EMPLOYMENT LAW REPORT

Winning The Corporate Shell Game In Employment Litigation

By Justin D. Cummins

INTRODUCTION

With the acceleration of corporate-driven globalization, coupled with the increasing sophistication of efforts to insulate corporations from liability, employer identity has become a hotly contested issue in employment cases. In short, large corporate defendants often now attempt to preclude discovery and ultimate liability by arguing that a subsidiary or affiliate is the employer rather than the named defendant.

This tactic presents challenges for plaintiffs and their counsel as actual corporate structure can be difficult to discern when defendants actively seek to confuse and obstruct. Savvy plaintiff counsel can cut through the obfuscation, however, by employing the administrative process, framing pleadings, pursuing written discovery, and taking depositions with a clear understanding of the legal principles that govern such cases.

I. PRE-SUIT DUE DILIGENCE CONCERNING EMPLOYER IDENTITY

As part of effective case selection, plaintiff counsel should carefully investigate employer identity. It may be that several affiliated entities, a parent company, or a subsidiary is the employer rather than the entity a plaintiff may initially think. Research of the entities' corporate filings with the Secretary of State for Minnesota as well as for the State of incorporation will provide vital information about, among other items, corporate form and status, assumed names, and agents for service of process. Reviewing filings with the Secretary of State for Delaware (if not the State of incorporation) may also provide key information that supplements or contradicts material assertions made in Minnesota. Such supplementation and contradictions will serve Plaintiffs well in post-suit discovery, at summary judgment, during trial, and on appeal.

Plaintiff counsel should obtain certified paper copies of the corporate filings rather than rely on the on-line Secretary of State records. Among other things, on-line records do not necessarily state with precision the corporate identity or form of an entity, especially when the entity uses assumed names. Such details may mean the difference between naming the correct party as a defendant and blowing the applicable statute of limitations.

Plaintiff counsel should also use the administrative process to draw out the identity of the employer and seek related discovery via requests pursuant to the Freedom of Information Act[1] and the Minnesota Data Practices Act.[2] Based on corporate filings with the Secretary of State, plaintiff paychecks and insurance records, the employer website, the employee handbook, and other work-related documents, plaintiff counsel should name all entities that reasonably appear to be involved in the workplace. Plaintiffs' paychecks are particularly revealing as Minnesota law requires those documents to bear the legal name of the employer: "[a]t the end of each pay period, the employer shall provide each employee an earnings statement. . . . * * * [that] must include . . . the legal name of the employer and the operating name of the employer if different from the legal name."[3]

II. CONFIRMING EMPLOYER IDENTITY VIA POST-SUIT DISCOVERY

If pre-suit discovery and the administrative process indicate that two or more entities may be the employer, Plaintiff counsel should set forth the relevant facts in the Complaint and allege that those entities are a joint employer or integrated enterprise (also known as a single employer). The test for joint employer and integrated enterprise is the same; courts may conclude entities are a joint employer or integrated enterprise after consideration of the following four factors: "(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership

or financial control."[4]

In the seminal joint-employer/integrated enterprise case in the nation, the Eighth Circuit established that "no one of the enumerated factors is controlling."[5] Importantly, all four of the factors need not be present to have a joint employer or integrated enterprise.[6] Minnesota courts analyze the question of joint employer/ integrated enterprise under state law as federal courts do under federal law.[7]

As set forth more fully below, plaintiffs must be prepared to show that all entities at issue are actively involved in handling the material aspects of their workplace rather than simply establishing policies or procedures and delegating implementation to another entity.

A. Interrelation Of Operations

Regarding the first factor, courts look to whether the entities at issue share, for example, human resources or other operational personnel, employment policies or procedures, bylaws, budgets, or managers that handle the relevant business activities.[8] Both the Eight Circuit and Minnesota's federal District Court have ruled for plaintiffs that make such a showing.[9] Minnesota courts have ruled similarly under Minnesota law.[10]

Carefully drafted document requests, interrogatories, and requests for admissions as well as 30(b)(6) depositions of operational personnel should yield much of the data necessary to establish the interrelation of operations. Testimony of customers, former employees, and other third parties also may be highly useful, particularly because the defendants usually have less capacity to control the testimony of those witnesses.

B. Common Management

Courts view substantial overlap in the chain of command, including officers and directors, to be probative of the second factor.[11] The Eighth Circuit, Minnesota's federal District Court, and Minnesota state courts have ruled for plaintiffs that provide such evidence.[12]

Secretary of State records can be invaluable vehicles for showing the highly similar or identical management structure and personnel. The entities' respective minute books also may contain powerful proof, such as documents confirming that the same personnel appoint the same handful of individuals to serve as directors and officers for all entities simultaneously. The minute books of the different entities may also include the same corporate resolutions and other instruments executed by the same director or officer pursuant to the same bylaws. Deposition testimony of managerial personnel and third-party witnesses should also demonstrate the second factor like it does the interrelationship of operations.

C. Centralized Control Of Labor Relations

Regarding the third factor, the Eighth Circuit and Minnesota's federal District Court look to whether the entities jointly use labor-relations policies or personnel or otherwise control employment terms and conditions in a coordinated fashion[13] Minnesota courts have ruled for plaintiffs similarly under Minnesota law.[14] The data sources for the first two factors generally also provide evidence for the third factor.

D. Common Ownership Or Financial Control

Plaintiffs establish the fourth factor by demonstrating, for example, that one entity is the sole or primary owner of other entities at issue, substantial overlap exists among the "money people" for the entities (e.g., Chief Financial Officer, Treasurer, Vice President of Finance, accountants, auditors, and bond signatories), or share budgets or tax filings. On that kind of

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***JUSTIN CUMMINS**, of Miller-O'Brien-Cummins, is Vice Chair of the MSBA's Labor & Employment Section and an Officer of National Employment Lawyers Association's Eighth Circuit Board. Justin teaches courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

record, the Eighth Circuit, Minnesota's federal District Court, and Minnesota state courts have ruled for plaintiffs.[15]

Secretary-of-State and other corporate filings, including 10-Q and 10-K reports when applicable, will contain the evidence needed. Of course, deposition testimony from the defendant's "money people" and business records concerning transactions made in the ordinary course of business, including purchase or rental agreements for heavy equipment, office space, and the like also demonstrate the financial control relevant to the fourth factor.

E. Recent Caveat: An Eighth Circuit Panel's Anomalous Analysis of Joint Liability

In *Brown v. Fred's Inc.*, a panel of the Eighth Circuit recently applied, in effect, a veil-piercing analysis to employment claims against a parent company and its subsidiary.[16] The panel declared, "[t]here is a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances."[17] Defense counsel will likely attempt to argue that *Brown*, in proposing the requirement that a parent company comprehensively dominate its subsidiary before being held liable, has overruled *Baker* and its progeny.

As a threshold matter, *Brown* does not even cite *Baker*, instead relying on a case from the Fourth Circuit and a case from the Tenth Circuit to justify its anomalous analysis.[18] In more recent decisions than those cited by *Brown*, both the Fourth Circuit and the Tenth Circuit (like all other Circuits except the Seventh Circuit) have followed the analysis set forth in *Baker*.[19] Importantly, those more recent cases concern the liability of a parent company for a subsidiary's conduct.[20] Similarly, Minnesota's federal and state courts also continue to adhere to the *Baker* analysis in cases involving a parent company and its subsidiary.[21] In short, *Baker* remains the law of the Eighth Circuit and Minnesota – as it has been for over three decades.

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Brown may also be distinguishable on the facts. In that case, the plaintiff alleged that the parent company was the employer solely based on the erroneous statement of a misinformed supervisor.[22] Effective pursuit of discovery, as outlined above, should yield much more evidence of a parent company's liability than that. In addition, the defendants in *Brown* made clear during the administrative process that the parent company was not the employer and, further, that the subsidiary was actually a viable company as opposed to a mere corporate shell.[23] Again, careful use of the administrative process and other pre-suit discovery should position plaintiffs well to satisfy the test proposed in *Brown*.

III. MOVING CASES FORWARD AND PREVAILING AT TRIAL

Defendants often seek summary judgment or even dismissal of employment and civil rights claims on technical grounds, such as employer identity, before courts delve into the merits of a case. Therefore, employers do not hesitate to bring dispositive motions alleging that plaintiffs have sued the wrong party.

As a threshold matter, plaintiffs must be ready to disprove the wrong-party allegation in one of two ways: (1) procuring documents (as outlined above in Part I) and affidavits from third-party witnesses or deposition testimony from supervisory personnel showing that the originally named defendant is, in fact, the employer or (2) obtaining documents and testimony confirming that the originally named defendant is a joint employer or integrated enterprise under the four factors outlined above in Part II and, in the case of a parent/subsidiary relationship, proof that the parent company demonstrably dominates the subsidiary. Developing and presenting this evidence is vital for defeating dispositive motions, winning at trial, and prevailing on appeal. Depending on the facts in a given case, plaintiff counsel may have several additional arrows in their proverbial quiver.

A. Employer Identity Is a Fact Question For The Jury To Decide

At the most tactically appropriate time, Plaintiff counsel should argue that summary judgment cannot reasonably be granted on the question of employer identity. Indeed, the Supreme Court and Minnesota's federal District Court have long recognized that "whether [the defendant] possessed sufficient indicia of control to be an 'employer' is essentially a factual issue. . . ."[24] The majority of Circuits reaching the issue also have ruled that "the question of joint liability is one that is fact-bound. . . ."[25] Granting summary judgment for a defendant on the wrong-party defense, then, ordinarily should be reversible error.

B. Defendants May Be Estopped From Asserting The Wrong-Party Defense

When an originally named defendant is a multinational or otherwise multi-layered corporation, that defendant has likely played the corporate shell game previously in similar cases. If the presiding court entered final judgment on the merits against that defendant in such a case, the collateral-estoppel doctrine will bar the defendant from defeating a subsequent plaintiff's claims based on the wrong-party defense.[26] In fact, plaintiff counsel should consider bringing a dispositive motion based on the prior adjudication of the wrong-party defense.

Thus, plaintiff counsel should take the time to search the online court filing system for federal courts to learn if there are any unpublished adverse judgments against the originally named defendant in Minnesota's federal District Court or elsewhere. Although there is no online court filing system for state courts across the country, it may be worth the time to check the paper records of the state courts in the jurisdiction where the originally named defendant is incorporated or headquartered. Of course, plaintiff counsel should also use Westlaw or Lexis to research published and unpublished decisions involving the originally named defendant and the employer-identity question.

C. Claims Against An Affiliated Entity Should Relate Back To The Timely Filed Claims Against The Originally Named Defendant

Even if plaintiff counsel misidentified the employer despite their best efforts, the governing rules and precedent allow plaintiffs to amend the pleadings to add the proper entity. "Federal Rule of Civil Procedure 15(a) governs a party's right to amend its pleadings and the rule declares that leave to amend 'shall be freely given

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when justice so requires.'"[27] Therefore, the Eighth Circuit has consistently ruled that, "[g]iven the courts' liberal viewpoint towards leave to amend, it should normally be granted absent good reason for a denial."[28] In fact, the Eighth Circuit has repeatedly reversed the denial of motions to amend when the amendments are based on facts similar to those in the original complaint.[29]

In such instances, the question becomes whether the relation-back doctrine applies to defeat the statute-of-limitations defense that defendants will undoubtedly invoke. The relation-back doctrine, recognized under Fed.R.Civ.P. 15, enables plaintiffs to add parties after commencing suit when plaintiffs show the following:

(1) The claims against the new defendant arise out of the same conduct set forth in the original complaint;
(2) The new defendant received notice of the case within the period provided by Fed.R.Civ.P. 4(m) and will not be prejudiced in defending on the merits; and
(3) The new defendant knew or should have known that, but for a mistake regarding the identity of the proper party, the new defendant would have been named in the case.[30]

Notably, the Supreme Court has long recognized, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[31]

In sum, as long as a newly added entity had notice of the case and plaintiffs' mistake within 120 days after plaintiffs filed their Complaint, plaintiffs' amendment is proper and relates back.[32] Indeed, the Advisory Committee Notes to Fed.R.Civ.P. 15(c) confirm as follows: "[i]f the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification."[33]

Notice to the newly added entity should be more readily established in cases involving parent companies and their wholly owned subsidiaries or other closely affiliated entities. In any event, plaintiff counsel must prepare agency charges to maximize the scope of notice regarding plaintiffs' legal claims. Moreover, written discovery and depositions should be used to establish that the originally named and newly added defendants share legal counsel or otherwise collaborate on employment-related legal problems such that the newly added entity had actual notice of plaintiffs' claims 120 days or less after the commencement of the lawsuit.

CONCLUSION

Plaintiff counsel must not allow defendants to hide behind the technical allegation that plaintiffs have sued the wrong party. Indeed, plaintiff counsel ultimately can use this procedural allegation against defendants to undermine defendants' credibility at trial and to prompt a more significant punitive damages award from the jury. To reach that point, however, plaintiff counsel must conduct a careful pre-suit investigation, tactically employ the administrative process, and meticulously pursue formal discovery to obtain the evidence needed to show defendants are, in fact, the employer or, alternatively, a joint employer/ integrated enterprise.

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[1] See 5 U.S.C. §§ 551, et seq.
[2] See Minn.Stat. §§ 13.01, et seq.
[3] See Minn.Stat. § 181.032(h).
[4] Baker v. Stuart Broad. Co., 560 F.2d 389, 392 (8th Cir. 1977) (citation omitted).
[5] Baker, 560 F.2d at 392 (citation omitted).
[6] Baker, 560 F.2d at 391 (citation omitted) (reiterating that a "liberal construction is . . . given the definition of 'employer.'"); McDonald v. JP Marketing Associates, LLC, 2007 WL 1114159, *6 (D.Minn. 2007) (ADM/AJB) (denying the motion

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to dismiss and ruling that the two defendants were a joint employer under Title VII based on the presence of two Baker factors); MacGregor v. Mallinkrodt, Inc., 2003 WL 23335194, *9, n.9 (D.Minn. 2003) (DSD/SRN) (concluding that the various worksites constituted an integrated enterprise under any one of the four Baker factors); see also Doe v. Lutheran High School, 702 N.W.2d 322, 329-30 (Minn.App. 2005) (citation omitted) (" All four factors need not be present. . . ."); Johns v. Harborage I, Ltd., 585 N.W.2d 853, 858 (Minn.App. 1998) (same); Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn.App. 1995) (same).

[7] Id.

[8] Sedlacek v. Hach, 752 F.2d 333, 334-36 (8th Cir. 1985) (affirming the ruling that the two defendants were an integrated enterprise because they shared operational personnel and employee-benefits programs); Baker, 560 F.2d at 392 (holding that the two defendants were an integrated enterprise because one defendant provided operational services and policy manuals to the other); Wilson v. Brinker International, Inc., 248 F.Supp.2d 856, 861 (D.Minn. 2003) (holding that the jury properly determined the defendants were a joint employer in a sex harassment, sex discrimination, and retaliation case); Scheidecker v. Arvig Enterprises, Inc., 122 F.Supp.2d 1031, 1037-39 (D.Minn. 2000) (ruling that a jury could conclude that the defendants were a joint employer or integrated enterprise because one defendant provided operational services to the other and the defendants shared human resources personnel); McDonald, 2007 WL 1114159 at *6 (holding that the defendants were a joint employer because one defendant appeared to have some control over employees).

[9] Id.

[10] Doe, 702 N.W.2d at 329-30 (affirming that the defendants were an integrated enterprise because employees of one defendant were involved in the human resources and other operational activities of the other defendant); Johns, 585 N.W.2d at 858-59 (holding that the defendants were an integrated enterprise because they shared legal counsel, policies, human resources personnel, and employee-benefits programs); Fahey, 525 N.W.2d at 572-73 (affirming that the defendants were an integrated enterprise because the human resources personnel of the parent company were involved in the labor affairs of the subsidiary and the two defendants shared policies).

[11] See, e.g., Sedlacek, 752 F.2d at 334-36 (affirming the two defendants were an integrated enterprise because they shared management); Baker, 560 F.2d at 392 (holding the two defendants were an integrated enterprise because of the overlap in directors, officers, and owners); Scheidecker, 122 F.Supp.2d at 1037-39 (ruling that a jury could conclude that the defendants were a joint employer or integrated enterprise because of the overlap in directors and management); Johns, 585 N.W.2d at 858-59 (holding that the defendants were an integrated enterprise because they shared management).

[12] Id.

[13] Sedlacek, 752 F.2d at 334-36 (affirming the conclusion that the two defendants were an integrated enterprise because they jointly handled personnel matters); Baker, 560 F.2d at 392 (holding that the two defendants were an integrated enterprise because of the joint use of policy manuals and labor-relations personnel); Scheidecker, 122 F.Supp.2d at 1037-39 (ruling that a jury could conclude that the defendants were a joint employer or integrated enterprise because the defendants shared human resources personnel); McDonald, 2007 WL 1114159 at *6 (holding that the defendants were a joint employer because one defendant appeared to have some control over employees of the other defendant).

[14] Doe, 702 N.W.2d at 329-30 (affirming

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that the defendants were an integrated enterprise because employees of one defendant were involved in the human resources of the other defendant); Johns, 585 N.W.2d at 858-59 (holding that the defendants were an integrated enterprise because they shared human resources personnel); Fahey, 525 N.W.2d at 572-73 (affirming that the defendants were an integrated enterprise because the human resources personnel of the parent compa ny were involved in the labor affairs of the subsidiary).

[15] Baker, 560 F.2d at 392 (holding that the two defendants were an integrated enterprise because of the overlap in ownership); Scheidecker, 122 F.Supp.2d at 1037-39 (ruling that a jury could conclude that the defendants were a joint employer or integrated enterprise because one defendant was the primary owner of the other defendant); Johns, 585 N.W.2d at 858-59 (holding that the defendants are an integrated enterprise because one defendant was the primary owner of the other defendant); Fahey, 525 N.W.2d at 572-73 (affirming that the defendants were an integrated enterprise because one defendant was a wholly owned subsidiary of the other defendant).

[16] 494 F.3d 736, 739 (8th Cir. 2007). For a discussion of the veil-piercing standard in Minnesota, see Virginia Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 512 (Minn. 1979) (considering, among other factors, whether the company lacked sufficient capitalization, failed to observe corporate formalities, did not pay dividends, was insolvent in the relevant time, lacked functioning directors or officers, and did not have corporate records).

[17] Id.

[18] Id. (citing Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993); Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981 (4th Cir. 1987)).

[19] See, e.g., Hukill v. Autocare, Inc., 192 F.3d 437, 442-43 (4th Cir. 1999); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999).

[20] Id.

[21] See, e.g., Wilson v. Brinker, Inc., 248 F.Supp.2d 856, 861 (D.Minn. 2003); Scheidecker v. Arvig Enterprises, Inc., 122 F.Supp.2d 1031, 1036-38 (D.Minn. 2000); Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn.App. 1995); see also Scribner v. McMillan, 2007 WL 685048, *2 (D.Minn. 2007) (DWF/RLE); Parks v. McNeilus Companies, Inc., 2004 WL 413282, *1-2 (D.Minn. 2004) (PAM/JSM).

[22] Brown, 494 F.3d at 740.

[23] Id.

[24] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1981); see also Wilson, 248 F.Supp.2d at 861 (denying the defendant's motion for judgment as a matter of law).

[25] Torres-Negron v. Merck & Company, Inc., 488 F.3d 34, 41-43 (1st Cir. 2007) (reversing summary judgment); see also Robinson v. Sappington, 351 F.3d 317, 338 (7th Cir. 2003) (reversing summary judgment because "the question of joint liability is one that is fact-bound. . . ."); Parker v. Columbia Pictures Indus., 204 F.3d 326, 341 (2nd Cir. 2000) (vacating summary judgment because "[a]lthough CPI points to testimony indicating that the two companies' Human Resources departments were separate, which reasonably might suggest that CPI was not an integrated enterprise with SPE, this testimony merely strengthens rather than forecloses the conclusion that factual issues remain for trial."); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999) (affirming judgment for the plaintiff); Virgo v. Riviera Beach Associates, Ltd., 30 F.3d 1350, 1360 (11th Cir. 1994)

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(affirming judgment for the plaintiff because "[w]hether [the defendant] retained sufficient control is essentially a factual question. . . ."); Wirtz v. Lone Star Steel Co., 405 F.2d 668, 669 (5th Cir. 1968) (citation omitted) ("Whether a . . . corporation is an employer or joint employer is essentially a question of fact."); Colindres v. QuitFlex Mfg., 235 F.R.D. 347, 364 (S.D. Tex. 2006) (denying summary judgment); Peltier v. Apple Health Care, Inc., 130 F.Supp.2d 285, 290 (D.Conn. 2000) (citation omitted) (denying summary judgment because " determination of [integrated enterprise] status is a question of fact."); Thornton v. Mercantile Stores Co., Inc., 13 F.Supp.2d 1282, 1291 (M.D. Ala. 1998) (denying summary judgment).

[26] See, e.g., Willems v. Commissioner of Public Safety, 333 N.W.2d 619, 621 (Minn. 1983) (holding that collateral estoppel applied); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (reaffirming federal courts' inherent powers to "levy sanctions in response to abusive litigation practices."); Fed.R.Civ.P. 11.

[27] Popp Telcom v. American Sharecom, Inc., 210 F.3d 928, 943 (8th Cir. 2000) (quoting Fed.R.Civ.P. 15(a)).

[28] Popp Telcom, 210 F.3d at 943 (citing Thompson-El v. Jones, 876 F.2d 66, 67 (8th Cir. 1989)).

[29] Popp Telcom, 210 F.3d at 944; Sanders v. Clemco Indus., 823 F.2d 214, 216-17 (8th Cir. 1987); Chestnut v. St. Louis County, 656 F.2d 343, 349 (8th Cir. 1981); Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 644 F.2d 690, 694 (8th Cir. 1981).

[30] Hayes v. Faulkner County, et al., 388 F.3d 669, 675-76 (8th Cir. 2004) (ruling that the amended complaint related back to the original complaint); Roberts v. Michaels, 219 F.3d 775, 778 (8th Cir. 2000) (same); Warren v. Department of Army, 867 F.2d 1156, 1161 (8th Cir. 1989) (same); Devin v. Schwan's Home Services, Inc., 2005 WL 1323919, *5-6 (D.Minn. 2005) (same).

[31] Conley v. Gibson, 355 U.S. 41, 48 (1957) (citation omitted); see also 6A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1498 ("The word 'changing' has been liberally construed by the courts, so that amendments simply adding or dropping parties, as well as amendments that actually substitute def endants, fall within the ambit of the rule.").

[32] Fed.R.Civ.P. 15(c); Hayes, 388 F.3d at 675-76; Roberts, 219 F.3d at 778; Warren 867 F.2d at 1161; Devin, 2005 WL 1323919, *5-6.

[33] See Fed.R.Civ.P. 15(c), Advisory Committee Notes to 1991 Amendments.

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