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The Impact Of 2009 Amendments To Rule 15

Law360, New York (January 11, 2010) -- Amendments to Rule 15 of the Federal Rules of Civil Procedure took effect Dec. 1, 2009, and with them came new opportunities for plaintiffs hoping to defeat removal to federal court.

The amendments to Rule 15 — governing amended and supplemental pleadings — significantly change pleading amendment practice by permitting a plaintiff to amend "as a matter of course" even after the defendant has served "a responsive pleading." Fed. R. Civ. P. 15(a)(b) (Dec. 1, 2009).

Prior to the Rule 15 amendments, a defendant could cut off the plaintiff's right to amend "as a matter of course" by serving an answer. When a plaintiff wanted to amend after the defendant had removed and answered, the plaintiff had to obtain leave of court, triggering the court's heightened scrutiny of amendments affecting the court's jurisdiction.

By allowing a plaintiff to amend "as a matter of course" even after the defendant has served an answer, the Rule 15 amendments raise questions about whether the plaintiff may avoid heightened scrutiny of jurisdiction-destroying amendments by making them "as a matter of course" under the new rule.

At first blush, the Rule 15 amendments seem to enable plaintiffs to foil removal through "matter of course" amendments joining nondiverse defendants, but case law addressing "matter of course" amendments prior to Dec. 1 should undermine attempts to thwart removal through "matter of course" amendments after Dec. 1.

2009 Amendments to Rule 15

Prior to Dec. 1, 2009, Rule 15 permitted a plaintiff to amend the complaint "once as a matter of course ... before being served with a responsive pleading." Fed. R. Civ. P. 15(a)(1)(A).

In all other situations, Rule 15 required the plaintiff to obtain the opposing party's consent or leave of court before amending the complaint. Fed. R. Civ. P. 15(a)(2).

"Responsive pleading" within the context of a complaint meant the defendant's answer — courts uniformly held that "responsive pleading" did not mean a motion to dismiss or even a notice of removal.

See, e.g., Foster v. DeLuca, 545 F.3d 582, 584 (7th Circ. 2008) ("For purposes of Rule 15(a), a motion to dismiss does not constitute a responsive pleading ..."); CRST Van Expedited Inc. v. Werner Enterprises Inc., 479 F.3d 1099, 1104 n.3 (9th Cir. 2007) ("A Rule 12(b)(6) motion to dismiss is not such a responsive pleading as to cut off a plaintiff's right to amend once, without leave of court."); Am. Bush v. City of South Salt Lake, 42 Fed. Appx. 308, 310, 2002 WL 1443474 at *1 (10th Cir. 2002) ("Similarly, the removal petition did not serve to cut off plaintiffs' right to amend their complaint once as a matter of course.").

Under the former version of Rule 15, a defendant could prevent amendments "as a matter of course" designed to eliminate the basis for removal simply by serving an answer prior to or with the filing of the notice of removal.

Serving a responsive pleading within the meaning of Rule 15(a) forced the plaintiff to seek leave of court to amend the complaint.

Amendment to the complaint affecting the court's jurisdiction triggered the court's heightened scrutiny of the amendment, a result plaintiffs ordinarily hoped to avoid. See Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987).

The December 2009 amendments to Rule 15 fundamentally alter pleading practice. Now, a plaintiff may amend the complaint "as a matter of course" within 21 days after serving it, or "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1).

Therefore, no longer may a defendant cut off a plaintiff's right to amend "as a matter of course" by serving an answer to the complaint.

Instead, a plaintiff may amend the complaint "as a matter of course" within 21 days after the defendant serves its answer or motion to dismiss.

If a plaintiff may amend "as a matter of course" even after the defendant has served an answer, the question becomes whether the plaintiff may amend "as a matter of course" even when the amendment affects the court's jurisdiction.

Cases pre-dating the Rule 15 amendments and addressing "matter of course" pleading amendments affecting jurisdiction provide the answer to that question.

Treatment of Jurisdiction-Destroying Pleading Amendments

“If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.” 28 U.S.C. § 1447(e).

Section 1447(e) gives the trial court only two options when a plaintiff seeks to join a nondiverse defendant who would destroy jurisdiction: it may deny the joinder or it may permit the joinder and remand. See Schur v. L.A. Weight Loss Centers Inc., 577 F.3d 752, 759 (7th Cir. 2009); Mayes v. Rapoport, 198 F.3d 457, 461-62 (4th Cir. 1999).

The Fifth Circuit’s decision in Hensgens v. Deere & Co. is widely considered the leading case on how a court should decide whether to allow a post-removal, jurisdiction-destroying pleading amendment. The plaintiff in Hensgens sued Deere for wrongful death in Louisiana state court, but Deere removed to Louisiana federal court.

Following removal, the plaintiff amended her complaint to join another defendant, one who was a citizen of Louisiana. The federal court later granted Deere’s motion for summary judgment on statute of limitation grounds.

For the first time on appeal, the plaintiff argued that the trial court lacked subject matter jurisdiction to enter summary judgment after the joinder of the nondiverse defendant.

The Fifth Circuit held that the trial court lacked jurisdiction following joinder but first should have determined whether to allow the joinder of the nondiverse defendant in the first place:

“The district court, when faced with an amended pleading naming a new nondiverse defendant in a removed case, should scrutinize that amendment more closely than an ordinary amendment.” Hensgens, 833 F.2d at 1182.

The court emphasized that “addition of a nondiverse defendant must not be permitted without consideration of the original defendant’s interest in the choice of forum.” Id.

The Fifth Circuit established four factors district courts should consider when deciding whether to grant or deny joinder of a nondiverse defendant who would destroy diversity: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; (2) whether the plaintiff has been dilatory in asking for amendment; (3) whether the plaintiff will be significantly injured if amendment is not allowed; and (4) any other factors bearing on the equities. Id.

Although Hensgens was decided before the enactment of § 1447(e), courts continue to follow and apply its four-part test today. E.g., Schur, 577 F.3d at 759 n.4 (“Hensgens was decided prior to the addition of 28 U.S.C. § 1447(e), but numerous courts have relied upon its analysis when determining whether joinder is proper under § 1447(e).”); City of Cleveland v. Deutsche Bank Trust Co., 571 F. Supp. 2d 807, 823 n.24 (N.D. Ohio 2008) (“Hensgens was decided before the enactment of 1447(e), but the analysis remains applicable.”).

Heightened Scrutiny of Jurisdiction-Destroying "Matter of Course" Amendments

Courts ordinarily apply the Hensgens factors when deciding a plaintiff's motion to amend the complaint to join a nondiverse defendant following removal, but several courts have also applied the factors to amendments made "as a matter of course" under the former version of Rule 15.

In Mayes v. Rapoport, for example, the plaintiff amended the complaint to join a nondiverse defendant following removal but before the defendant had served an answer.

The Fourth Circuit held that "a district court has the authority to reject a post-removal joinder that implicates 28 U.S.C. 1447(e), even if the joinder was without leave of court." 198 F.3d at 462 n.11. Lower courts have reached similar conclusions.

See, e.g., Bevels v. Am. States Ins. Co., 100 F. Supp. 2d 1309, 1312 (M.D. Ala. 2000) (following Mayes and holding that court had authority to reject jurisdiction-destroying pleading amendments made "as a matter of course" under Rule 15(a)); El Chico Restaurants Inc. v. The Aetna Cas. and Sur. Co., 980 F. Supp. 1474, 1483 (S.D. Ga. 1997) ("Although Defendants have not yet filed an answer in this case, Plaintiff cannot amend its Complaint 'as a matter of course' under Rule 15(a) to name additional parties whose presence will destroy complete diversity."); Winner's Circle of Las Vegas Inc. v. AMI Franchising Inc., 916 F. Supp. 1024, 1026 (D. Nev. 1996) ("However, although Winner's may have thought its amendment proper since it was filed 'as of right,' Rule 15(a) cannot be used to deprive the court of jurisdiction over a removed action.").

The same rules should apply to "matter of course" amendments made under the current version of Rule 15. If heightened scrutiny applied to "matter of course" amendments before, it should apply no less to amendments made within 21 days after the defendant has served an answer, as permitted by the amended Rule 15.

Indeed, when a plaintiff attempts to amend the complaint post-removal "as a matter of course," the defendant may and should still challenge the amendment under Hensgens when it would divest the court of jurisdiction.

By aggressively challenging jurisdiction-destroying amendments — in whatever form they may take — defendants can more effectively protect their right to remove to federal court.

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