

Retaliatory Lawsuit Could Set Ominous Mass Tort Precedent

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In the world of mass torts, there is no shortage of schemes or artifices that plaintiffs counsel will use to try to avoid the removal of lawsuits to federal court. However, it would be unreasonable and unjustified for a defendant, or its counsel, to face retaliatory litigation simply for attempting to exercise removal rights conferred through federal statute and rules of court. Nonetheless, that's exactly what's happening in a recent case that began in a West Virginia state court.

It is no secret that plaintiffs usually seek to prevent removal of a state court action by joining a nondiverse defendant to the case, even though they typically have no intention of seeking or establishing any liability against that defendant. Plaintiffs seldom, if ever, try to evade diversity jurisdiction by arguing or stipulating that the plaintiffs *will not accept* damages in excess of \$75,000.

However, the plaintiff in a West Virginia state court case filed against Volkswagen Group of America (Morris I) tried this novel tactic. He sued Volkswagen for claims arising out of Volkswagen's diesel-emissions testing and certification for some of its cars. The plaintiff's state court complaint sought both compensatory and punitive damages, as well as "such other and further relief, *both legal and equitable*, as justice ... require[s]." Despite seeking punitive damages and all equitable relief available, the plaintiff included the following "stipulation" in his prayer for damages, in an attempt to avoid federal jurisdiction:

HOWEVER, PLAINTIFF STIPULATES THAT HE WILL NOT ACCEPT MORE THAN \$75,000 IN DAMAGES, EXCLUSIVE OF INTERESTS AND COSTS.

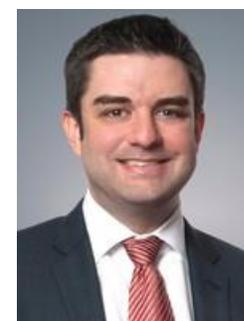
Morris I raises factual and legal issues substantially similar to those at issue in the multidistrict litigation pending in California, styled *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, No. 3:15-md-2672 (N.D. Cal.).

Volkswagen removed the action to the Southern District of West Virginia on Dec. 10, 2015, ignoring the plaintiff's attempt to limit the amount sought to less than \$75,000. Then, because Morris I raised questions of fact similar or identical to those at issue in the California MDL, Volkswagen designated the case as a "tagalong" case to be transferred to the California MDL.

On Dec. 15, the plaintiff filed a motion to remand the case back to state court. The U.S. Judicial Panel on Multidistrict Litigation (JPML) issued a conditional transfer of Morris I to the California MDL on Dec. 16.



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The plaintiff failed to file any objection to the conditional transfer within the seven days required by the JPML's Rule 7.1, and Morris I was subsumed into the California MDL. This did not sit well with the plaintiffs counsel.

In a surprising turn of events, on Feb. 17, 2016 the plaintiff sued Volkswagen and its lawyers for fraud and statutory obstruction of justice in *Morris v. Neale*, No. 2:16-cv-02847 (S.D. W. Va. 2016) (*Morris II*). He alleged that Volkswagen and its lawyers made false and fraudulent statements to the state and federal courts by "maliciously" misrepresenting that the amount in controversy exceeded \$75,000 in order to remove Morris I to the California MDL.

The defendants have moved to dismiss *Morris II*, arguing that all of the plaintiff's claims are: (1) preempted by the federal judiciary's plenary power to decide subject matter jurisdiction; (2) barred by the litigation privilege; and (3) deficient as a matter of law. The plaintiff has since sought leave to amend his complaint to add Racketeer Influenced and Corrupt Organizations Act claims, essentially alleging that the defendants have engaged in a fraudulent scheme or practice of fraudulent removal of cases to federal court through intentional misrepresentations to various federal courts around the country. All motions are currently briefed and are being considered by the federal court in West Virginia.

Looking past the merits of the plaintiff's arguments for remand in *Morris I* (which is still pending before the California MDL), the claims and arguments set forth in *Morris II* appear to have little to no merit and border on the frivolous and sanctionable. The dispute over whether diversity jurisdiction exists in *Morris I*, like most disputes over federal jurisdiction, necessarily depends on nuanced legal argument of established precedent, and is subject to the federal court's analysis and interpretation. Once a defendant has removed a lawsuit, the burden then falls back to the plaintiff to establish why remand must be granted.

What the plaintiff ignores is that a check and balance governing a defendant's improper or unwarranted removal already exists in the plenary power of the court to require the defendant to pay the "just costs and actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). While an award of costs, expenses and attorney fees incurred as a result of an improper removal is discretionary, courts are encouraged to award fees in situations where a "removing party lack[s] an objectively reasonable basis for seeking removal." See *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 711, 163 L. Ed. 2d 547 (2005). At the very minimum, the plaintiff asserts that Volkswagen (and its counsel) lacked an objectively reasonable basis for removing *Morris I*. Given the broad language of § 1447, if the plaintiff's counsel had properly followed the JPML's procedures and filed a timely objection, the plaintiff would likely have been able to assert a claim for those costs and fees, in addition to the costs and fees incurred in remanding the case to state court, if his argument that there was no basis for removal was accepted.

Here, the plaintiff's protestation appears to be more an issue with the rules established by the JPML, and his inability to follow those rules in a timely manner, than a valid, good-faith argument concerning federal subject matter jurisdiction. A plaintiff's attack on a defendant, or its counsel, based on the right to remove an action based on federal statutes, established precedent and legal argument through a collateral lawsuit claiming fraud or RICO violations is itself an abuse of process, and should not stand. To decide otherwise would effectively preclude a defendant from seeking to exercise its removal rights pursuant to federal statute for fear of subjecting it and its lawyers to additional liability simply for making otherwise valid legal arguments. We anticipate that the court will shut down the plaintiff's attempt to punish Volkswagen for relying on the plaintiff's substantive claims and ignoring the plaintiff's attempt to stipulate away federal jurisdiction.

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