First Things First

John Doe Defendants in Farmer-Paellman v. FleetBoston et al.

Ward Farnsworth

The debate over reparations to descendants of slaves has, like most matters of public interest, turned into a lawsuit. The case raises large questions involving the law of torts, equitable remedies, and doctrines governing timeliness; but might it also raise homelier yet urgent questions about federal jurisdiction? Professor Ward Farnsworth thinks so, as the letter reproduced on the following pages shows.

– *The Editors*

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Hon. Edward Korman
Hon. Nicholas Garaufis
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Farmer-Paellmann v. FleetBoston et al*, No. 02CV1862

Dear Chief Judge Korman and Judge Garaufis,

I am not a party to the above-referenced case, but have taken an interest in it because it involves matters of significant public interest: reparations to descendants of slaves. I understand that the case and its companions have been assigned to your chambers. On reading the complaint, I was struck by a troubling jurisdictional flaw it appears to contain. Perhaps you have noticed it as well: the plaintiffs have filed their suit under the diversity jurisdiction, but have named up to 1,000 "John Doe" corporate defendants. The lead plaintiff appears to be a citizen of New York (only her residence is alleged, a deficiency that should be addressed forthwith); if so, then if any of those John Doe defendants have New York citizenships—and it seems likely that a number of them will—diversity will be destroyed. For this reason I believe the best understanding of 28 U.S.C. §1332 is that John Doe defendants generally may not be named by a plaintiff in a diversity case. See, e.g., *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997) (Posner, J.); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); 14 Wright, Miller & Cooper, Federal Practice and Procedure §3642.

One possibility under such a rule is to dismiss John Doe defendants from such a case; another is to dismiss the case outright. The latter option seems to me more sound: if the plaintiffs explicitly had named a non-diverse party, dismissal without prejudice of the case rather than of the party would be the normal outcome. But as your court recognized in *Hitchcock v. Woodside Literary Agency*, 15 F.Supp.2d 246 (E.D.N.Y. 1998), the proper handling of such a case may depend on its details; exceptions to the rule may be appropriate in certain instances. In *Hitchcock* the court dismissed Doe defendants from a diversity case because "the possibility that any of the potentially fictitious defendants exists [was] purely speculative." This approach is in keeping with the liberal treatment sometimes accorded to diversity plaintiffs who name Doe defendants that are nominal or otherwise unlikely ever to enter the case. See, e.g., *Moore v. General Motors Pension Plans*, 91 F.3d 848 (7th Cir.

1996). But that does not appear to be a good description of the reparations suit, where the plaintiffs seem intent on adding more corporate defendants and where it may not be difficult to find many such defendants who arguably can be brought within the allegations of the complaint and from whom vast sums may be sought.

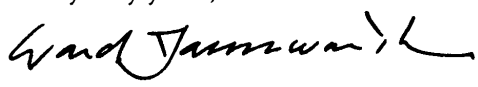
Hitchcock also mentioned another possibility: letting the plaintiff proceed in federal court "at her peril," taking the risk that if a Doe defendant later is identified as non-diverse, either the complaint will have to be dismissed or substitution of the non-diverse defendant will not be permitted. See, e.g., *W. Weber Co. v. Kosack*, 1997 WL 666246 (S.D.N.Y. 1997). The rationale of *Weber* is that any other view gives defendants an asymmetrical advantage: defendants can remove cases to federal court on diversity grounds despite the presence of Doe defendants, see 28 U.S.C. §1441(a) ("For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded"), but plaintiffs in such cases cannot file in federal court in the first instance. I do not think the asymmetry is troubling. It is a common practice among plaintiffs in many types of cases to name diversity-destroying defendants in order to prevent a suit from being removed to federal court. §1441(a) prevents plaintiffs from achieving this same effect by the simple expedient of naming Doe defendants. It also avoids some difficult problems of timing that can arise under the rest of the removal statute when the identity of a Doe defendant is ascertained late in a case. But it does not follow that plaintiffs intending to add parties who may well spoil diversity should themselves be able to proceed under the diversity jurisdiction. Indeed, the 1988 amendment of §1441 to allow the removal of cases naming Doe defendants might better be understood to cut the other way: Congress made no comparable adjustment to the provisions of §1332, suggesting that it did not intend to permit such defendants in diversity suits filed in federal court by plaintiffs. See *Kunz v. Dow Corning*, 1992 WL 390722 (N.D.Ill. 1992) (calling this inference "compelling").

The strongest objection to using the *Weber* approach here, however, is practical and specific to the nature of this case. Between now and whenever the Doe defendants are identified, the court may be called upon to make important and sensitive legal determinations that have substantial public significance. The named defendants also may be put to considerable expense and exposed to controversy. It would be wasteful and otherwise highly unfortunate if those consequences were to occur in a case that ended up being dismissed later for want of jurisdiction. This is the concern that most prompts me to write: the danger that matters of public and private importance will be debated and affected in a litigation that later ends up being thrown out of court. Saying that the plaintiffs can "proceed at their peril" is not comforting in these circumstances, for they also will be creating peril for others. Finally, one of the reasons the peril to the plaintiffs was thought to be an adequate constraint on their judgment in *Weber* was that the plaintiffs there ran the risk that if their suit later was dismissed from federal court it might be time-barred in the state courts. Again, that is not likely to give the plaintiffs pause in this case, since whatever theory of tolling, estoppel, or laches they rely on would seem as likely or unlikely to succeed in the state courts as in the federal.

My suggestion therefore is that the case be dismissed without prejudice so that the plaintiffs can refile either against defendants who are named and from whom they are diverse, or so that they can refile in state court. In the alternative, I suggest giving the plaintiffs the option of striking the Doe defendants from their complaint. Above all, however, I suggest resolving these issues one way or the other before any more proceedings are conducted in the case.

My apologies if it seems officious to raise this issue rather than waiting for the parties to decide whether and when to do so. I am aware of the dangers of kibitzing and partisanship that can arise when academics attempt to advise courts (see Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U.L. Rev. 13 (2001)). In this case I write in my capacity as a teacher of civil procedure and a student of federal jurisdiction. I am not a partisan for one side or the other in this case, and have no connection to any of the parties or their lawyers. As for the propriety of writing directly to a judge, problems of subject matter jurisdiction of course are matters that must be resolved regardless of the parties' wishes, and one reason for this rule is that there is a public interest in ensuring that courts stay within their jurisdictional bounds. In my view there is a related public interest in ensuring that the types of issues the plaintiffs have raised not be resolved by the judicial branch unless that becomes entirely necessary. The patience to enforce jurisdictional rules carefully is one of many passive virtues that prevent courts from deciding politically charged matters unnecessarily. I write in the service of these public interests as I understand them. The narrower point is that diversity cases containing latent jurisdictional defects sometimes go forward for a while, or indeed indefinitely, because the defendants pursue other issues and may lack a full incentive to object to this feature of the plaintiff's case; and again, I believe there is a risk of public injury if that occurs here.

Very truly yours,



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