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Delaying Tactic du Jour Fails to Remove Matter de Jure

Focus Column

By Benjamin G. Shatz

A common defense tactic in litigation is to inject procedural complication to delay reaching the merits. One typical stratagem in that regard is to remove a case from state to federal court. The snag with that approach, however, is that without grounds for federal jurisdiction, the delay will be short-lived.

The removal and remand process moves at a fairly quick pace, and district court judges jealously protect their limited jurisdiction. A crafty defense lawyer, recognizing the amount of time it takes to resolve an appeal to the 9th U.S. Circuit Court of Appeals, however, may wonder if there was some way to remove an action and then appeal any resulting remand order.

Of course, remand orders are not appealable, right? Title 28 U.S.C. Section 1447(d) makes clear that an "order remanding a case to the State court from which it was removed is not reviewable on appeal." But Section 1447(d) has an exception: an "order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal." Section 1443 is a special provision allowing removal of civil rights cases, where a defendant is denied or cannot enforce a law providing for equal civil rights. Congress enacted this statute in 1948, when state court lawsuits were being used to thwart enforcement of federal civil rights laws. More than 50 years later, this statute remains on the books as originally enacted, but in modern practice removal under this statute is "rare." *Davis v. Glanton*, 921 F.Supp. 1421(E.D. Pa. 1996).

Perhaps defense counsel has come up with a way to delay litigation against his client. All he needs to do is somehow transmogrify the claims against his clients as civil rights issues, remove to federal court and then appeal any remand order. Will this ploy work to essentially put a case on ice during the pendency of a 9th Circuit appeal - which could take more than a year? Two recent cases definitively dispel that notion.

In *People v. Bhakta*, 135 Cal.App.4th 631 (2006), the city of Los Angeles brought a Red Light Abatement Law action seeking to restrain certain motel owners from permitting prostitution in their motel. The trial court granted the People's application for an order to show cause and ordered the motel owners to file an opposition. Instead of filing opposition papers, however, the motel owners, of South Asian descent, filed a notice of removal premised on Section 1443 civil rights jurisdiction. When the district court remanded the action to state court, the motel owners appealed to the 9th Circuit. During that appeal, the matter returned to state court, which proceeded to rule against them. The motel owners appealed, arguing that the state court lacked jurisdiction to act while the remand order remained pending with the 9th Circuit.

The court of appeal made short work of this argument. Nearly 40 years ago California courts noted that the pendency of a federal appeal would not, in itself, deprive a state court of jurisdiction to proceed with a remanded matter. *People v. Mason*, 259 Cal.App.2d 30, 42 (1968). Although a removal petition deprives a state court of jurisdiction, jurisdiction returns to the state court as soon as the federal remand order is filed in the state court. *People v. Bogart*, 7 Cal.App.3d 257 (1970). The only way to continue to deprive the state court of jurisdiction is to obtain a stay either from the federal district court or court of appeals. *Bhakta*.

In the similar case of *Del Taco v. Patel*, 2005 WL 2010187 (4th Dist. Div. 3, 2006), Del Taco became embroiled in a dispute with a franchisee. Del Taco compelled arbitration under the franchise agreement and won an arbitration award. In response to Del Taco's petition in state court to confirm the award, the franchisees - of South Asian lineage - attempted to remove the petition to federal court as a civil rights matter. The district court granted Del Taco's remand motion (and imposed sanctions for a frivolous removal), and the franchisees appealed to the 9th Circuit. Meanwhile, the matter returned to state court, where the arbitration award was confirmed. The franchisees appealed to the court of appeal, arguing that their pending 9th Circuit appeal of the remand order robbed the state court of jurisdiction to confirm the arbitration award.

The court of appeal, in an unpublished decision, cited *Bogart* and *Mason* as clear authority that without a stay of the district court's remand order, jurisdiction returns to the state court, and that court may act

even during the pendency of a federal appeal.

But what about the federal appeal of the remand order? That side of the story appears in *Del Taco v. Patel*, 2006 U.S. App. LEXIS 10882 (9th Cir., May 2, 2006). The 9th Circuit easily affirmed the remand order, noting that nothing in the record suggested that California's courts would not enforce any relevant civil rights implicated by the franchise dispute. The district court also exercised its discretion under Section 1447(c) to award attorneys' fees to Del Taco. The 9th Circuit affirmed this, too, quoting recent Supreme Court authority that fees could be awarded if there was no objectively reasonable basis for removal. *Martin v. Franklin Capital Corp.*, 126 S.Ct. 704 (2005).

Moreover, the 9th Circuit rejected the argument that the pending federal appeal deprived the state court of jurisdiction to proceed after the remand order. *Fosdick v. Dunwoody*, 420 F.2d 1140 (1st Cir. 1970) (absent a supersedeas order, further state court proceedings not avoidable during appeal of Section 1443 remand order).

So what went wrong with defense lawyer's plan? Well, for one thing, civil rights removal is a very rare and restricted doctrine. Simply being a member of a minority ethnicity and becoming involved in a legal dispute does not convert that dispute into a civil rights matter. In other words, playing the race card in what are ordinary civil or criminal proceedings will not work to suddenly make a federal case out of it.

Beyond that, the courts will not allow a baseless attempt at federal removal to delay progress of a case back in state court after remand. An appeal of a civil rights remand order is very unlikely to succeed. In the Del Taco matter, the appeal from the state court's confirmation of the arbitration award was resolved nearly eight months before the 9th Circuit decided the federal appeal - even though the federal appeal began much earlier. This is not to say there may never be a situation where a state court should stay matters pending a federal appeal. But for that to happen, the appellant must convince the district court or 9th Circuit to issue a stay - which would seem unlikely under these circumstances.

Thus, the new removal strategy du jour - removing on flimsy civil rights grounds and appealing to the 9th Circuit - is a failure. In light of recent decisions - and the potential for attorneys' fees awards punishing such conduct - wiser counsel will not attempt this.

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