

EXAMINERS' ANALYSIS OF QUESTION NO. 12

Outside of certain class actions or other discrete circumstances, there are two primary grounds for removing an action from state court to federal court—(1) federal-question jurisdiction, or (2) diversity jurisdiction. Thompson's lawsuit is based on unpaid taxes under SRETTA, a state tax law. Defendants, as the removing parties, bear the burden of showing that federal jurisdiction exists at the time of removal. See *Eastman v Marine Mech Corp*, 438 F3d 544, 549 (CA 6, 2006). There is nothing in the fact pattern to suggest a federal question, so federal-question jurisdiction cannot be a basis for removal.

Therefore, the only possibility for removal would be under diversity jurisdiction. To show diversity, there must be "complete diversity," i.e., (1) a plaintiff must be a citizen of a state different from any state where a defendant is a citizen (i.e., no plaintiff can be a citizen of the same state where a defendant is a citizen), and (2) there must be over \$75,000 in controversy. 28 USC 1332. *Newman-Green, Inc v Alfonzo-Larrain*, 490 US 826, 828-829 (1989). In addition to complete diversity, removal based on diversity also requires that no defendant be a citizen of the state where the original state action was filed. 28 USC 1441(b)(2). Thus, for Mulligan Properties Inc. to have a valid basis for removal, it must show that there is complete diversity among the parties and that no defendant is a citizen of Michigan.

The monetary threshold is likely met here, as the allegations in the complaint make clear that the likely amount in controversy is in the six figures, i.e., \$100,000 or greater.

As for citizenship, Thompson is the plaintiff and, in his official capacity as Register of Deeds, he is a citizen of Michigan. Mulligan Properties Inc. has dual citizenship because it is a citizen of the state of its incorporation and the state of its principal place of business. Where its shareholders are domiciled is irrelevant. Thus, Mulligan Properties Inc. is a citizen of Delaware and Texas for purposes of diversity. Finally, as an unincorporated sole proprietorship, Wyatt Title is a citizen of the state where its member-owner resides, Michigan.

Therefore, at first blush, there does not appear to be sufficient grounds to remove based on diversity. Both the

plaintiff, Thompson, and one of the defendants, Wyatt Title, are citizens of Michigan. Under this analysis, the case would likely be remanded for at least two reasons: (1) lack of complete diversity; and (2) one of the defendants is a citizen of the state where the original state-court action was filed.

But, the key point to identify here is that fraudulent joinder of a non-diverse defendant will not defeat removal based on diversity. "Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity." *Casias v Wal-Mart Stores, Inc*, 695 F3d 428, 432-433 (CA 6, 2012) (internal quotation marks and citation omitted). The relevant inquiry in determining whether a non-diverse party has been fraudulently joined is whether there is a colorable basis for predicting that the plaintiff may recover against that party. *Id.* at 433. The fact pattern makes clear that, under SRETTA, it is the seller who is responsible for paying the transfer tax. Here, the only seller is Mulligan Properties Inc. There are no allegations to suggest that Wyatt Title had any ownership interest in any of the 20 properties. Thus, there is nothing in the fact pattern to suggest that there is a reasonable basis for predicting that state law (SRETTA) might impose liability on Wyatt Title. Indeed, no allegations of failure to pay the tax were even made against Wyatt. Rather, the title company was likely added as a defendant only to defeat removal based on diversity jurisdiction.

Accordingly, Mulligan Properties Inc. could remove the action from Pleasant Circuit Court to the Western District of Michigan and, as part of the removal pleading, the company can make the argument that Wyatt Title was fraudulently joined as a defendant in the state court action. If it can be shown that Thompson does not have a colorable claim against Wyatt Title, then there would otherwise be complete diversity and proper removal jurisdiction—i.e., over \$75k in controversy, complete diversity, and no defendant is a citizen of Michigan. Based on this fact pattern, the likely outcome would be that the federal district court would ignore the presence of Wyatt Title as a defendant for purposes of determining whether removal was appropriate, and allow removal to stand.