

How Does One Know When A Corporation Is Antagonistic?

Article By:

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When a shareholder files a derivative suit in state court, the defendants often will try to have the case removed to the federal district court. Federal courts, however, are courts of limited jurisdiction and not every plaintiff can make a “federal case” out of their complaint. When federal court jurisdiction is based on diversity (28 U.S.C. § 1332), the ability to remove (or prevent removal) will depend upon the accident of the citizenship of the parties.

In *Gartner v. Pyatt*, 2016 U.S. Dist. LEXIS 164281 (D. Nev. Nov. 29, 2016), the plaintiff filed a derivative complaint in Nevada state court. One of the defendants petitioned for removal to the federal district court, alleging that he is a citizen of Kentucky and that all of the other individual defendants are citizens of Colorado, where corporation is based. The corporation, however, was incorporated in Nevada. Would this make a difference? The plaintiff thought so.

The plaintiff argued that the resident defendant rule prevented removal to a federal court if one of the parties “properly joined and served” as a defendant is a citizen of the state in which the case was filed. 28 U.S.C. § 1441(b). This raised the question of whether the corporation, a nominal defendant, should be considered a defendant for purposes of the resident defendant rule or whether it was more properly aligned on the plaintiff’s side. The plaintiff argued that because the corporation’s management was antagonistic to the lawsuit, the corporation should not be aligned as a plaintiff in the lawsuit.

Judge [Jennifer A. Dorsey](#) found that a corporation is generally antagonistic when management “refuses to take action to undo a business transaction or whenever . . . it so solidly approves [of the transaction] that any demand to rescind would be futile.” quoting *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir. 2008) (citing *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 (1947)). In this case, Judge Dorsey found that the corporation was not antagonistic at the time the suit was filed because only 3 of the 7 board members were named as defendants and the plaintiff had not made demand on the board before filing suit. Although the plaintiff made allegations as to the independence and impartiality of the 4 non-defendant parties, Judge Dorsey found these to be insufficient to show that they were antagonistic to the plaintiff at the time suit was filed.

Although somewhat abstruse, a rationale does underlie the resident defendant rule. The theory is that diversity jurisdiction is intended to protect an out-of-state defendant from being “hometowned” in a state court. If a defendant is a citizen of the state, the need for diversity jurisdiction falls away and

the case can remain in state court.

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