

John Doe Defendants—Federal v. State Court By C. Stephen Stack, Jr.

Although the federal and state court rules of civil procedure largely mirror one another, one difference which is particularly important when a suit is filed toward the end of the statute of limitations period is the use of fictitious parties or John Doe defendants. Rule 9(h) of the Mississippi Rules of Civil Procedure provides:

Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

The Federal Rules of Civil Procedure contains no such provision. This becomes important when a motion for leave to amend is filed after the statute of limitations has run, as the question becomes whether or not the claim will relate back.¹ Under Rule 15 of both the federal and state court rules, an amended complaint which changes the party against whom a claim is asserted normally relates back to the original filing only when three (3) conditions are met:

- (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;
- (2) the party to be brought in has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits; and

¹ If it does not relate back, the court will either disallow the amendment as futile or will allow the amendment but then grant summary judgment to the newly added defendant on the basis of the claims being time-barred.

(3) the party to be brought in knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

However, Rule 15(c)(2) of the Mississippi rules specifically states, “An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.”

Therefore, when substituting a party for a Doe defendant in state court, the plaintiff’s attorney need only satisfy the first prong—that the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading—in order to have the claim relate back.²

Since the Federal Rules do not contain a Rule 9(h), it would appear that a party seeking to substitute for a Doe defendant must meet all three requirements of Rule 15. This is normally fatal to any such motion for leave to amend, as the Fifth Circuit has ruled “that, for a ‘John Doe’ defendant, there [is] no ‘mistake’ in identifying the correct defendant; rather, the problem was not being able to identify that defendant.” *Jacobsen v. Osborne*, 133 F.3d 315, 320-21 (5th Cir. 1998). See also *Johnson v. Burnett*, 2011 U.S. Dist. LEXIS 27854 *; 2011 WL 976579 (S.D. Miss. 2011); *Rutland v. McMillin*, 2011 U.S. Dist. LEXIS 70360, *3 (S.D. Miss. 2011). However, certain district courts have indicated that the provision in Federal Rule 15(c)(1)(A), which allows relation back when “the law that provides the applicable statute of limitations allows relation back” requires a court to apply Mississippi Rule 15(c) and potentially 9(h) if a substitution of Doe

² In order to use Rule 9(h), the plaintiff also must demonstrate that he has exercised reasonable diligence in determining the true identity of the fictitious party. *Wilner v. White*, 929 So.2d 315, 322-323 (Miss. 2006).

defendants is sought.. See *Turnage v. McConnell Sales & Eng'g Corp.*, 2016 U.S. Dist. LEXIS 15681, *3-4 (S.D. Miss. 2016) (noting that the advisory committee notes to this rule state that "[w]hatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim." Fed. R. Civ. P. 15(c)(1) advisory committee note). See also *Pruitt v. Invacare Corp.*, No. 2:13-CV-293-TSL-JCG, 2014 U.S. Dist. LEXIS 153473, 2014 WL 5465342, at *3 (S.D. Miss. Oct. 28, 2014); *Thomas v. Rankin Cty., Miss.*, No. 3:14-CV-419-DPJ-FKB, 2015 U.S. Dist. LEXIS 132701, 2015 WL 5772398, at *3 (S.D. Miss. Sept. 30, 2015).

It is not entirely clear why certain district courts look to the more flexible Mississippi rules and others take the hard-line approach set forth by the Fifth Circuit in *Jacobsen*. But given the uncertainty in this area, an attorney who files a case naming Doe defendants in federal court (or one which may be removed to federal court) within days of the expiration of the statute of limitations does so at his/her own potential peril. Any amended complaint may very well not relate back when the true identities of those persons and/or entities are ultimately learned.