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Federal Procedure

Hon. Mark Hornsby
U.S. District Court, Western District of Louisiana

Update on Federal Jurisdiction & Procedure

Shreveport Bar Association

December 17, 2020

8:30 a.m. to 9:30 a.m.

Mark L. Hornsby
United States Magistrate Judge
Western District of Louisiana
300 Fannin Street, Suite 4300
Shreveport, LA 71101
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Well-Pleaded Complaint Rule

St. Charles Surgical Hosp. v. Louisiana Health Service, 2020 WL 634918 (E.D. La.) (Morgan, J.):

Plaintiff health care providers sued Blue Cross for failure to pay for medical procedures after saying that it would. Plaintiffs disavowed any reliance on federal law and sought instead to rely solely on state law. Blue Cross removed arguing, among other things, that Plaintiffs' claims were preempted by ERISA. Plaintiffs moved to remand.

Under the well-pleaded complaint rule, plaintiff is the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law. An independent corollary to the rule is the complete pre-emption doctrine. If state law is completely preempted, any claim under that law is considered a federal claim.

Motion to remand was granted. This was not a suit to recover benefits under an ERISA plan. The health care providers were attempting to recover the benefits that Blue Cross allegedly assured them that it would provide.

General Jurisdiction

Frank v. PNK (Lake Charles), 947 F.3d 331 (5th Cir. 2020):

Wrongful death lawsuit arising out of 86-year old casino patron falling off a swivel chair. Can a federal court exercise general jurisdiction over a non-resident casino due to its numerous local advertising contacts with the forum state, including billboards, local television, and local radio?

Plaintiffs argued that the Texas federal court erred in not exercising personal jurisdiction over Defendant because of Defendant's targeted advertising in Texas.

The Fifth Circuit applied the "redefined general jurisdiction test" under Daimler v. Bauman, 571 U.S. 117 (2014): In order to properly exercise general jurisdiction, a defendant-company must be "at home" in the forum state. At home means state of incorporation or PPB. Even though a corporation might operate in many places, it cannot be deemed "at home" in all of them because unpredictability would follow, and jurisdictional rules are meant to promote greater predictability.

Snap Removals

The term "snap removal" deals with a situation in which a party removes an action based on diversity jurisdiction before a forum defendant has been served. Durham v. AMIKids, Inc., 2018 WL 6613816 (M.D. La. Sept. 25, 2018).

LMN Consulting, Inc. v. DaVincian Healthcare, Inc., 2019 WL 2565281 (W.D. Tex. Mar. 29, 2019). Courts are split on the "fairness" of allowing one defendant to remove before any forum defendants have been served. In the absence of Fifth Circuit precedent prohibiting "snap removals" and in the absence of gamesmanship by Defendant, this court will follow the plain language of the statute, which requires consent only from "all defendants who have been properly joined and served." See 28 U.S.C. § 1441(b)(2).

A "snap back" solution is being considered in Congress. If Plaintiff serves the in-state defendant within 30 days, the case is remanded.

Motions to Amend

Phillips v. Exact Sciences, 2020 WL 419369 (W.D. La.) (Hornsby, M.J.):

This is an employment-related sexual harassment case. Plaintiff specifically invoked Louisiana law but did not cite any federal laws or allege a claim under federal law.

The nearest the petition came to invoking federal law was this quote: "Plaintiff has timely filed a charge with the Equal Employment Opportunity Commission and is currently waiting on the issuance of a Notice of Right to Sue."

The case was removed based on diversity. A scheduling order was issued setting a trial date and a date for amendments to pleadings. Plaintiff received the right to sue letter but did not ask for leave to amend her complaint until four months after the deadline. The proposed amendment would have added only the following: "Plaintiff has timely filed a charge with the Equal Employment Opportunity Commission and received her Notice of Right to Sue, attached hereto as Exhibit A."

Leave to amend is freely granted under Rule 15(a). But once a deadline has passed, a movant must show good cause. Defendant objected to the amendment arguing that Plaintiff did not properly assert a Title VII claim in her original petition, and it was too late to do so now because discovery was closed.

The court found that there was no Title VII claim that would be recognized under the well pleaded complaint rule. According to the court: "The Title VII claim cannot be like Schrödinger's Cat, which was simultaneously both alive and dead. It cannot be non-

existent under the well-pleaded complaint rule yet simultaneously exist for purposes of stating a claim on which relief may be granted."

The motion to amend was denied. Plaintiff could have asked for leave to amend quickly after receiving her notice of right to sue, only a few weeks after the pleading deadline, and it would have been looked upon more favorably. Instead, there was a lengthy unexplained delay before Plaintiff asked to file an amendment that doesn't squarely assert a Title VII claim but could unnecessarily complicate the litigation because of its ambiguity.

Experts and Daubert

Watch Your Deadlines:

Million v. Exxon Mobil Corp., 2019 WL 6617400 (M.D. La. 2019): Plaintiffs filed a motion to extend scheduling order deadlines and assumed the extension would be granted. Plaintiffs chose not to retain medical causation experts in anticipation of the additional time. The extension was denied after Plaintiffs' deadline passed, and it was too late for Plaintiffs to secure an expert. Court granted Defendant's MSJ because without an expert, Plaintiffs could not prove causation.

What is a Supplemental Report?

Petrone v. Werner Enters., Inc., 940 F.3d 425 (8th Cir. 2019): Defendants deposed Plaintiffs' expert and revealed serious flaws in the methodology used in the expert's report.

Plaintiffs moved to modify the scheduling order to permit them to file a post-deadline *supplemental report* that corrected those flaws. The district court stated that Plaintiffs did not show "good cause" for the extension because nothing precluded them from recognizing the flaws in the original report. However, the district court granted the extension based on Rule 37(c) because the corrected information was "useful and necessary to the disposition of the case on the merits."

The appellate court agreed that the report was not supplemental but was a new, distinct report. The new report materially altered the original report. It did not merely clarify the original, and there was no evidence that Plaintiffs subsequently learned of information that was previously unknown or unavailable to them.

The appellate court reversed the extension of the deadline, holding that (1) the "good cause" standard for modification of a schedule is not optional, therefore the district court applied the wrong standard and abused its discretion in granting the extension; and (2) the error was not harmless because the jury "clearly relied" on the expert's report in reaching the damages award.

Is the Expert Qualified?

Weiner, Weiss, & Madison v. Fox, 2019 WL 2112978 (W.D. La. 2019) (Hicks, C.J.): Defendant's expert was not qualified to testify regarding the issue of whether Plaintiffs breached the applicable standard of care for attorneys practicing in Louisiana. The standard of care in Louisiana is governed by a locality standard. The expert had never been licensed to practice in Louisiana and did not have sufficient contacts with Louisiana-based firms/attorneys to otherwise render him qualified to opine as to the applicable standard of care or reasonableness.

On the other hand, Plaintiff's expert was a Louisiana-licensed attorney with over 40 years of experience in Louisiana. He had been admitted as an expert witness in numerous state and federal courts to opine as to applicable standards of care and reasonableness of attorney fee agreements. Therefore, he was qualified to render an opinion on standard of care and reasonableness.

Is the Expert's Opinion Helpful?

Busby v. Texas Roadhouse Holdings, LLC, 16-cv-1467, 2019 WL 7167189 (W.D. La. 2019) (Foote, J.): Personal injury case; Plaintiff tripped on a piece of rebar protruding from the ground at a restaurant. Defendants planned to introduce the report of an expert in the field of commercial architecture. He opined that the rebar was left by the city.

Court held that Defendant's proffered expert report did not meet requirements of Rule 702 because it failed to demonstrate how the expert's architectural knowledge could aid the trier of fact in determining who owned and/or left the rebar; because the expert's opinion was not based on sufficient facts to support his conclusion; and because his declaration/report did not reference any principles or methodologies that were employed to reach his conclusion. Court found that the report was entirely conclusory and was "precisely the type of speculation that Daubert seeks to avoid."

Discovery

Don't Ask for "Any and All…"

Kitchen v. BASF, No. 18-41119, 2020 WL 964371 (5th Cir. 2020): Employment discrimination case alleging violations of the Age Discrimination in Employment Act. In an attempt to support his claim, Plaintiff propounded a request for *all documents related to all employees and terminations at BASF for 2010 to present.*

The court refused to require BASF to produce the information. Because Plaintiff had no evidence to support his claim, summary judgment was affirmed.

Not Proportional

Perez v. Boecken, 2019 WL 5080392 (W.D. Tex. 2019): Following a car wreck, Plaintiff sought medical treatment with various providers who were not a party to the case. Defendants served the non-party providers with Rule 45 subpoenas seeking reimbursement rates of insurers, which the providers contended were trade secrets.

The reduced prices that an uninsured plaintiff may have received if he had participated in an insurance program for which he may have been eligible are irrelevant.

Even if tangentially relevant, the discovery was not proportional to the needs of the case. The discovery placed too high a burden on the non-parties. "Thus, the relative unimportance of the third parties' information in resolving disputed issues as compared to other available information, as well as the burden and expense discovery of this information imposes on non-parties, renders the information disproportional to the needs of this case. See Fed. R. Civ. P. 26(b)(1)."

Independent Medical Examinations

Alcaraz Valdez v. Mears Group, 2019 WL 6829471 (W.D. La. 2019): Following an auto accident, Defendant arranged an IME for Plaintiff. Prior to the IME, Plaintiff served the examining doctor with a subpoena seeking all communications between the doctor and defense counsel, as well as numerous documents regarding past IMEs that were unrelated to Plaintiff or the case. Plaintiff wanted the information to show bias.

The court refused to order production of information related to past IMEs performed by the doctor. Plaintiff did not come forward with any evidence of bias, and the court would not permit a fishing expedition.

Compare to Blaze v. McMoran, 2018 WL 2074751 (W.D. La. 2018) where the plaintiffs did present evidence of potential bias, and limited discovery was allowed regarding prior IMEs by the doctor.

Supplementing Discovery; Rule 60(b); & Disbarment

In re Eugene Ray, 2020 WL 1026928 (5th Cir. 2020)(Stewart, J.):

Plaintiff, a military reservist, skipped work to go to the emergency room complaining of headache and back pain related to his military service the prior weekend. He was fired by his employer for violating its "no call/no show" policy.

Plaintiff sued his former employer under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The employer propounded a RFP for Plaintiff's

medical records. The employer also obtained a signed medical release, but did not obtain the records itself.

Plaintiff's counsel received the medical records from the ER and he claimed to have faxed the records to defense counsel, but later discovered that the fax failed to transmit.

Following a bench trial, the court ruled in favor of the employer. Plaintiff appealed, and the Fifth Circuit reversed and remanded for a computation of damages. *While the case was pending on remand, the employer learned that Plaintiff's counsel had the ER records in his possession prior to trial but failed to disclose them.*

The employer filed a Rule 60(b) motion for relief from the final judgment. The motion included the medical records revealing that Plaintiff's complaints of pain resulted from a chronic condition that he had for many years --- and not related to his military service.

The district court granted the 60(b) motion and found that Plaintiff and his wife testified falsely to mislead the employer and that testimony ultimately misled the Fifth Circuit on appeal. The court also found that Plaintiff's counsel failed to take appropriate steps to supplement incomplete discovery responses --- as required by Rule 26(e) --- by providing the ER records once they came into his possession.

Plaintiff and the employer settled and the case was dismissed. However, the district court entered a show cause order to Plaintiff's counsel regarding his conduct. The court ultimately disbarred Plaintiff's counsel from the Northern District of Texas. The attorney's conduct caused the employer to spend over $340,000 in litigation costs. And the attorney sat quietly during oral argument at the Fifth Circuit when a judge on the panel asked if there was any evidence rebutting Plaintiff's claim that the ER visit was the result of Plaintiff's military service the weekend before. The Fifth Circuit affirmed the disbarment.

1. Be kind. Always. You should assume that a judge will read every email or letter that you exchange with opposing counsel.

2. Notify chambers immediately upon settlement, even if the paperwork has not yet been drafted.

3. Call chambers if you have a question or know of a potential problem. Judges do not like surprises.

4. Be prepared. The judge will be very prepared.

5. Do not assume you will get oral argument. Put everything in your brief.

6. Do not oppose a reasonable request for a short extension of time unless you have a good reason.

7. STOP USING ALL CAPS. No need to yell. Plus, it is hard to read.

8. Stop using string cites. Find and cite the most recent Fifth Circuit case and move on. Also, check Westlaw and Lexis for prior opinions written by your judge.

9. Do not waste all of your page limit with boilerplate law on standard of review or burden of proof – unless it is critical to your unique situation. And please do not print on both sides of the paper.

10. Motions for extension. Tell us why you need it.

11. Statements of Consent. Every motion for extension of time should contain a statement regarding whether the opposing party consents or opposes. Make a clear statement of the opposition.

    Bad example: "Consent was sought but not obtained." What does that mean? Did you call at 5:30 on a Friday and the lawyer had left for the day?

12. Draft a precise order. Proofread your order. If you are not sure which judge will sign your order, use a generic signature line: "Judge".

13. Call your opponent. You can get a lot more done during a real conversation rather than through an exchange of emails.

14. Deliver paper courtesy copies of briefs to chambers. Include exhibits. Not sure if your judge wants a paper copy? Call chambers and ask.

15. Exhibits in CM/ECF. Label them with descriptions so we can find them. Example: "Exhibit 1 Change Order" or "Exhibit 2 Depo. of Plaintiff".

16. Initial disclosures. Include contact information for witnesses. Plaintiff must include a damages calculation, even if it is difficult at the time.

17. Treating physicians. No expert report is needed in the Shreveport or Monroe division as long as the testimony and opinions are based on the treatment as reflected in the medical records. But be careful. Other courts may require more. Read Rule 26(a)(2)(C).

18. Removal. Check your form for LLC citizenship allegations. It is based on the citizenship of each member.

19. Do not assume you will get a continuance because you are very busy and have not done any work on your case.

20. We require the dispositive motion deadline to be three months before the pretrial conference. Do not ask for an extension that affects that deadline unless you want a new trial date.

21. Sur-replies are strongly disfavored. Avoid them absent exceptional circumstances.

22. Do not send an associate to cover a status or pretrial conference for you. Instead, call chambers to ask about rescheduling so that you can attend. You are encouraged to bring law clerks, interns, and associates with you to the conferences.

23. Resist the urge to file a motion for more definite statement. Instead, propound discovery.

24. Avoid motions to dismiss under Rule 12(b)(6), unless you can terminate the whole case. Motions to dismiss are disfavored and are rarely granted.

25. Don't file multiple motions for partial summary judgment. We know that you are trying to avoid the 25-page limit.

26. General objections. Don't use them in your discovery responses. They are worthless.

27. Can you "Facebook" the prospective jury? Maybe, maybe not. Judges may differ on this. Ask your judge at the pretrial conference.