# To Doe or not to Doe in Federal Court

**By Jim Wagstaffe**

Young lawyers drafting their first civil complaint will tell you that the supervising partners routinely warn that it's malpractice not to include Doe defendants to protect the statute of limitations as against unknown parties. However, to Doe defendant or not to Doe defendant *in federal court*: that is the question.

There are certain linguistic truisms emphasized by federal court practitioners when distinguishing state court civil litigation. These include:

- "It's a counterclaim so don't call it a cross-complaint;"
- "Forget notice pleading—*Twombly/Iqbal* is how we do it in federal court;"
- "Federal venue rolls by residence in the district, not by where you live in a county"; and finally and emphatically,
- "There are no Does in federal court so don't look ignorant by pleading them."

However, in light of modern case developments, maybe the no-Does truism isn't so true after all. For these days there is much ado about Doe defendants in federal court arising from the conflict between the federal rule which severely limits the untimely joinder of new defendants and the mandated rule that, at least in diversity cases, federal courts must follow substantive state court statutes perhaps including the Doe rules extending state law statutes of limitation.[1]

## 1. The Doe Defendant Practice in State Courts

Virtually every state in the country allows the pleading of fictitious defendants in a complaint for the purpose of preserving the statute of limitations against unknown parties.[2] The requirements for obtaining the benefit of the Doe practice are that the plaintiff must (i) be ignorant of the fictitious defendants' identities and/or roles in the alleged wrongdoing, and (ii) actually include the boilerplate allegations against the Does and name them in the caption by numbers (e.g. Does I-X).[3]

The purpose of Doe defendants is salutatory in the sense that if the statute of limitation otherwise would have expired between the filing of the complaint and the identification of the hitherto unknown Doe defendant, the statute will be preserved. Specifically, this statute saving occurs by "relating back" the amendment to the time when the original complaint was filed. Indeed, as long as the complaint contains the magic Doe defendant incantation, malpractice can be avoided in those albeit unusual cases when an unknown defendant's identity emerges for the first time in discovery.[4]

## 2. The Problem of Doe Defendants in Federal Civil Actions

Historically, there are two reasons why federal courts have treated the pleading of Doe defendants with disdain and outright rejection. First there is no rule in federal practice expressly authorizing the use of the Doe defendant procedure.[5] To the contrary, the federal rules of civil procedure expressly require that each defendant be named and identified by their capacity to be sued.[6]

Second, if the basis for federal jurisdiction is complete diversity of citizenship under 28 U.S.C. § 1332, the presence of a fictitious defendant in the caption would seem to preclude properly pleading such jurisdiction. Simply put, since the fictitious defendants' identities (and therefore citizenship) are not known, their presence would seem to be wholly at odds with alleging the required complete diversity of citizenship. Thus the Doe practice has been rejected by numerous federal courts.[7]

In the removal context, of course, years ago Congress addressed and solved this problem by passing a statute

stating that for purposes of removal the citizenship of Doe defendants is to be disregarded.[8] Recognizing that virtually every complaint in state court includes boilerplate Doe allegations that would, in essence, always bar diversity removal, Congress opted for addressing evolving jurisdictional developments at the time, if ever, of the concededly rare later amendment to add a non-diverse Doe. If a non-diverse Doe were to be added then and only then would remand be ordered.[9]

Perhaps importantly, there is no comparable federal statute addressing the jurisdictional impact, if any, of the presence of Doe defendants in complaints filed *originally* in federal court. However, the presence of a potentially non-diverse Doe defendant would seem to destroy complete diversity and in federal question cases might be viewed as an unauthorized mechanism for obtaining relation back of amendments in conflict with Rule 15(c).[10] So, how to address the conundrum?

## 3. The Doe Defendant/Statute of Limitations Conundrum in Federal Court

While it is understandable that federal courts resist the pleading of Doe defendants in diversity cases because the fictitious party might destroy complete diversity, the conundrum can be stated easily: If you must plead Does in order to obtain the benefit of relation back of the statute of limitations under state law, then to preclude such a procedural device could be seen as depriving plaintiffs of a substantive right.

In *Lindley v. General Electric Co.*,[11] the Ninth Circuit expressly held that California's Doe statute extending the statute of limitations must be applied in a diversity action because under the Erie rule it is a matter of substantive law. And to underscore the point, Rule 15(c) was amended some years back to state that an amendment will relate back when "the law that provides the applicable statute of limitations allows relation back." Therefore, in an action involving state law claims, federal courts will expressly incorporate state relation back provisions, including Doe defendant statutes.[12]

In federal question cases, by contrast, there is no problem of destroyed diversity, and relation back is governed expressly by the remaining provisions of the federal rule. When state law does not provide the relation back principle (*i.e.*, *most* federal question cases), Rule 15(c) allows relation back only if:

- (i) the claim arose out of conduct set out in the original pleading,
- (ii) the party to be brought received such notice that it will not be prejudiced in maintaining a defense,
- (iii) that party knew or should have known that, but for a mistake of identity, the original action would have been brought against it, and
- (iv) the second and third criteria are fulfilled within the 90-day window by which the complaint must be served under the federal rules (Rule 4(m)).[13]

Therefore, in federal question cases, there is no real need for fictitious defendants as they presumably can be added if the strict requirements of the rule are satisfied.[14] And courts have uniformly held that even if a Doe defendant is named in the caption, there will be no relation back because Rule 15(c) is meant to correct a mistake concerning the identity of the party and not to allow an amendment because of a lack of knowledge of the party to be added.[15]

While all this addresses the relation back principle in federal question and diversity cases, it does not solve the possible impact of the Doe defendant on the existence of complete diversity. Since there must be complete diversity, and since the fictitious defendants might be non-diverse, then what does one do with the continuing presence of the Does before (or if) there is a request to amend the complaint?

## 4. Answering the Doe Defendant Question as a Practical Matter

Although (unlike in removed actions) there is no statute for cases filed originally in federal court saying that the Doe defendants can be disregarded in diversity actions, there is simply no good reason why they cannot be named and their citizenship considered later at the time of any amendment. And federal judges will simply have to hold their noses when plaintiffs include such fictitious defendants in their federal diversity complaints.

The solution, it seems to me, is to get over our fear of Doe defendants in federal court and acknowledge that there is really no jurisdictional danger at all. If, as rarely is the case, the Doe defendant's existence and/or role are later identified in discovery, and if that party does indeed destroy complete diversity, the federal court can simply take a new snapshot of complete diversity, allow the joinder and dismiss the case.[16]

On the other hand and consistent with Rule 19 (necessary party analysis), if the proposed new defendant is sham, nominal or being added simply to avoid federal jurisdiction late in the case, the federal court can decline to allow the amendment, strike the Does and go forward with the case.[17] This can occur trusting that a state court in any follow-up action against the former Doe might simply toll the statute for a reasonable failure to discover the defendant's identity. My bet that when the suggested Doe defendant is truly nominal, the plaintiff won't separately pursue the party at all.

Let there be no question about it: federal judges have a longstanding discomfort with the Doe defendant practice reasoning that it is uniquely state in nature and conflicts with simple federal pleading rules. However, since the right to name Does does appear to be substantive under *Erie*, federal courts should and must borrow this state practice.

So our survival tips are as follows:

- Don't plead Does in federal question cases as they are unnecessary
- Do plead Does in diversity cases to preserve the relation back protection
- Since the federal court may dismiss such defendants for failure to serve within 90 days under Rule 4(m), conduct prompt discovery to identify any possible Doe
- Resist a Judge's request that you stipulate to striking the Does in the interim as you just might need them.

That's the answer.

## Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

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[1] Compare Fed. R.Civ. P. 15(c) (severely limiting relation back when adding new defendants) and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (for state law claims in federal court apply state substantive law); and see The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial at § 7-IV[D][2], 7.290 (LexisNexis 2020).

[2] See, e.g., Ala. R. Civ. P. 9(h); Ariz. Rule 10(f); Cal. Code Civ. Proc. § 474; N.J. Rule 4:26-4; Ohio Civ. R. 15(d).

[3] See, e.g., *Barnes v. Wilson*, 40 Cal. App. 3d 199, 203 (1974); *Harrison v. Trump Plaza Hotel & Casino*, 2015 U.S. Dist. LEXIS 1919 (D. N.J. Jan. 8, 2015).

[4] For an excellent discussion of the Doe defendant practice in federal court pleadings, see *Gardiner Family, LLC v. Crimson Resource Mgmt. Corp.*, 147 F. Supp. 3d 1029 (E.D. Cal. 2015) (O'Neill, J.).

[5] See, e.g. *Graziose v. Am. Home Prod. Corp.*, 202 F.R.D. 638, 643 (D. Nev. 2001); *Richardson v. Johnson*, 598 F.3d 734, 738 (11th Cir. 2010); *Gillespie v. Civiletti*, 629 F.2d 637, 642-643 (9th Cir. 1980).

[6] See Fed. R. Civ. P. 10(a); *Fifty Associates v. Prudential Insurance Co. of America*, 446 F.2d 1187, 1191 (9th Cir. 1970); *Taylor v. Federal Home Loan Bank Bd.*, 661 F. Supp. 1341, 1350 (N.D. Tex. 1986). The Wagstaffe Practice Guide: Fed. Civ. Proc. Before Trial § 17.269.

[7] *Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 981 (9th Cir. 1980); *Vogel v. Go Daddy Group, Inc.*, 266 F. Supp. 3d 234, 239-240 (D. D.C. 2017); see also The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 17.269.

[8] 28 U.S.C. § 1441(a); see also The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 7-IV[D][2][b][i].

[9] However, make no mistake about it—if the court does, in its discretion, allow the amendment and adds a non-diverse defendant after removal, the action must then be remanded to state court for lack of continuing jurisdiction. See 28 U.S.C. § 1447(e).

[10] See *Winzer v. Kaufman County*, 916 F.3d 464, 471 (5th Cir. 2019) (in federal civil rights action, Rule 15(c)—not the state Doe practice—governs relation back of amendments adding new parties); *Heglund v. Atkin Cty.*, 871 F.3d 572, 579 (8th Cir. 2017) (same).

[11] 780 F.2d 797, 800 (9th Cir. 1986).

[12] See *Gardiner Family, LLC v. Crimson Resource Mgt. Corp., supra; Doe v. Ciolli*, 611 F. Supp. 2d 216, 220 (D. Conn. 2009); *Fat T, Inc. v. Aloha Tower Assoc. Piers 7, 8 & 9*, 172 F.R.D. 411, 414 (D. Haw. 1996).

[13] Importantly, Rule 15(c) does not allow a new party to be added beyond the statute of limitations unless the party knew it should have been named in the case at the time the action was filed or within the ninety day penumbral period thereafter. This means, therefore, that very few fictitious defendants allowed to be sued in state court can be added in a federal question case since rarely will they actually have known they should have been named at any time, much less within the ninety day period after commencement. But see *Ceara v. Deacon*, 916 F.3d 208, 211 (2d Cir. 2019) (if party was simply misnamed—"Deagan" should have been "Deacon" courts will allow the pleading to be corrected).

[14] Of course, it is not unusual to see the pleading of fictitious parties in federal question cases. Famously, for example, there is *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); see also *Gillespie v. Civiletti*, *supra*, 629 F.2d at 639 (Doe pleading allowed where plaintiff is given opportunity through discovery to identify the unknown defendants). Moreover, when there is an overriding privacy concern, courts even allow plaintiffs to plead anonymously. *Doe v. Vill. of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016); The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 17.250. However, none of these cases address the complete diversity conundrum.

[15] *Ceara v. Deacon, supra; Heglund v. Atkin Cty., supra; Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 470 (2d Cir. 1995).

[16] *Gardiner Family, LLC v. Crimson Resource Mgmt. Corp., supra*; see also *Brown v. Owens-Corning Inv. Review Comm.*, 622 F.3d 564, 572 (6th Cir. 2010) (plaintiffs permitted to sue Doe defendants until discovery reveals their identity); *Martinez-Rivera v. Sanchez Ramos*, 498 F.3d 3, 8 (1st Cir. 2009) (same).

[17] *Lee v. Airgas-Mid South, Inc.*, 793 F.3d 894, 899 (8th Cir. 2015).