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PRODUCT LIABILITY

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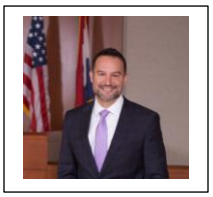
Although over five years have passed since Congress enacted the bad faith exception to the one-year bar to removal, there is still very little law acknowledging what constitutes bad faith on behalf of plaintiffs. This article will explore recent case law addressing these issues and provide tips for meeting the exception.

The Bad Faith Exception to the One Year Bar to Removal Based on Diversity Jurisdiction

Is Proof of Forum Shopping Enough or do Defendants Need to Prove More?

ABOUT THE AUTHORS



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In 1988, Congress enacted the original one year bar to removal based on diversity jurisdiction through 28 U.S.C. § 1446(c)(1). The courts believe the bar was implemented to preserve judicial economy when "substantial progress has been made in state court."[1] However, in practice, the one year bar became simply a statute of limitations of sorts that plaintiffs needed to meet to prevent defendants from removing cases that could, and probably should be, in federal court. Some tactics used to defeat removal were failing to disclose the amount in controversy, changing the amount in controversy just after the one year bar, amending complaints removing non-diverse defendants, and keeping non-diverse defendants in cases just past one year from filing. The Fifth Circuit took it upon themselves to create an equitable exception to the one-year limitation[2], which Congress later codified.[3]

Even though over five years have passed since Congress enacted the bad faith exception, there is still very little law acknowledging what constitutes bad faith on behalf of plaintiffs. There is not a universal standard for showing bad faith to remove after one year, but at least one district has found that simply "strategic avoidance" of federal jurisdiction is not bad faith, rather, "[t]o prove bad faith, a defendant must show 'forum manipulation.'"[4] A recent case actually lays out some of the framework for meeting the bad faith requirement.[5]

The most straightforward cases on point deal with the $75,000 amount in controversy limitation to diversity removal. While these

[1] *Tedford v. Warner–Lambert Co.,* 327 F.3d 423, 427 (5th Cir.2003) *citing* H.R.Rep. No. 889, at 72(1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6032.

[2] *Tedford v. Warner–Lambert Co.,* 327 F.3d 423 (5th Cir.2003).

[3] Federal Courts Jurisdiction & Venue Clarification Act of 2011, Pub. L. 112–63, § 103(b)(3)(C), 125 Stat. 758, 760; *id.* § 205(2), 125 Stat. at 764–65 (noting that amended law applies to cases commenced on or after December 7, 2011)

[4] *Hackney v. Golden Girl*, No. 3:16-cv-06569, 2016 WL 6634898, at *2 (S.D. W. Va. Nov. 8, 2016)(Chambers, J.) (quoting *Johnson v. HCR Manorcare LLC*, No. 1:15-cv-189, 2015 WL 6511301, at *4 (N.D. W. Va. Oct. 28, 2015)); *accord Ramirez v. Johnson & Johnson*, No. 2:15-cv-09131, 2015 WL 4665809, at *3 (S.D. W. Va. Aug. 6, 2015)

[5] *Massey v. 21st Century Centennial Insurance Company*, 2017 WL 3261419 (S.D. W. Va. 2017) "Determining whether the plaintiff manipulated the forum has been described as a two-step process, one this Court has adopted previously." *Ramirez*, 2015 WL 4665809, at *4 (citing *Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1277 (D.N.M. 2014)). The first step and central inquiry is "whether the plaintiff actively litigated against the removal spoiler." *Aguayo*, 59 F. Supp. 3d at 1264. "A finding that the plaintiff did not actively litigate against the removal spoiler constitutes bad faith, and the Court will retain jurisdiction over the case." *Id.* at 1228. On the other hand, active litigation against the non-diverse defendant creates a presumption of good faith. *Id.* at 1229. The presumption may be rebutted at step two by a showing that "the plaintiff kept the removal spoiler in the case to defeat removal." *Id.*; *see also Ramirez*, 2015 WL 4665809, at *7 (requiring a defendant relying on the bad faith exception " 'to show either that the plaintiff did not litigate at all, or engaged in a mere scintilla of litigation against the removal spoiler; or (ii) that the defendant has strong, unambiguous evidence of the plaintiff's subjective intent, for which the plaintiff cannot offer any plausible alternative explanation.' " (quoting *Aguayo*, 59 F. Supp. 3d at 1277)). Plainly, the presence or absence of bad faith will depend on the unique circumstances of each case.

cases are helpful and somewhat illustrative of what the courts require, defendants are much more concerned about cases where the amount in controversy grossly exceeds the $75,000 requirement because those cases are the ones where the consistency of the federal forum is beneficial. That said, district courts have consistently held the bad faith exception applies when plaintiffs hide the amount in controversy to prevent removal based on diversity jurisdiction.[6] An interesting component to the Middle District of Florida's analysis in *Hill* is although the court found bad faith, they appear to also rely on the fact plaintiff had explanation for his changing the amount in controversy, which leads you to believe if plaintiff has any reason to alter their damages after the one year bar, it may not constitute bad faith. Also, in *Public Service Towers, Inc. v. Best Buy Stores, L.P.*, the Court held it was not bad faith when there is no evidence of a misrepresentation of the value of a claim even when plaintiff represented to the Court that the amount in controversy was less than $75,000 and later believes the amount is greater than $75,000.[7] Therefore, this could lead to parties originally thinking, and possibly even stipulating, the claims were less than $75,000. Then, during the course of discovery, if evidence develops through no concealment of their own, such as facts establishing recklessness or gross negligence on part of defendant allowing the value of the claims to rise to greater than $75,000, the bad faith requirement may not be met.

Based on the recent case law, defendants do have some clarity when the alleged bad faith of the plaintiff involves the amount in controversy. However, when the removal is based on lack of complete diversity through alleged fraudulent joinder and fraudulent misjoinder, there is much less transparency and the benefit of the doubt normally goes to the plaintiff. This is true even though some courts believe "the 2011 amendments to § 1446 were intended to stop … gamesmanship and forum shopping."[8]

The *Aguayo* court performed a detailed analysis of the cases interpreting removal based on amount in controversy, fraudulent joinder, and fraudulent misjoinder. The later categories are much less rigid in their application. For some background:

> Fraudulent misjoinder occurs when a plaintiff sues a diverse defendant in state court and joins a non-diverse or in-state defendant even though the

[6] *Hill v. Allianz Life Ins. Co. of North America*, 51 F.Supp.3d 1277 (M.D. Fla. 2014) (Plaintiff acted in bad faith by concealing information relevant to actual amount in controversy in order to prevent removal when plaintiff sought damages greater than $15,000 but less than $75,000, but then waited until just over three months after one year removal window had run to file motion to amend his complaint, in which he stated that he no longer restricted the amount of damages to under $75,000.) *See also Cameron v. Teeberry Logistics, LLC*, 920 F.Supp.2d 1309 (N.D. Ga. 2013) (Driver acted in bad faith by specifically pleading her case was not removable to prevent truck driver and owner from removing her action, and therefore, removal pursuant to diversity jurisdiction upon receipt of settlement demand letter for $575,000 was proper after expiration of one-year period from commencement of action.)

[7] 28 F.Supp.3d 1313 (M.D. Ga. 2014)

[8] *Hill*, 51 F.Supp.3d at 1282.

plaintiff has no reasonable procedural basis to join such defendants in one action. While the traditional fraudulent joinder doctrine inquires into the substantive factual or legal basis for the plaintiff's claim against the jurisdictional spoiler, the fraudulent misjoinder doctrine inquires into the procedural basis for the plaintiff's joinder of the spoiler. Most state joinder rules are modeled after the federal joinder rule that authorizes permissive joinder of parties when the claims brought by or against them arise "out of the same transaction, occurrence, or series of transactions or occurrences" and give rise to a common question of law or fact. Thus, in a case where the joined claims are totally unrelated, a federal district court may find removal jurisdiction pursuant to the fraudulent misjoinder doctrine even though the plaintiff has a reasonable substantive basis for the claim against the jurisdictional spoiler.[9]

Courts are very reluctant to find the bad faith exception has been met outside of the amount in controversy provision of diversity jurisdiction. Therefore, it is much less likely the court will find bad faith when there is not diversity on the face of the petition and the removal is based on fraudulent joinder or fraudulent misjoinder.[10] Many recent cases have been remanded to state court following removal by defendants who removed based on fraudulent misjoinder based on lack of personal jurisdiction pursuant to the United States Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court.*[11]

Another issue to take into consideration is that in similar circumstances courts have dismissed non-diverse plaintiffs for lack of personal jurisdiction in cases timely removed within 30 days of service and prior to any

[9] *Aguayo v. AMCO Ins. Co.,* 59 F.Supp.3d 1225 (D.N.M. 2014) *citing* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine,* 29 Harv. J.L. & Pub. Pol'y 569, 572 (2006) (footnotes omitted).

[10] *Id.* (plaintiffs did not act in bad faith to prevent removal in joining defendants from New Mexico)

[11] 137 S.Ct. 1773 (2017). *See Meisha Jackson v. Bayer Healthcare Pharmaceuticals, Inc.*, et al., 2017 WL 2691413, Case No. 4:17-cv-01413-JAR (E.D. Mo. June 22, 2017) (Defendant failed to prove bad faith because there was no evidence the diversity destroyers were added only to prevent diversity and were not actively litigating their claims); *See also Anglin, et al., v. Johnson & Johnson, et al.,* 4:17-CV-01844-JAR, 2017 WL 3087672 E.D. Mo. July 20, 2017); *Livaudais, et al. v. Johnson & Johnson, et al.,* 4:17-CV-1851 SNLJ, 2017 WL 3034701 (E.D. Mo. July 18, 2017); *Swann, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01845-SNLJ (E.D. Mo. July 18, 2017); *Ingham, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01857-SNLJ (E.D. Mo. July 18, 2017); *Dunn, et al. v. Johnson & Johnson, et al.*, 4:17-cv-01846-JAR (E.D. Mo. July 20, 2017); *Forrest, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01855-JAR (E.D. Mo. July 20, 2017); *Timms, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01859-JAR (E.D. Mo. July 20, 2017); *Hall, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01843-RWS (E.D. Mo. July 21, 2017); *McCullen, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01852-RWS (E.D. Mo. July 21, 2017); *Loyd, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01853-RWS (E.D. Mo. July 27, 2017); *Farrar, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01854-CDP (E.D. Mo. August 2, 2017); *Littlejohn, et al. v. Janssen Research & Development, LLC, et al.,* 4:17-cv-02009-CDP (E.D. Mo. August 2, 2017); *Young, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01861-ERW (E.D. Mo August 3, 2017); and *Buchek, et al., v. Johnson & Johnson, et al.,* 4:17-CV-1850-RWS (E.D. Mo. August 15, 2017).

impact of the one year bar.[12] Therefore, it appears some courts will dismiss non-diverse plaintiffs who lack personal jurisdiction over the defendants who are joined in cases to defeat diversity jurisdiction. However, while it seems plaintiffs' sole purpose was to join those non-diverse plaintiffs to defeat diversity, that act does not rise to the level of bad faith to also meet the requirements of the exception to the one year bar.[13]

It is fairly obvious when plaintiffs file cases in plaintiff friendly forums consistently ranked in the ATRA Report of Judicial Hellholes and add non-diverse plaintiffs to defeat federal court diversity jurisdiction, but if the court believes they are litigating those claims and are simply choosing a preferential forum for their action, it will not rise to level of bad faith to overcome the one year bar. But in the fraudulent misjoinder scenario, we may have come to the end of joining plaintiffs who lack personal jurisdiction simply to defeat diversity jurisdiction now that defendants can strongly rely on the reasoning of *Bristol-Myers Squibb Co*.[14] That said, it is still up to the district court judge if they want to analyze personal jurisdiction prior to subject matter jurisdiction. The case law gives them the discretion to remand the case for lack of complete diversity when the petition lacks subject matter jurisdiction on its face.[15] In cases like *Rios*, the defendant of course has the option of challenging personal jurisdiction in state court and then removing once complete diversity exists. However, when courts find plaintiffs joining non-diverse plaintiffs who lack personal jurisdiction to defeat diversity jurisdiction is not in bad faith, if it takes defendants more than one year from service to obtain an order dismissing non-diverse defendants, which is by no means a long time in congested plaintiff friendly state court dockets, the defendant may be stuck in state court for the long haul.

Clarity on removal and reasons for remand is hard to come by given the federal courts limited jurisdiction and the inability of defendants to appeal cases remanded based on lack of diversity jurisdiction when no costs are sought by the prevailing party. In fact, plaintiffs sometimes waive costs to prevent the review by appellate courts of remanded cases where the defendant's removal appears to have merit.[16] Therefore, defendants are stuck relying on the limited amount of district courts that have applied the statute to find

[12] *See Jinright, et al., v. Johnson & Johnson, et al.,* 2017 WL 3731317, No. 4:17CV01849 ERW (E.D. Mo. August 30, 2017).

[13] *See Young, et al. v. Johnson & Johnson, et al.,* 4:17-cv-01861-ERW (E.D. Mo August 3, 2017) *Meisha Jackson v. Bayer Healthcare Pharmaceuticals, Inc.*, et al., 2017 WL 2691413, Case No. 4:17-cv-01413-JAR (E.D. Mo. June 22, 2017).

[14] 137 S.Ct. 1773 (2017)

[15] *Rios v. Bayer Corp.,* 2017 WL 3600374, 17-CV-758-SMY-SCW (S.D. Ill. August 22, 2017) (district court held because diversity is lacking on the face of the Complaint, remand is proper regardless of personal jurisdiction issues with the non-diverse plaintiffs.)

[16] *Robinson, et al. v. Pfizer, Inc., et al.*, No. 4:16-CV-00439, 2017 WL 1541216 (8th Cir. May 1, 2017) (Pfizer removed and urged the district court to ignore the six New York plaintiffs who destroyed diversity because they had been fraudulently joined, District Court remanded and awarded attorneys' fees so Pfizer appealed, but 8th Circuit claimed appeal was moot because the plaintiff's filed a Satisfaction of Judgment shortly after the appeal.

bad faith or refuse to do so when analyzing the bad faith exception to the one year bar on diversity removal.

In practice, if at all possible, issues regarding fraudulent joinder and fraudulent misjoinder should be addressed as soon as possible to avoid having to prove bad faith under the one year bar. Of course it is difficult to prove if plaintiffs are actually going to appease the courts by at least attempting to litigate against the diversity destroying defendant at the beginning of the case, but as soon as you can remove the better to avoid the bad faith requirement. The case law will continue to progress and hopefully a uniform test will develop to help defendants determine when they can prove bad faith to defeat a motion for remand pursuant to the one year bar to diversity removal.

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