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Third Circuit Holds "Later-Served" Rule Applies to Removal in Multiple Defendant Cases

In a recent decision, *Delalla v. Hanover Ins.*, Nos. 10-3933 & 11-1532, 2011 U.S. App. LEXIS 20651 (3d Cir. Oct. 12, 2011), the Third U.S. Circuit Court of Appeals determined that, under 28 U.S.C. § 1446(b), each defendant in a multiple defendant case has a 30-day period within which to remove to federal court a lawsuit filed in state court. The Third Circuit's adoption of this "later-served" rule is significant because it allows an earlier-served defendant to join in a notice of removal filed by a later-served defendant, even though the 30-day removal period for the earlier-served defendant has lapsed. The *Delalla* decision marks a precedential opinion from the Third Circuit.

The facts concerning the *Delalla* case were as follows. Plaintiffs-appellants Nicole M. Delalla and NMD Marketing Inc. (NMD) were sued for trademark infringement. NMD held a liability insurance policy issued by defendant-appellee Hanover Insurance. Hanover retained defendant-appellee Joseph Oberlies of Connor Weber & Oberlies (Connor) to represent both Delalla and NMD. Oberlies negotiated a settlement of the trademark dispute. Subsequently, Delalla and NMD filed suit against Hanover, Oberlies, and Connor in state court alleging legal malpractice and related state law claims.

More than 30 days after Hanover was served, but less than 30 days after Oberlies and Connor were served, Oberlies and Connor filed a notice of removal, in which Hanover joined. Hanover had not filed its own notice of removal.

Delalla and NMD filed a motion to remand the action to state court, alleging that the notice of removal was not timely under 28 U.S.C. § 1446, because it was filed more than 30 days after Hanover was served. Judge Robert B. Kugler denied the motion to remand and found that the removal was timely. The case was transferred to the Eastern District of Pennsylvania, where it was ultimately dismissed with prejudice. Delalla and NMD appealed, *inter alia*, the court's denial of their motion to remand the matter to state court.

The Third Circuit affirmed the denial of the motion to remand and joined the majority of circuit courts in adopting the later-served rule. Under the later-served rule, each defendant gets its own 30-day window to file a notice of removal, beginning when that defendant was served, provided that defendant has the unanimous consent of its codefendants. Under the



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alternate, first-served rule, a case is removable only within the 30-day period following service of the first defendant. The Third Circuit found that the later-served rule represents the best reading of 28 U.S.C. § 1446(b) and affords more equitable treatment of later-served defendants.

In so ruling, the court first examined the statute's wording and construction. The court observed that 28 U.S.C. § 1446(a) provides that a "defendant or defendants" may file a notice of removal. Section 1446(b), which sets out the 30-day limitation, uses the singular and provides that "[t]he notice of removal...shall be filed within thirty days after the receipt by the defendant." The Third Circuit found that the text of § 1446 points toward the later-served rule because the sections must be read together: § 1446(a) specifically contemplates the filing of multiple notices of removal, while § 1446(b) pertains to an individual defendant's notice of removal. Thus, each defendant should have 30 days to file a notice of removal.

Second, the Third Circuit found that the later-served rule is fairer than the alternative, whereby a later-served defendant might lose its right to seek removal because it was not served earlier. The court was also concerned that, in a first-served regime, a plaintiff could avoid a notice of removal by delaying service on the defendant(s) most likely to seek removal. Under the later-served rule, each defendant has an equal amount of time to decide whether to file a notice of removal.

As removal requires unanimity, the Third Circuit addressed the criticism that the later-served rule allows defendants two opportunities to remove an action. The court observed that the argument incorrectly equates filing a notice of removal with choosing to join in a notice of removal. Moreover, the court noted that 28 U.S.C. § 1446(b) specifically pertains to the requirements for filing a notice of removal, not to joinder in a codefendant's notice of removal. Therefore, under the later-served rule, an earlier-served defendant may join in a later-served defendant's notice of removal even though the defendant chose not to file its own notice of removal.

Last, the Third Circuit found that the Supreme Court implicitly rejected the policy that removal statutes be strictly construed in its decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (holding that, under 28 U.S.C. § 1446(b), a defendant's time to remove a case is not triggered until a defendant is formally served with process). Given the Supreme Court's abandonment of the policy of strict construction, the plain language of § 1446, and the fairness concerns at issue, the Third Circuit joined the Sixth, Eighth, Ninth, and Eleventh circuits in adopting the later-served rule.

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