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75 F.4th 918
United States Court of Appeals, Eighth Circuit.

Anastasia WULLSCHLEGER, On behalf of themselves and all others similarly situated; Geraldine Brewer, Plaintiffs - Appellants
v.
ROYAL CANIN U.S.A., INC.; Nestle Purina Petcare Company, Defendants - Appellees

No. 22-1796
|
Submitted: January 11, 2023
|
Resubmitted: February 10, 2023
|
Filed: July 31, 2023

Synopsis
Background: Buyer of prescription dog food filed putative class action in state court against sellers, alleging violation of Missouri Merchandising Practices Act (MMPA) and other antitrust and unjust-enrichment claims under state law. After removal, the United States District Court for the Western District of Missouri, Gary A. Fenner, Senior District Judge, remanded. Sellers appealed. The Court of Appeals, 953 F.3d 519, vacated and remanded. Buyer amended complaint. The District Court, Gary A. Fenner, Senior District Judge, 2022 WL 1164662, dismissed for failure to state a claim. Buyer appealed.

Holdings: The Court of Appeals, Stras, Circuit Judge, held that:

[1] case no longer presented a removable federal question;

[2] issue of federal question jurisdiction was governed by amended complaint and not original complaint; and

[3] supplemental jurisdiction could not be used to keep case in federal court.

Vacated and remanded with directions.

Procedural Posture(s): On Appeal; Motion for Remand.

West Headnotes (17)

[1] **Federal Courts** Determination of question of jurisdiction

No matter the stage of the case, the Court of Appeals must be sure that subject matter jurisdiction exists, even if the parties expect a decision on the merits.

[2] **Federal Courts** Jurisdiction

Court of Appeals' review of issue of subject matter jurisdiction is de novo.

1 Case that cites this headnote

[3] **Federal Courts** Grounds or Exclusions of Jurisdiction in General

Removal of Cases Original jurisdiction of United States court

Original jurisdiction is the key to getting into federal court, whether by filing there from the start or by removal.

[4] **Federal Courts** State-law claims and causes of action

Federal question jurisdiction may lie over a state law claim that implicates significant federal issues. 28 U.S.C.A. § 1331.

4 Cases that cite this headnote

[5] **Federal Courts** State-law claims and causes of action

To qualify for federal question jurisdiction, one or more of the state-law claims in complaint must (1) necessarily raise federal issues, (2) that are actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. 28 U.S.C.A. § 1331.

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1 Case that cites this headnote

[6]
Removal of Cases Allegations in Pleadings

Buyer's putative class action against sellers of prescription dog food no longer presented a removable federal question, where, after first appeal and a remand, buyer amended complaint to cut the state-law antitrust and unjust enrichment claims that the Court of Appeals had determined to fall within federal question jurisdiction, and all that remained were Missouri Merchandising Practices Act (MMPA) claims which did not necessarily raise a substantial federal issue, buyer kept MMPA claims largely the same on remand, and buyer's new civil-conspiracy claim was based on the same basic theory as her MMPA claims that did not present a federal question. 28 U.S.C.A. § 1331; Mo. Ann. Stat. § 407.010 et seq.

1 Case that cites this headnote
More cases on this issue

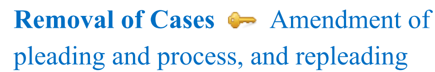
[7]
Removal of Cases Hearing and scope of inquiry

Removal of Cases Amendment of pleading and process, and repleading

Issue of whether case presented a removable federal question was governed by buyer's amended complaint and not her original complaint, where district court did not order buyer to amend her complaint and buyer's decision to amend was not otherwise involuntary, in putative class action against sellers of prescription dog food alleging state-law claims including claims of alleged violations of Missouri Merchandising Practices Act (MMPA). 28 U.S.C.A. § 1331; Mo. Ann. Stat. § 407.010 et seq.

1 Case that cites this headnote
More cases on this issue

[8]
Federal Civil Procedure Effect of amendment


Removal of Cases Amendment of pleading and process, and repleading

An amended complaint supersedes an original complaint and renders the original complaint without legal effect, and it makes no difference whether the case ends up in federal court through removal.

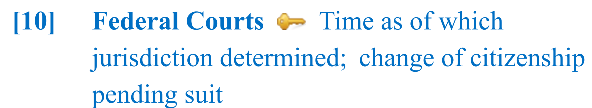
3 Cases that cite this headnote

[9]
Removal of Cases Want of jurisdiction or of cause for removal

Removal of Cases Amendment of pleading and process, and repleading

If the plaintiff changes his pleading voluntarily so that the federal court will no longer have jurisdiction over a case that was removed from state court, it becomes the court's duty to remand the case. 28 U.S.C.A. § 1447(c).

5 Cases that cite this headnote

[10] 
Federal Courts Time as of which jurisdiction determined; change of citizenship pending suit

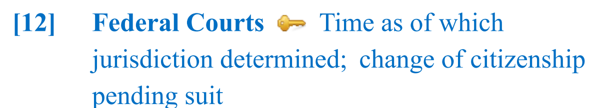
Diversity jurisdiction depends upon the state of things at the time the action is brought.

2 Cases that cite this headnote

[11]
Federal Courts Time as of which jurisdiction determined; change of citizenship pending suit

Rule that diversity jurisdiction depends upon the state of things at the time the action is brought applies to changes to the state of things, not to changes to the alleged state of things; both must support jurisdiction.

1 Case that cites this headnote

[12] 
Federal Courts Time as of which jurisdiction determined; change of citizenship pending suit

The “state of things” at the time of filing, as affecting diversity jurisdiction, refers to the actual facts on the ground.

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1 Case that cites this headnote

[13] **Federal Courts** Time as of which jurisdiction determined; change of citizenship pending suit

A party's destruction of diversity by moving to another state after a complaint is filed does not destroy diversity jurisdiction.

[14] **Federal Courts** Objections, Proceedings, and Determination

A change in state of facts that existed at time of filing, consisting of a change to amount in controversy, does not destroy diversity jurisdiction.

[15] **Removal of Cases** Amendment of pleading and process, and repleading

A plaintiff can add a federal claim after removal from state court to cure a lack of subject-matter jurisdiction or replace a diverse defendant with a non-diverse one to divest the district court of jurisdiction.

1 Case that cites this headnote

[16] **Removal of Cases** Evidence

All doubts about federal jurisdiction for a case that is removed from state court must be resolved in favor of remand to state court. 28 U.S.C.A. § 1447(c).

2 Cases that cite this headnote

[17] **Removal of Cases** Amendment of pleading and process, and repleading

Supplemental jurisdiction could not be used to keep a removed putative class action against prescription dog food sellers in federal court upon buyer's amendment of her complaint, on remand from a decision in earlier appeal, to cut her state-law antitrust and unjust enrichment claims that Court of Appeals had determined to fall within federal question jurisdiction and leave only her Missouri Merchandising Practices Act (MMPA) claims that did not present a federal question and a new civil-conspiracy claim that was based on same basic theory as MMPA claims; it was too late to turn back the clock, and the original complaint was without effect. 28 U.S.C.A. §§ 1331, 1367(a); Mo. Ann. Stat. § 407.010 et seq.

More cases on this issue

***920** Appeal from United States District Court for the Western District of Missouri - Kansas City

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Kelly Clare Frickleton, of Leawood, KS. The following attorneys appeared on the appellant brief; Daniel Rees Shulman, of Minneapolis, MN., James P. Frickleton, of Leawood, KS., Michael Patrick Morrill, of Columbus, GA.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Joseph Sullivan Bushur, of Washington, DC. The following attorneys also appeared on the appellee brief; Christopher M. Curran, of Washington, DC., Jason M. Hans, of Kansas City, MO., Michael S. Hargens, of Kansas City, MO., Bryan A. Merryman, of Los Angeles, CA., and Stephen Raber, of Washington, DC.

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

We must decide whether amending a complaint to eliminate the only federal questions destroys subject-matter jurisdiction. The answer is yes, so the case must return to state court.

I.

Anastasia Wullschleger's dog, Clinton, suffered from health problems. The solution, at least according to a veterinarian, was to feed him specialized dog food available only by prescription. It has different ingredients than regular dog food but includes no special medication.

Prescription dog food is expensive. The crux of Wullschleger's complaint is that the "prescription" requirement is misleading because the Food and Drug Administration never actually evaluates the product. And the damages came from its higher sales price.

The original complaint, which included only state-law claims, reflected these theories. Brought on behalf of all similarly situated Missouri consumers, it alleged a violation of Missouri's antitrust laws, claims under Missouri's Merchandising Practices Act, and unjust enrichment. Wullschleger initially filed her complaint in state court, but Royal Canin and Nestle Purina quickly removed it to federal court. The district court then remanded it—a decision that ended up before us on appeal. *See* 28 U.S.C. § 1453(c)(1) (providing for an appeal of "an order of a district court granting or denying a motion to remand a class action").

We concluded that Wullschleger's antitrust and unjust-enrichment claims had important federal ingredients that would require "explication of federal law." *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 522 (8th Cir. 2020); *see* ***921** *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005) (allowing removal when a state-law claim "necessarily raise[s] a stated federal issue, actually disputed and substantial"). The antitrust claim, for example, alleged a conspiracy consisting of unlawful parallel conduct between the manufacturers, pet-food stores, and other pet-food producers to ignore Food and Drug Administration guidance and bypass regulatory approval. *See* 21 U.S.C. §§ 321(f)–(g), 352(o), 360; Draft Compliance Policy Guide Sec. 690.150 on Labeling and Marketing of Nutritional Products Intended for Use To Diagnose, Cure, Mitigate, Treat, or Prevent Disease in Dogs and Cats, 77 Fed. Reg. 55,480 (Sept. 10, 2012). The complaint's prayer for relief, which requested an injunction to stop the violations of federal law, only added to the federal character of the case. *See Wullschleger*, 953 F.3d at 522. We decided it belonged in federal court. *See id.*

Wullschleger switched gears once she returned to the district court. She eliminated every reference to federal law in the complaint, cut the antitrust and unjust-enrichment claims, and narrowed her request for injunctive relief. As a replacement, she added a civil-conspiracy claim. *See Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 780–81 (Mo. banc 1999) (per curiam) (listing the elements of civil conspiracy).

The changes, however, made no difference. The district court believed that federal-question jurisdiction still existed. *See* 28 U.S.C. § 1331. It also eventually granted the manufacturers' motion to dismiss, which has resulted in a second appeal. *See* Fed. R. Civ. P. 12(b)(6). We asked the parties to submit supplemental briefing on whether subject-matter jurisdiction exists.

II.

[1] **[2]** No matter the stage of the case, we must be sure it exists, even if the parties expect a decision on the merits. *See Bilello v. Kum & Go, LLC*, 374 F.3d 656, 659 (8th Cir. 2004) ("[W]hen the record indicates jurisdiction may be lacking, we must consider the jurisdictional issue sua sponte."). Our review is de novo. *See M & B Oil, Inc. v. Federated Mut. Ins. Co.*, 66 F.4th 1106, 1108 (8th Cir. 2023).

A.

[3] **[4]** Original jurisdiction is the key to getting into federal court, whether by filing there from the start or by removal. *See id.* at 1109. At first, original jurisdiction came through the federal questions in Wullschleger's complaint. *Wullschleger*, 953 F.3d at 521–22 (citing 28 U.S.C. § 1331). Not the typical type, which are "cause[s] of action created by federal law." *Grable*, 545 U.S. at 312, 125 S.Ct. 2363. Rather, ones consisting of "state-law claims that implicate significant federal issues." *Id.*

[5] To qualify, one or more of the claims in her complaint must have "(1) necessarily raised [federal issues], (2) [that were] actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *See Gunn v. Minton*, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). *Id.* We determined in the first appeal that Wullschleger's antitrust and unjust-enrichment claims fell into this "special and small category" of cases. *Id.*

[6] Now those claims are gone. All that remains are the Missouri Merchandising Practices Act claims, which do not *necessarily* raise a substantial federal issue. *See Wullschleger*, 953 F.3d at 521. Wullschleger kept those claims largely the same on ***922** remand, so they cannot supply the now-missing federal question. *See Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976) (explaining how the law-of-the-

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case doctrine applies to legal determinations from a previous appeal).

Nor can her newly pleaded civil-conspiracy claim, which "is not [even] a separate and distinct action" in Missouri. *W. Blue Print Co. v. Roberts*, 367 S.W.3d 7, 22 (Mo. banc 2012). It is instead a theory for holding the manufacturers jointly and severally liable for their allegedly illegal conduct. *See id.* And it is based on the same basic theory as the Missouri Merchandising Practices Act claims: the manufacturers misled pet owners into believing that prescription pet food *legally required* a prescription. If those claims cannot create federal-question jurisdiction, then the civil-conspiracy claim cannot either. *See Wullschleger*, 953 F.3d at 521.

Just on the face of the amended complaint, the answer today is as clear as it can be. Only the carryover claims and their civil-conspiracy counterpart remain, and neither one presents a federal question. It is no longer possible to say that "dependence on federal law permeates the allegations" of Wullschleger's complaint. *Id.* at 522. In fact, the opposite is true: there is nothing federal about it.

B.

[7] The manufacturers, for their part, would rather have us focus on the original complaint. In their view, amendments do not matter: once a federal question, always a federal question.

[8] **[9]** The manufacturers' argument runs into our rule that "an amended complaint [supersedes] an original complaint and renders the original complaint without legal effect." *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000). It makes no difference whether the case ends up in federal court through removal. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 929 (8th Cir. 2005) (holding that the district court had jurisdiction after removal from state court based on an amended complaint). [1] As we put it nearly 100 years ago, if "[t]he plaintiff ... change[s] his pleading voluntarily [so] that the court will no longer have jurisdiction ... then [it] becomes the duty of the court to remand the case, if it be a removed case." *Highway Constr. Co. v. McClelland*, 15 F.2d 187, 188 (8th Cir. 1926) (per curiam); *see* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

[10] **[11]** There is, to be sure, another rule that "the jurisdiction of the [c]ourt depends upon the state of things at the time of the action brought." *Mollan v. Torrance*, 22 U.S. 9 Wheat. 537, 539, 6 L.Ed. 154 (1824). But both can be true: we can assess "the state of things" at the time of filing and still evaluate jurisdiction according to the allegations in an amended complaint. As the Second Circuit has explained, the "time-of-filing rule applies to changes [to] the 'state of things,' ... not to changes [to] the '*alleged* state of things.' " *Gale v. Chi. Title Ins. Co.*, 929 F.3d 74, 78 (2d Cir. 2019) (quoting *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007)). *Both* "must support jurisdiction." *Id.* at 77.

***923** **[12]** **[13]** **[14]** The distinction between the two is subtle. The "state of things," which is subject to the time-of-filing rule, refers to the actual facts on the ground. Suppose, for example, that one party destroys diversity by moving to another state after filing. This change to the "state of things" does not destroy diversity jurisdiction, even if living in that state from the beginning would have. *See Morgan's Heirs v. Morgan*, 15 U.S. 2 Wheat. 290, 297, 4 L.Ed. 242 (1817). The same goes for after-filing changes to the amount-in-controversy. *See Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294–95, 58 S.Ct. 586, 82 L.Ed. 845 (1938); *Fochtman v. Hendren Plastics, Inc.*, 47 F.4th 638, 642–43 (8th Cir. 2022).

[15] We treat changes to the "*alleged* state of things" differently. *Gale*, 929 F.3d at 78 (quoting *Rockwell*, 549 U.S. at 473, 127 S.Ct. 1397). For example, a plaintiff can add a federal claim after removal to cure a lack of subject-matter jurisdiction, *see Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984); *see also ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008) (allowing a plaintiff to "switch[ ] jurisdictional horses" in an amended complaint), or replace a diverse defendant with a non-diverse one to "divest[ ] the district court of jurisdiction," *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP*, 362 F.3d 136, 142 (1st Cir. 2004); *see McClelland*, 15 F.2d at 188. The facts on the ground have not changed, but the facts in the complaint have. Under our rule that "an amended complaint [supersedes] an original complaint," these changes can create or destroy federal jurisdiction. *Atlas Van Lines*, 209 F.3d at 1067; *see Gale*, 929 F.3d at 78.

Was there a change to the "state of things" or the "alleged state of things" here? The facts on the ground never changed, but the allegations in the complaint did. There is little difference,

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from a jurisdictional perspective, between *adding* a federal claim in the absence of federal-question jurisdiction, *see Bernstein*, 738 F.2d at 185, and *subtracting* a claim or two, as happened here, to eliminate federal-question jurisdiction. Both involve the same simple act of amendment, a change to the "alleged state of things." *See Shaw v. Gwatney*, 795 F.2d 1351, 1354 (8th Cir. 1986) (looking to the amended complaint when the plaintiff added a claim that fell within the exclusive jurisdiction of the Court of Federal Claims).

To the extent that other courts have come out differently, most have emphasized forum-manipulation concerns [2] over jurisdictional rigor. *See, e.g.*, *16 Front St., L.L.C. v. Miss. Silicon, L.L.C.*, 886 F.3d 549, 558–59 (5th Cir. 2018); *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 101–02 (2d Cir. 2015). Taking the above example, some might say that attempting to cure a lack of federal-question jurisdiction by adding federal claims after removal is not forum-manipulative, but subtracting ***924** federal claims to thwart removal is. So we should allow the former but not the latter.

[16] Jurisdictional first principles counsel otherwise. One reason is that there is no preference for federal jurisdiction. Quite the opposite: "all doubts about federal jurisdiction must be resolved in favor of remand." *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009). It makes little sense, as the manufacturers argue, to apply a one-way forum-manipulation ratchet in favor of federal jurisdiction, but not the other way around.

A second is that it is not even clear that the time-of-filing rule applies in federal-question cases, and certainly not to the extent it does in diversity cases. It first arose in a diversity case nearly 200 years ago. *See Mollan*, 22 U.S. at 539. And for the most part, it has not strayed from there. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004) (explaining that the time-of-filing rule "measures all challenges to subject-matter jurisdiction *premised upon diversity of citizenship* against the state of facts that existed at the time of filing" (emphasis added)); *see also ConnectU*, 522 F.3d at 92; *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996); Erwin Chemerinsky, *Federal Jurisdiction* § 5.5, at 377–78 (6th ed. 2012) (recognizing this distinction).

And perhaps most importantly, we adopt the distinction between the "state of things" and "*alleged* state of things" because our precedent requires it. *Gale*, 929 F.3d at 78 (quoting *Rockwell*, 549 U.S. at 473, 127 S.Ct. 1397). Recall that we stated nearly 100 years ago that it is a court's "duty ... to remand the case," even if the plaintiff voluntarily amends the complaint in "a removed case." *McClelland*, 15 F.2d at 188. [3] The *McClelland* rule makes as much sense today as it did then.

C.

[17] The manufacturers hope to keep the case in federal court through supplemental jurisdiction. It is too late, however, to turn back the clock. The original complaint is "without legal effect," *Atlas Van Lines*, 209 F.3d at 1067, meaning that the possibility of supplemental jurisdiction vanished right alongside the once-present federal questions, *see* 28 U.S.C. § 1367(a). *See M & B Oil*, 66 F.4th at 1109 (discussing the need for "original jurisdiction" in removal situations); *see also Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243–44 (11th Cir. 2007) (per curiam) (explaining that when "there [is] no longer a federal claim on which the district court could exercise supplemental jurisdiction," the source of the "district court's subject-matter jurisdiction cease[s] to exist"). The only option now is state court.

III.

We accordingly vacate the district court's judgment and send this case back to the district court with directions to remand it to Missouri state court.

All Citations

75 F.4th 918

Footnotes

1 There is an exception. We would have looked at the original complaint if the "district court [had] order[ed] [Wullschleger] to amend [her] complaint or [if] the decision to amend [was] otherwise involuntary." *Atlas Van Lines*, 209 F.3d at 1067; *see* *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1240–42 (8th Cir. 1995). Neither, however, occurred here.

2 There is a straightforward procedural answer to curbing potential forum manipulation. Unless amendments to the complaint happen quickly, a district court can withhold "leave" to amend if the only reason for the changes is to destroy federal jurisdiction. Fed. R. Civ. P. 15(a)(1) (explaining when a party may amend as of right), (a)(2) (allowing a district court to deny leave to amend "when justice so requires"); *see* *Brown v. Wallace*, 957 F.2d 564, 566 (8th Cir. 1992) (per curiam) (pointing to "undue delay," "bad faith," and "undue prejudice to the non-moving party" as reasons to deny leave to amend (citation omitted)); *see also* *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 309 (8th Cir. 2009) (directing district courts "to consider ... 'the extent to which the joinder of [a] nondiverse party is sought to defeat federal jurisdiction' " in deciding whether to grant leave to amend (citation omitted)).

3 To the extent that *McLain v. Andersen Corp.*, 567 F.3d 956, 965 (8th Cir. 2009), is inconsistent with *McClelland*, we follow the latter. *See* *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (requiring a "subsequent panel[ ]" to follow the "earliest opinion" (citation omitted)).

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