IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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JOEL C. HALL and CHRISTINE HALL,

Plaintiffs,

v.

ANDERSEN CORPORATION and
GALLAGHER BASSETT SERVICES, INC.,

Defendants.

OPINION AND ORDER

10-cv-821-slc

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In this civil action, plaintiffs Joel C. Hall and Christine Hall seek compensation for workplace injuries sustained by Joel Hall. Plaintiffs initially brought this suit in the Circuit Court for Dunn County, Wisconsin; defendant Andersen Corporation removed it to this court on December 23, 2010, asserting diversity under 28 U.S.C. § 1332 as the ground for federal jurisdiction.

Before the court are two motions: (1) plaintiffs' motion to remand this case to state court based on defects in the removal procedure, dkt. 3; and (2) defendant Andersen's motion, filed at the court's prompting, for leave to file its untimely answer, dkt. 21. As explained in more detail below, I am granting the motion to file the untimely answer and I am denying the motion to remand to state court.

## BACKGROUND

Plaintiffs Joel and Christine Hall, husband and wife, commenced this personal injury action in the Circuit Court for Dunn County, Wisconsin on November 29, 2010, seeking to recover damages for injuries sustained by Joel Hall at work when a handle snapped off a patio door that he was lifting. Plaintiffs sued the door manufacturer, Andersen Corporation, for

negligence, breach of warranty and negligence. Also named as a defendant was Gallagher Basset Services, Inc., the workers' compensation carrier for Joel Hall's employer, CEVA Logistics. Plaintiffs asserted that "the court should order the workers compensation carrier reimbursed under the formula contained in Wis. Stat. § 102.29." Complaint, ¶¶2-3.

On December 23, 2010, defendant Andersen Corporation filed a notice of removal in this court, asserting diversity as the basis for federal jurisdiction. Dkt. 1. Andersen did not obtain Gallagher's consent before filing the removal petition, nor did it serve copies of the removal papers on Gallagher. It filed its removal papers in the state circuit court on December 27, 2010.

On January 21, 2011, plaintiffs filed a motion to remand the action to state court. Dkt. 3. Plaintiffs asserted that the removal was procedurally flawed because Andersen did not file its removal papers on Gallagher and did not indicate that Gallagher consented to the removal, and because Andersen had failed to provide the states of incorporation for the defendants, thereby failing to establish diversity jurisdiction. In addition to these procedural defects, plaintiffs argued that the case was not removable because it arose under the worker's compensation laws of Wisconsin, so that removal was barred under 28 U.S.C. § 1445(c) ("[A] civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."). Although not an asserted basis for remand, plaintiffs also pointed out that Andersen had not yet filed an answer to the complaint as required by Fed. R. Civ. P. 81(c), even though such answer was to have been filed within seven days of the filing of the notice of removal. Later that day, Andersen filed its answer. Dkt. 7.

On February 1, 2011, Andersen filed its brief opposing the motion for remand. Dkt. 9. It also filed an amended notice of removal, which it sent to counsel for plaintiffs and to counsel

for Gallagher, in which it asserted that Andersen was incorporated in Minnesota and Gallagher was incorporated in Delaware. Dkts. 10 & 12. The amended petition also indicated that Gallagher's consent to removal was not necessary because it was at most a nominal defendant from whom no consent was required.

Meanwhile, on December 30, 2010, Gallagher filed its answer and affirmative defenses in the Circuit Court for Dunn County. Second Dec. of Dean R. Rhode, dkt. 18, exh. 2. Gallagher admitted that it had provided workers' compensation benefits to plaintiff and that it had a statutory right to recovery under Wis. Stat. § 102.29. In its affirmative defenses, Gallagher asserted that it should be realigned as an involuntary plaintiff rather than a defendant and that it was "entitled to be totally reimbursed out of any settlement or judgment obtained in the plaintiffs' favor, and/or directly against the named defendants." *Id*. at 2-3. Gallagher's lawyer filed a notice of appearance in *this* court on January 21, 2011.

On March 16, 2011, after plaintiffs had filed their reply brief, this court entered an order noting that Andersen had filed its answer late without making the showing of good cause as required by Fed. R. Civ. P. 6(b). Dkt. 20. The court directed Andersen to make a showing of good cause and gave plaintiffs the opportunity to respond.

Andersen filed its submission in accordance with the order on March 25, 2011. The two lawyers from SmithAmundsen LLC representing Andersen in this matter, Mark Broderick and Patrick Lubenow, submitted affidavits offering the following explanation for their failure to file a timely answer:

Attorney Broderick prepared the notice of removal. However, the notice was reviewed, signed and filed by Attorney Lubenow because Attorney Broderick was not admitted to practice

in federal court. Attorney Broderick assumed that Attorney Lubenow would prepare the answer and file it in federal court in accordance with Fed. R. Civ. P. 81(c). Attorney Lubenow, however, assumed that Attorney Broderick had prepared the answer and filed it in state court before the notice of removal was prepared and filed. Attorneys Lubenow and Broderick had little, if any conversation, about the case after the notice of removal was filed because of the Christmas holiday and because Attorney Broderick was on vacation from December 29, 2010 through January 3, 2011. In addition, during December, both lawyers were working on trial preparation and motions *in limine* in a $20 million explosion case. Neither Attorney Broderick nor Attorney Lubenow discovered the failure to file an answer until plaintiffs filed their motion for remand on January 21, 2011, which prompted them to file the answer.

## OPINION

### I. Andersen's Untimely Answer

For purposes of this motion, Andersen does not dispute that it filed its answer 18 days late. Andersen asks the court to excuse its delay under Fed. R. Civ. P. 6(b), which permits the court to extend the time for the doing of an act "if the party failed to act because of excusable neglect." The term "excusable neglect" is a flexible concept that encompasses late filings caused by inadvertence, mistake or carelessness. *Pioneer Investment Services Co. v. Brunswick Associates, Ltd.*, 507 U.S. 380, 389 (1993). In deciding whether a particular neglect is "excusable," the court must consider all the relevant circumstances surrounding the omission, including the length and reason for the delay, its potential impact on judicial proceedings, whether the movant acted in good faith and the danger of prejudice to other parties. *Id*. at 395.

Had Andersen filed the requisite motion under Rule 6(b) at the time it filed its answer, I would have had no trouble finding excusable neglect. Although not exactly compelling, the reasons for the delay—the press of other cases, the holidays and a miscommunication between the lawyers handling the case—are the sort of inadvertence that fits within the post-*Pioneer* notion of neglect.[1] Further, although 18 days late, Andersen's lawyers promptly filed the answer upon learning of their default. At that point, neither plaintiffs nor the court's schedule suffered any harm from Andersen's tardy filing: the case had been pending for less than a month and the parties had not even had their pretrial scheduling conference. Finally, there is no evidence that Andersen acted in bad faith or sought to gain some advantage by delaying its answer.

More troubling is the failure of Andersen's lawyers to explain why they failed to file the requisite motion under Rule 6(b) until asked to do so by the court. Rule 6(b)(1)(B) predicates the necessary finding of good cause on the filing of a motion by the delinquent party. Here, Andersen's lawyers did not take that step until directed to do so by the court, and *that* omission has caused some delay. Notably, because the motion was not filed, this court did not realize the answer was late until it reviewed the motion to remand, which had to be put on hold while it waited for Andersen to demonstrate excusable neglect. (It would make no sense to consider Andersen's amended removal petition, which was the subject of some of the parties' arguments, if Andersen was in default when it filed it.)

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[1]As a general proposition and the for the purposes of the Rule 6(b) "excusable neglect" analysis at issue here, the failings of the attorney may be attributed to the party. *Pioneer*, 507 U.S. at 396-97; *In re KMart Corp.,* 381 F.3d 709, 715 (7th Cir. 2004).

In the end, however, I am persuaded that excusable neglect exists to permit the filing of the late answer. It may be that Andersen assumed that the court, by inviting Andersen to file the Rule 6(b) motion, implicitly had excused Andersen's failure to file the motion when Andersen filed the answer. Further, there is no deadline for filing a Rule 6(b) motion, so Andersen is not technically required under the rules to show excusable neglect for failing promptly to file that motion. That omission weighs against Andersen in the equitable analysis, *see*, *e.g. In re KMart Corp.*, 381 F.3d 709, 714-15 (7th Cir. 2004) (lawyer's failure to bring motion to permit filing of late claim until 28 days after she learned claim was filed late supported district court's finding of no excusable neglect), but not so heavily as to warrant denying the motion.

Although this case is off to a slow start, not all of the delay is Andersen's fault. Some is simply the result of the court's workload. Moreover, other than the delay itself, plaintiffs have not suggested any resulting harm, such as the loss of witnesses or the destruction of evidence. On the other hand, disallowing the answer (and essentially finding Andersen in default) because of Andersen's technical noncompliance would be an unduly harsh sanction at this early stage of the litigation. Trials on the merits are favored over default judgments, with default judgment reserved for the "extreme situation" in which a party "willfully disregards pending litigation." *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811 (7th Cir. 2007). Andersen's screw-ups have not been extreme and they do not establish willful disregard of this lawsuit.

Accordingly, I find that Andersen has made the showing required under Rule 6(b)(1)(B) to permit the filing of the late answer.

## II. Propriety of Removal

### A. Legal standard

Under 28 U.S.C. § 1441(a), any civil action filed in state court over which a federal court would have original jurisdiction may be removed to federal district court. The procedure for removal is set forth in 28 U.S.C. § 1446. Subject to some exceptions, all defendants must join in a removal petition and any removal motion must be filed within 30 days after receipt of the initial pleading. 28 U.S.C. § 1446(b); *Northern Illinois Gas v. Airco Industrial Gases*, 676 F.2d 270, 272 (7th Cir.1982). If all defendants do not join in the removal petition, the remaining defendants have the burden of explaining affirmatively why any co-defendants are not included in the petition. *Northern Illinois Gas*, 676 F.2d at 272. In determining whether removal is proper, the federal court is limited to considering the facts existing at the time of removal. *Gould v. Artisoft, Inc.*, 1 F.3d 544, 547 (7th Cir.1993). Under 28 U.S.C. § 1446(d), removal is effected by the defendant's taking three procedural steps: filing a notice of removal in federal court, giving prompt written notice to "adverse parties" and filing a copy of the notice in state court.

### B. Andersen's failure to notify Gallagher or explain its lack of consent

In their complaint, plaintiffs named Gallagher, the workers' compensation carrier for Joel Hall's employer, CEVA Logistics, as a defendant. Plaintiffs do not assert any claims directly against Gallagher, but allege that Gallagher has a right under Wis. Stat. § 102.29 to be reimbursed for health care expenses paid on behalf of CEVA Logistics. That statute provides that an employee who claims workers' compensation from his employer or an insurer retains the right to bring a tort action against third parties, and provides for the allocation of proceeds

recovered in such an action between the workers' compensation carrier and the plaintiff. Wis. Stat. § 102.29.

Andersen does not deny that it failed to obtain Gallagher's consent before it filed the petition for removal, failed to explain this omission in its removal papers and failed to serve copies of its removal papers on Gallagher. According to Andersen, none of these steps was necessary because Gallagher does not have interests in this case that are adverse to plaintiffs.

Plaintiffs concede that Gallagher should be realigned as a party plaintiff and that therefore, Andersen did not need to obtain its consent before removing the case. Dkt. 17, at 7. *Andersen v. Garber*, 160 Wis. 2d 389, 398-99, 466 N.W. 2d 221, 225 (Ct. App. 1991) (subrogated insurer should be joined as plaintiff); *Ryan v. State Bd. of Elections*, 6651 F.2d 1130, 1134 (7th Cir. 1981) (consent of nominal or formal parties not necessary to removal). They maintain, however, that because Gallagher has interests in this case that are adverse to Andersen's, Andersen *was* required to provide Gallagher with written notice of removal as required by 28 U.S.C. § 1446(d) (promptly after filing notice of removal, defendant "shall give written notice thereof to all adverse parties").

The term "adverse" is not defined in the removal statute. However, I am convinced that Gallagher's interests are not adverse to Andersen's in this case. Although plaintiffs assert repeatedly that Gallagher has asserted a "direct claim" against Andersen as allowed by Wis. Stat. § 102.29(1) (providing that worker's compensation carrier has same right as employee to make claim or maintain action in tort against any other party for injury or death), I do not see any such direct claim in Gallagher's answer. As Andersen points out, although Gallagher has asserted in its affirmative defenses that it has a right to be reimbursed out of any judgment in the case,

Gallagher has not filed any claims or asserted any cause of action against Andersen. Indeed, consistent with the parties' Rule 26(f) joint pretrial conference report, the only claim Gallagher has advanced in this case is a right to be reimbursed under the statutory formula, Wis. Stat. § 102.29, a right that depends on plaintiffs' success in this lawsuit. If anything, Gallagher's interest in obtaining recovery could be viewed as adverse to plaintiffs (because it will reduce plaintiffs' recovery), but it is not adverse to Andersen's. *Accord Thorpe v. Daugherty*, 606 F. Supp. 226, 227 (D.C. Ga. 1985) (defendants who cross-claimed against removing defendant not "adverse parties" under removal statute because their actual interest in case was contingent on removing party's liability).

Furthermore, the propriety of removal is to be determined on the facts existing at the time the notice of removal was filed. At that time, Gallagher had not filed its answer asserting a claim against Andersen. Accordingly, even if Gallagher has made claims in its answer that arguably make its interests "adverse" to Gallagher's, Andersen did not have this information when it filed its removal petition. Finally, it is worth noting that Gallagher has not objected to removal. For all these reasons, I conclude that Andersen's failure to provide Gallagher with written notice of removal is not a basis for remand.

The remaining question is whether remand is required because Andersen failed in its original petition for removal to explain why it had not obtained Gallagher's consent. Although Andersen filed an amended removal petition curing the defect, dkt. 10, plaintiffs argue that the court must not allow the amendment because it was filed outside the permissible 30-day window for amendment.[2]

[2] Plaintiffs also argue that the court must not allow the amended petition because Andersen did not file a motion seeking permission to file it. Whether such a motion is required under the rules is unclear, but in any event I find such a request to be implicit.

I disagree. Even after the 30-day time limit set out in 28 U.S.C. § 1446(b) has elapsed, amendments to correct "defective allegations of jurisdiction" are permitted under 28 U.S.C. § 1653. *Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982). In general, courts may grant permission to amend a petition outside the 30-day window when the defendant seeks to "address[] only incorrect statements about jurisdiction that actually exist[], and not defects in the jurisdictional facts themselves." *Newman-Green, Inc. v. Alfonza-Larrain*, 490 U.S. 826, 831 (1989). *See also* 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3733 (3d ed. 1998) (amendment may seek to correct imperfect statement of citizenship, state previously articulated grounds more fully, or correct jurisdictional amount; completely new grounds may not be added and missing allegations may not be furnished). A failure to explain the absence of a defendant is generally regarded as a "technical" pleading deficiency when the missing defendant is a nominal party, as Gallagher is in this case. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 368 (7th Cir. 1993) (failure to obtain consent was "a technicality that doesn't go to the heart of jurisdiction"); *Northern Illinois Gas*, 676 F.2d at 274 (district court properly allowed defendant to cure defective petition where non-joining defendant was purely nominal party); *Estate of Pilsnik v. Hudler*, 118 F. Supp.2d 905, 909 (E.D. Wis. 2000) (allowing defendants' motion to amend their notice of removal to include explanation). Thus, Andersen shall be permitted to amend its removal petition.[3]

[3]For this same reason, Andersen may amend its petition to include the states of incorporation of the defendants.

### C. Wisconsin's Worker's Compensation Law

Finally, I am not persuaded that this case must be remanded under 28 U.S.C. § 1445(c) because it "arises under" the workers' compensation laws of Wisconsin. Again, plaintiffs do not focus on their own claims but on Gallagher's statutory claim for reimbursement. Plaintiffs point out that under Wis. Stat. § 102.29(1), Gallagher may be able to recover for future obligations that it might incur under the Act, and that disputes may arise with respect to attorney fees, both of which will require the court to interpret the worker's compensation act.

The fact that this court might be called upon to *interpret* the Act when fashioning an appropriate judgment does not mean that the case "arises under" the Act. A "suit arises under the law that creates the cause of action," *American Well Works v. Layne*, 241 U.S. 257, 260 (1916), which in this case is the law of tort and contract. *Accord Houston v. Newark Boxboard Co.*, 597 F. Supp. 989, 991 (E.D. Wis. 1984) (suit by employee against company who manufactured machine that injured employee at work did not arise under Wisconsin worker's compensation law even though law might "regulate the prosecution of the plaintiff's claims").

## ORDER

IT IS ORDERED that:

1. Defendant Andersen's motion for leave to file its untimely answer, dkt. 21, is GRANTED;

2. Plaintiffs' motion for remand, dkt. 3, is DENIED;

3. Defendant Andersen's request for oral argument, dkt. 15, is DENIED as unnecessary; and

4. Defendant Andersen's implied request for leave to file an amended petition for removal, dkt. 10, is GRANTED.

Entered this 3rd day of May, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge