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Article 14

Procedure - Effect of Federal Removal Statute in Actions Where Secretary of State is Served as Statutory Agent

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PROCEDURE–EFFECT OF FEDERAL REMOVAL STATUTE IN ACTIONS WHERE SECRETARY OF STATE IS SERVED AS STATUTORY AGENT

Acting under a non-resident motorist statute, plaintiff served the Secretary of State of Missouri as the statutory agent of the Illinois defendants. Seven days later a registered letter was received by the defendants informing them of the action. Twenty days thereafter defendants filed a petition for removal to the federal courts. Plaintiffs filed a motion to remand to the state court on the ground that the petition was not filed within the twenty day period provided by the federal removal statute.[1] The motion to remand was denied on the ground that the twenty day period allowed by statute within which to bring such a petition started to run only after the copy of the service was received by the defendant. *Welker v. Hefner*, 97 F. Supp. 630 (E.D. Mo., 1951).

This case presents a departure from prior decisions interpreting the recently amended federal rules for the removal of causes of action in state civil proceedings. The first case construing Section 1446(b) which involved facts identical to the instant case, held that the twenty day period for removal commenced upon service on the Secretary of State.[2] In both cases, service on the Secretary of State was held to have completed service for the purpose of the state court proceedings. Dicta in a recent case involving the same type of state statute as to service of process indicated that although the particular facts of that case made removal untimely whatever criterion was utilized, the period should commence when service was had on the Secretary of State.[3] This court mentioned with approval the reasoning employed by the court in *Helgeson v. Barz*[4] which also held that service on the Secretary of State started the period.

The removal statute was interpreted in federal district court cases in New York[5] and Kansas,[6] both involving a state statute which provided that service was not complete until a certain number of days had elapsed following the receipt by the defendant of a copy of the process. The court

[1] 62 Stat. 939 (1948), as amended 28 U.S.C.A. § 1446(b) (1949). Pertinent provisions provide: "The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading. . . ." The original removal provision provided in part: Removal is possible "at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead." 36 Stat. 1095 (1911), 28 U.S.C. § 72 (1940).

[2] Helgeson v. Barz, 89 F. Supp. 429 (Minn., 1950).

[3] Youngson v. Lusk, 96 F. Supp. 285 (Neb., 1951).

[4] 89 F. Supp. 429 (Minn., 1950).

[5] Alexander v. Peter Holding Company, 94 F. Supp. 299 (E.D. N.Y., 1950).

[6] Merz v. Dixon, 95 F. Supp. 193 (Kan., 1951).

in one of the cases pointed out that "there was no pending action which could have been removed, until the ... essential elements of service, filing and the lapse of ten days thereafter, had been accomplished."[7] Both courts ruled that the twenty day period started only after service of process was complete as provided in the state statute.

Thus the decisions depended on the applicable state statute as to when service of process had been completed. In all of the cases before the *Welker* decision, an attempt was made to comply with the intention of the congressional revisors as to uniformity. These draftsmen had stated: "As thus revised, the section will give adequate time and operate uniformly throughout the federal jurisdiction."[8]

The purpose of the revision of the removal statute was not to present a period which would be mathematically exact in every case, but to provide an ascertainable date from which the twenty day removal period could be definitely computed. Professor Moore, in his *Commentary on the U.S. Judicial Code*, states that "under Section 1446(b), ... the time for removal is geared essentially to the initiation of the state court action...."[9] Once, therefore, that the definite date was selected, there would remain only the necessity of applying the removal period to that date. In this manner substantial uniformity throughout the states would be guaranteed.

There are but two other possibilities as to the revisors' intentions. If the removal statute were to be interpreted in strict compliance with the *Helgeson* decision, and the twenty day period were held to start upon service on the Secretary of State, regardless of the particular state view as to when an action commenced, removal would be possible in a situation where there was actually no suit pending in the state court. If the state statute deemed process complete only after a certain period following service on the Secretary of State, and at the same time, the matter were removable immediately upon service on the Secretary of State, again the fantastic result would be presented that removal was theoretically possible when no case was pending.

Equally absurd would be the conclusion reached if the *Welker* decision were followed. If the removal period were construed as starting only a certain number of days after actual receipt by the defendant of a copy of the service, and at the same time process was considered complete under the state statute upon service on the Secretary of State, judgment could possibly be entered in the state court before the period for removal had ever commenced.

It is true that either of these theories would guarantee full rights to the defendant if all the state statutes were similar, but such a similarity simply

[7] Alexander v. Peter Holding Company, 94 F. Supp. 299, 300 (E.D. N.Y., 1950).

[8] Revisors' Note, 28 U.S.C.A. § 1446(b) (1949).

[9] Moore, Commentary on U.S. Judicial Code 273 (1949).

does not exist. The more practical solution was that adopted by the courts in the majority of decisions interpreting the removal statute. Not only is it the more workable solution, but it is also that which was intended by the revisors. Until the *Welker* decision the courts solidly tried to maintain this uniformity by making the exact date when the twenty day period had started more easily and more objectively ascertainable.

In an effort to safeguard more completely the rights of the defendant seeking removal, the court in the *Welker* case departed from the established pattern, and in so doing, took one step toward defeating the purpose of the statute. The *Welker* decision, however, properly points up the regard which must be had for the rights of the defendant. While the decision here discussed would certainly guarantee that a defendant would not be deprived of his rights, yet to protect those rights at the risk of destroying the uniformity sought by the revisors seems to be a great price to pay for the occasional safeguard which it provides. The motives which compelled the court to reach the *Welker* decision cannot be questioned, but it seems that the wisdom which guided the earlier decisions resulted in a preferable judicial treatment of the removal statute.