the case from state to federal court (even where the codefendants initially chose not to remove, and their time to do so has expired). Only time will tell how broadly the *Heimlich* approach will be followed by other courts.

Endnotes

1. *See, e.g.,* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254,1262–63 (5th Cir. 1988); Turner Constr. Co. v. Dorn-Platz Prop., Inc., 2008 WL 3992621 at *3, No. 08-610-AC (D. Or. Aug. 26, 2008); Smith v. Time Ins. Co., 2008 WL 4452147 at *3, No. 08-cv-00419-REB-BNB (D. Colo. Sept. 30, 2008).

2. ___ F. Supp. 2d ____, 2009 WL 330142, No. 08 C 6022 (N.D. Ill. Feb. 9, 2009).

3. *See, e.g.,* Brown v. Demco, Inc., 792 F.2d 478, 481–82 (5th Cir. 1986); Collins v. Pontikes, 447 F. Supp. 2d 895, 897 (N.D. Ill. 2006); Jonathan Pepper Co. v. Hartford Cas. Ins. Co., 381 F. Supp. 2d 730, 731 (N.D. Ill. 2005); Phoenix Container, L.P. ex rel. Samarah v. Sokoloff, 83 F. Supp. 2d 928, 932 (N.D Ill. 2000).

4. *Heimlich*, 2009 WL 330142 at *4.

5. *Id.* at *2 (citing *Bailey* v. Janssen Pharmaceutica, Inc. 536 F.3d 1202, 1205–08 (11th Cir. 2008); Marano Enters. of Kan. V. Z-Teca Rests., L.P., 254 F.3d 753, 754–57 (8th Cir. 2001); Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 532–33 & n. 3 (6th Cir. 1999)).

6. *Heimlich*, 2009 WL 330142 at *2.

7. *Id.* at *2, *4.

8. *Id.* at *3 (quoting 526 U.S. 344, 347–48 (1999)).

9. Price v. Wyeth Holdings Corp., 505 F.3d 624, 631 (7th Cir. 2007) (emphasis added).

10. *Heimlich*, 2009 WL 330142 at *3. Under section 1446, that proper basis must include complete diversity of citizenship, alleged damages that meet the jurisdictional amount, and unanimity among all defendants to remove the action (even if they did not timely do so on their own).

11. *Id.*

12. *Compare* Collins v. Pontikes, 447 F. Supp. 2d 895, 897 (N.D. Ill. 2006) and Jonathan Pepper Co. v. Hartford Cas. Ins. Co., 381 F. Supp. 2d 730, 731 (N.D. Ill. 2005) *with* Cholpek v. Fed. Ins. Co., No. 05 C 545, 2005 WL 3088355, at *1–2 (W.D. Wis. Nov. 17, 2005). *See also Heimlich*, 2009 WL 330142 at *2 (citing "Sixth, Eighth, and Eleventh Circuit[]" decisions rejecting the "first-served defendant" rule).

13. *Heimlich*, 2009 WL 330142 at *3. Recent cases in other jurisdictions have also identified and reinforced this trend. *See, e.g.,* Lead I JV, LP v. N. Fork Bank, ___ F. Supp. 2d ____, 2009 WL 605423, No. 08-CV-0843 (DRH)(MLO) (E.D.N.Y. March 11, 2009); Pegasus Blue Star Fund, LLC v. Canton Prod., Inc., 2009 WL 331413, No. 08-1533 (HAA) (D. N.J. Feb. 10, 2009); Lewis v. City of Fresno, 2008 WL 5246095, No. 1:08-cv-01062 OWW GSA (E.D. Cal. Dec. 15, 2008); Dansie v. Eaton Corp., 2008 WL 2627520, No. 2:07-cv-00963 (D. Utah June 30, 2008).