IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY J. KRAFT,

OPINION AND ORDER

Plaintiff,

11-cv-308-bbc

v.

JEANNIE THOMPSON,
JEANNIE THOMPSON
ACCOUNTING, LLC and
TWIN CITY FIRE INSURANCE
CO.,

Defendants.

- -

This civil action for money damages raises a question much disputed in the district courts but rarely addressed by the courts of appeals: whether the procedures for removal of cases to federal court set out in 28 U.S.C. § 1446(b) are jurisdictional and therefore not subject to equitable exceptions. The question arises out of the following circumstances. Plaintiff Jeffrey J. Kraft sued defendants Jeannie Thompson and Jeannie Thompson Accounting, LLC, in state court for accounting malpractice; sometime thereafter, a bankruptcy proceeding filed by defendant Jeannie Thompson intervened, leading to the customary stay. When the stay was finally lifted 19 months later, the state circuit court

entered judgment in plaintiff's favor, limiting the amount that plaintiff could obtain from this defendant to the amount for which defendant would be indemnified by her insurer.

Barred from obtaining any damages from defendants (apparently Jeannie Thompson, LLC, has no assets of its own), plaintiff decided to sue the insurer of the Thompson defendants. Rather than filing a new lawsuit, he filed an amended complaint, adding the insurer, defendant Twin City Fire Insurance Co., and keeping the Thompson defendants in the suit. Within 30 days after defendant Twin City was served with the amended complaint, it removed the case to federal court, long after the one-year deadline for removal had run.

In its notice of removal, defendant averred that it is incorporated in Indiana and has its primary place of business in Connecticut. (Twin City is the only defendant with a stake in this motion, so all further references to "defendant" will be to this defendant.) Also, it averred that plaintiff and the Thompson defendants are citizens of Wisconsin. However, it contended that federal diversity jurisdiction existed because the Thompson defendants either should not have been joined as parties at all or, alternatively, should be treated as plaintiffs because their interests are aligned with plaintiff Kraft's and antagonistic to those of defendant.

Plaintiff moved for a remand, arguing both that federal diversity jurisdiction does not exist and even if it did, defendant's attempted removal was untimely under 28 U.S.C. § 1446(b), which prohibits removal of a diversity case from state court more than one year

after it is begun. As to the second point, defendant argues that the provisions of § 1446(b) are not jurisdictional and are therefore subject to equitable tolling. It maintains that it is entitled to such tolling because plaintiff deprived it of an opportunity to remove by his ploy of adding defendant to a case that had been resolved.

I conclude that § 1446(b) is not jurisdictional, but procedural, and for that reason, equitable tolling could apply. I find, however, that this is not a case in which equitable tolling *should* apply. Although plaintiff's decision to amend his complaint rather than to start a new action deprived defendant of its opportunity to remove the case to federal court, this action was not so flagrant a manipulation of the system as to warrant giving defendant the benefit of equitable tolling. I conclude also that plaintiff's action against defendant is a direct action under Wisconsin law, which means that under federal law, the parties are not diverse. Therefore, diversity jurisdiction does not exist and defendant's suit is not removable.

Solely for the purpose of deciding this motion, I find the following facts from the record.

RECORD FACTS

Plaintiff Jeffrey J. Kraft filed suit on May 9, 2009, against defendants Jeannie Thompson and Jeannie Thompson Accounting, LLC, in the Circuit Court for Pierce County,

Wisconsin, alleging accounting malpractice. Sometime before January 10, 2010, Jeannie Thompson filed a petition for bankruptcy in the United States Bankruptcy Court, which activated the automatic stay of the pending civil litigation. Dkt. #5-7. On May 28, 2010, more than a year after plaintiff filed his original complaint, he filed an amended complaint in the state court action, adding Twin City Fire Insurance Co. as a defendant, dkt. #5-15, but he never served this complaint on the newly added defendant.

Sometime before January 24, 2011, the bankruptcy court lifted the stay, which allowed the circuit court to address plaintiff's unopposed motion for summary judgment against both Thompson defendants in the amount of $151,824.66. Dkt. #5-24. The court ruled in favor of plaintiff, but noted that any relief plaintiff could obtain from defendant Jeannie Thompson had been limited by the bankruptcy court to the amount for which she was indemnified by her insurer. Id. ("Pursuant to the order of the United States Bankruptcy Court for the Western District of Wisconsin, dated March 2, 2010, the claim against Ms. Thompson is limited to the insurance coverage available to her on the claim.")

On February 24, 2011, one month after the grant of the motion for summary judgment, plaintiff amended his complaint a second time, again naming defendant and the Thompson defendants. Plaintiff alleged three claims against defendant: (1) it was liable to plaintiff for the Thompson defendants' negligence, making it a proper defendant under Wis. Stat. § 803.04(2); (2) defendant had a contractual duty to indemnify the Thompson

5defendants for the amount of the judgment entered against them in the Pierce County court; and (3) defendant was liable for the damages it had caused the Thompson defendants by failing to defend them. This time, plaintiff served defendant; it received a copy of the summons and complaint on March 28, 2011.

Defendant removed the suit to this court on April 26, alleging diversity of citizenship and more than $75,000 in dispute. Plaintiff moved promptly for remand of the case to state court.

OPINION

A. Characterization of One-Year Deadline in § 1446(b)

Section 1446 sets out the procedure for removal of state actions to federal court. Subsection (b) contains two separate time limits. The first requires the filing of a notice of removal within 30 days of the defendant's receipt of the complaint or, if the original complaint does not suggest a basis for removal, within 30 days of receipt of an amended complaint that first shows that the case may be removable. The second places an overall time limit on removal: "a case may not be removed on the basis of jurisdiction conferred by title 1332 of this title more than 1 year after commencement of the action."

Whether this second requirement is jurisdictional, in the sense that it allows no equitable exceptions, or merely procedural is a question that has divided the district courts.

E.g., Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1327 (N.D. Okla. 2003) (one-year time limit is jurisdictional; if time limit lends itself to abuses and inequities, "it is for the Congress and not this Court to rewrite the provisions of section 1446(b) to curb such abuses"); Leslie v. BancTec Service Corp., 928 F. Supp. 341, 346 (S.D.N.Y. 1996) (allowing late removal of case when defendant had tried removal unsuccessfully on two prior occasions only to have case remanded after plaintiff stipulated he would not seek damages in excess of $50,000 but repudiated his stipulation after remand); Kite v. Richard Wolf Medical Instruments Corp., 761 F. Supp. 597, 600 (S.D. Ind. 1989) (applying one-year limit rigidly in all cases in which it applies would "open[] the door to potential abuse of the rule, the effect of which will be to undermine the very purpose behind Federal diversity jurisdiction").

The distinction between the two kinds of rules carries significant consequences. A federal court that lacks personal or subject matter jurisdiction to hear a dispute has no capacity to hear that dispute. This means that its rulings are subject to challenge at any time in the life of the case, even after it is on appeal and even if no party objected to jurisdiction at any earlier time. On the other hand, if a court mischaracterizes a deadline as "jurisdictional," parties may be barred unjustifiably from asserting equitable defenses to the deadline or challenging their opponents' waiver of their opportunity to object to late filings or other missteps.

Recent cases from the Supreme Court have instructed lower courts to give closer

attention to the distinct concepts of jurisdictional and procedural rules, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2606 (2011) ("Because '[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system,' we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such.") (quoting Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011)). The Court has recommended that courts not refer to a rule as jurisdictional unless it pertains to the court's adjudicatory capacity and that they use the term "claim-processing rule" for any rule setting time limits or procedural requirements, Henderson, 131 S. Ct. at 1203, but it has not made it entirely clear how this applies to statutory time limits. In Henderson, the Court held that the 120-day deadline in 38 U.S.C. § 7266(a) was not jurisdictional, taking into consideration, among other factors, the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims" and the placement of § 7266(a) within the Veterans' Judicial Review Act under a subchapter entitled "Procedure." Id. at 1205-06. However, in Bowles v. Russell, 551 U.S. 205, 209-10 (2007), in a case involving a tardy appeal from the denial of a petition for a writ of habeas corpus, the Court held that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"

Only a few appellate decisions have addressed the question whether § 1446(b)'s one-year deadline for removal is jurisdictional or procedural. One is Tedford v. Warner-Lambert

Co., 327 F.3d 423 (5th Cir. 2003), in which the court held that the deadline was not jurisdictional, relying on the Supreme Court's statement in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990), that "time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" and on previous Fifth Circuit cases, such as Leininger v. Leininger, 705 F.2d 727, 729 (1983) (holding that time limit for removal is not jurisdictional, but "modal and formal and may be waived"). Although many district courts have reached the opposite conclusion on various grounds and at least two circuit courts have disagreed in dictum with the result that Tedford reached, Lovern v. General Motors Corp., 121 F.3d 160 (4th Cir. 1997); Burns v. Windsor Insurance Co., 31 F.3d 1092 (11th Cir. 1994), I am persuaded that Tedford reached the right result. (It is worth noting that both Burns and Lovern were decided before the Supreme Court's recent spate of opinions clarifying the distinction between jurisdictional requirements and procedural rules). The one-year limit on removal is properly characterized as a claim-processing rule, designed "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." Henderson, 131 S. Ct. at 1203.

As the Court recognized in Henderson, the courts' characterization of a rule is not the last word. "Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule." Id. (citing Bowles, 551 U.S. at 212-13). In deciding whether Congress has done so, courts are to look to see whether "there

is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" Id.

The one-year deadline at issue in this case was enacted in 1988 as part of the Judicial Improvements Act, Pub. L. 100-702. That Act included two true jurisdictional changes, primarily the creation of special federal court subject matter jurisdiction to deal with dispersed and complex litigation, but also an increase to $50,000 for the amount in controversy required for diversity jurisdiction. Both of these were discussed in Title III of the section-by-section analysis in the House Report under the heading "Federal Jurisdiction Reform." H. Rep. No. 100-889, at 37-46, 1988 U.S.C.C.A.N. 5982-6006. The addition of the one-year deadline to § 1446(b) was discussed in Title X, "Miscellaneous Amendments," H. Rep. No. 100-889 at 72, 1988 U.S.C.C.A.N. at 6032-33. This differential in treatment is evidence that Congress did not intend to make the deadline jurisdictional, in the sense of affecting the courts' adjudicative capacity to hear the dispute. This conclusion is bolstered by the explanation that is given in the House Report for the deadline change, which is that the amendment was intended to reduce the opportunity for removal after substantial progress has been made in state court. Id. Consideration of the case management problems of state courts is a far cry from concerns about the adjudicative capacity of the federal courts to hear a diversity action.

Categorizing a rule as procedural does not mean that it has no force. For example, 28 U.S.C. § 2244(d) imposes a firm deadline on filing a petition for a writ of habeas corpus.

Nevertheless, in Holland v. Florida, 130 S. Ct. 2549, 2560 (2010), the Supreme Court held that § 2244(d) is subject to equitable tolling in appropriate cases. Id. at 2560 ("We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor "of equitable tolling." Irwin [v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990)]"). The ruling in Holland is a limited one, however. Relief from the deadlines is limited to those few cases in which a court can find "extraordinary circumstances."

Since Holland was decided, the lower courts have found equitable tolling proper in only a few habeas cases. E.g., Dillon v. Conway, 642 F.3d 358, 362 (2d Cir. 2011) (finding extraordinary circumstances when counsel filed habeas petition one day late because of misunderstanding of deadline calculation, petitioner was pursuing his rights diligently, both petitioner and his wife had been "persistent in maintaining contact" with counsel to insist that he file petition ahead of deadline, counsel admitted knowingly misleading petitioner by promising he would file petition before deadline and petitioner could not have foreseen or prevented consequences of counsel's failure to meet filing deadline); Socha v. Pollard, 621 F.3d 667, 670 (7th Cir. 2010) (returning petition to district court to determine whether extraordinary circumstances present, while suggesting that warden's interference with inmate-petitioner's ability to file habeas corpus petition could support application of equitable estoppel, so that petition could be entertained).

B. Existence of Extraordinary Circumstances

As with habeas petitions, not every claim to equitable tolling or estoppel justifies a waiver of § 1446(b)'s one-year deadline for removal. At the least, the removing party must show extraordinary circumstances in order to resist a motion for remand. Such circumstances do not exist in this case. In hindsight, plaintiff should have included defendant as a party to his lawsuit at the outset, but it is not likely he knew then that the Thompson defendants would turn out to be judgment proof. It is odd, but not apparently venal or even particularly blameworthy, that plaintiff never served defendant a copy of his first amended complaint, but withholding it made no difference to defendant. The one-year time limit had run before the bankruptcy court lifted its stay and thus, before plaintiff knew that defendant Jeannie Thompson was judgment proof.

Naming the Thompson entities as defendants was a ploy to defeat diversity but so obviously ineffective as hardly to be worth mentioning. By contrast, in Tedford, 327 F.3d 423, the plaintiff had filed suit against Warner-Lambert in state court in a county in which she did not reside, setting out a claim that was not cognizable under state law against the sole nondiverse party, who had no connection to the plaintiff. When the plaintiff learned that Warner-Lambert intended to remove the case, she amended her complaint to add her own physician, but then filed a notice of non-suit against him that she withheld from the court until after the one-year deadline for removal had run. See also Elsholtz v. Taser

International, Inc., 410 F. Supp. 2d 505 (N.D. Tex. 2005) (court found grounds for equitable tolling when plaintiff brought suit against nondiverse defendant and added defendant Taser five months later, sought series of continuances until one-year deadline for removal had run and then dismissed nondiverse defendant).

C. Existence of Diversity

As an alternative argument, plaintiff asserts that diversity does not exist, for two separate reasons. First, both the plaintiff and the Thompson defendants are citizens of Wisconsin. Whether the Thompson defendants are proper defendants is questionable in view of plaintiff's failure to assert any claims against them in his second amended complaint or to seek any relief from them. Plaintiff contends in his complaint only that defendant is liable to him because of the negligence of its insureds (the Thompson defendants), that defendant had a contractual duty to indemnify the Thompson defendants and that defendant is liable for any damages they suffered by its failure to defend them. (Plaintiff does not say to whom the liability runs; presumably, it is to the Thompson defendants.)

Far more persuasive is plaintiff's second argument, which is that, whether or not the Thompson defendants are properly aligned in the present suit, diversity is lacking because plaintiff's suit is a direct action suit against defendant under Wisconsin law. Therefore, plaintiff argues, defendant is considered a citizen of the state of Wisconsin. 28 U.S.C. §

1332(c)(1) provides that an insurer is deemed a citizen of the same state as the insured when sued in a direct action. Wis. Stat. § 632.24 provides

> **Direct action against insurer**. Any bond or policy of insurance covering liability to others for negligence makes the insurer liable . . . to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

Although § 632.24 does not apply if the insurance policy under which suit is brought was not issued in Wisconsin or delivered to an insured in this state, defendant has not suggested that it qualifies for either exception. Thus, defendant is left with the fruit of its own argument: if plaintiff's case against the Thompson defendants is a sham, as defendant maintains (and with good reason), his case against defendant is a direct action to which § 632.24 applies. Plaintiff's suit against defendant is essentially an assertion of the same claim as the one he filed against the Thompson defendants, seeking damages from them for their tortious conduct. As § 632.24 says, such a claim can be asserted against the insurer, "whether the liability is presently established or is contingent." Defendant cites National Athletic Sportswear, Inc. v. Westfield Ins. Co., 528 F.3d 508 (7th Cir. 2008), as rejecting the notion that diversity jurisdiction was lacking under the direct action provision of § 1332(c)(1). In that case, the insured was suing the insurer for its failure to pay losses from burglary under commercial insurance policy. In this case, plaintiff is suing the insurer of the

tortfeasors.

Accordingly, I conclude that plaintiff's motion to remand this action to state court must be granted, both because defendant has failed to show that plaintiff's conduct in state court entitles defendant to equitable relief from the one-year deadline for removal and because plaintiff's action against defendant is, in actuality, a direct action in which the parties are not diverse by operation of law.

D. Interlocutory Appeal

Defendant has asked the court to certify any ruling adverse to it for appeal to the Court of Appeals for the Seventh Circuit. It seeks an "interlocutory" appeal, but the conclusion that plaintiff is entitled to remand this case ends all the proceedings in federal court. There would be nothing "interlocutory" about an appeal at this time. Therefore, certification is a moot point and defendant's request will be denied. If defendant believes it has grounds for an appeal, it is free to try to convince the court of appeals that 28 U.S.C. § 1447(d) does not bar it from hearing defendant's appeal.

ORDER

IT IS ORDERED that plaintiff Jeffrey J. Kraft's motion to remand this case to the

Circuit Court for Pierce County, Wisconsin, is GRANTED. Defendant Twin City Fire Insurance Co.'s request for an interlocutory appeal of this order is DENIED.

Entered this 10th day of August, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge