

So You Want to Remove a Case to Federal Court

by Keith Miller

This article will give a practical overview of the removal process. It will explain what removal is, why practitioners often prefer to have cases removed to federal court, which cases can be removed, and how to remove a case. The article also will explain why some cases are remanded back to state court, and will point out common removal pitfalls that often trip up unwary practitioners.

What is Removal?

Removal is a statutory procedure through which defendants can have cases filed in state court transferred to federal court.¹ Practitioners should be aware that the removal statute was recently amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which applies to any suit commenced in state court on or after Jan. 6, 2012.² The act made substantial changes to how the amount of controversy in a removed lawsuit is determined, to the timing of removal in multiple defendant cases, and to the ability to remove cases containing both removable and non-removable claims, among other things. This article will discuss the removal statute as amended by the act under the assumption that the removed cases were commenced in state court on or after Jan. 6, 2012.

Although the removal statute states that “any civil action” within the original jurisdiction of a district court is removable except as otherwise expressly provided in the statute,³ in practice the scope of removal jurisdiction is substantially more limited than the original jurisdiction of a district court. To begin with, the removal statute expressly precludes removal in a number of subject areas, including cases involving railroads, common carriers, workers’ compensation, and certain other federal statutes.⁴ Further, the removal statute prevents an in-state defendant from removing a diversity case, even if all the other requirements of the

removal statute have been satisfied, which substantially limits the scope of removal jurisdiction.⁵

Removal jurisdiction also raises practical problems that are not at issue in original jurisdiction cases. For example, the removing party (the defendant) must justify jurisdiction, which is the opposite of original jurisdiction cases in which the plaintiff must justify jurisdiction. Because the district court is aware that the plaintiff initially decided to avail itself of the state court forum, as a practical matter the shifted burden may be greater for a defendant on removal. Practitioners should be aware that district courts often do not hesitate to remand cases for relatively minor removal deficiencies. This derives from the general judicial antipathy to removal and concern for the limited scope of federal subject-matter jurisdiction.⁶

Why Remove?

Despite the fact that removal can be a complicated process with numerous pitfalls, many practitioners prefer to remove cases to federal court whenever possible. There are many reasons for this federal court preference. One of the main reasons is to limit perceived bias against litigants. Defendants often feel they will be treated more fairly in federal court than in state court, especially if plaintiffs and their counsel are well known ‘locals’ in the particular county where the state court matter is venued. Another reason for removal is to facilitate transfer to another district court under 28 U.S.C. §1404(a). There is a lesser showing required to transfer a removed case under that statute than there would be to transfer a case directly out of state court under the common law doctrine of *forum non conveniens*.

An important reason for removing is to take advantage of active case management in federal court. A federal court case will be assigned to a single district judge/magistrate judge team from the beginning of the case through trial. The magistrate judge will take an active role in planning discovery and motion practice

and in resolving discovery disputes, which can be critical in complex cases. Moreover, it is much easier to obtain discovery from out-of-state witnesses under federal court practice. The court will also become involved in the settlement process much sooner in federal court than in state court.

Another advantage for defendants in federal court is that it is generally easier to have cases dismissed on the pleadings or on summary judgment motions than it would be in state court. District judges are used to handling complex dispositive motions, and federal case law encourages the dismissal of cases with weak factual or legal underpinnings.

Which Cases Can be Removed?

The removal statute states that except as otherwise expressly provided, any civil action within the original jurisdiction of a district court is removable.⁷ As a practical matter, this means that most cases are removed based on either federal question jurisdiction or diversity jurisdiction. However, as discussed below, the jurisdictional analysis for each is more complicated in the removal context than in the original jurisdiction context.

Removal based on federal question jurisdiction is relatively straightforward when a federal statute has given federal courts exclusive jurisdiction regarding the subject matter of the claims in the complaint. However, it is rare for a state court complaint to expressly plead a purely federal cause of action, such as patent infringement or an antitrust violation. More common is a situation in which a complaint artfully pleads state law claims based on facts that could also give rise to federal claims. These situations are governed by the so-called ‘well-pleaded complaint rule,’ which holds that “federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.”⁸ It is well settled that the plaintiff is the master of the complaint and, therefore, may plead state

rather than federal claims in order to litigate the claims in state court.⁹ It also is well settled that the existence of a federally based affirmative defense is insufficient to justify removal, as long as the plaintiff’s claims are limited to state law.¹⁰

All is not lost for defendants, however, because it is also well settled that the artful words of a state court complaint do not control the federal question jurisdictional analysis; the substance of the complaint does. Federal question jurisdiction can be established if an issue of federal law is an essential element of a plaintiff’s case.¹¹ Federal question jurisdiction can also be established if the claims fall within an area of law Congress has completely preempted as “necessarily federal in character.”¹² Areas where federal law completely preempts state law include claims under the Employee Retirement Income Security Act (ERISA) and the National Labor Relations Act, rendering such claims removable regardless of the wording of the complaint. Practitioners considering removal should, therefore, carefully consider the substance of the complaint rather than its wording, because it is often possible to remove based on federal question jurisdiction even when the complaint goes out of its way to avoid expressly pleading a federal cause of action.

Removals based on diversity jurisdiction under 28 U.S.C. §1332 are more commonplace than federal question removals, because many state law complaints meet the basic diversity requirements (namely the plaintiffs and defendants must be citizens of different states and the amount in controversy must exceed \$75,000). However, several procedural nuances pertaining to diversity removals should be considered by practitioners prior to removal. Among the most important is the so-called ‘forum defendant rule’ preventing a defendant from removing a case to the district court in which the defendant is a citizen.¹³ This is a substantial departure from original diversity jurisdiction, in which a defendant can be a citizen of the

forum state as long as the plaintiffs are citizens of different states.

In removals based on diversity jurisdiction, the removal statute mandates that “all defendants who have been properly joined and served must join in or consent to the removal of the action.”¹⁴ This so-called ‘all defendants rule’ does not require consent from ‘Doe’ defendants and other fictitious or nominal parties. Regarding all other defendants, it behooves the careful practitioner to make efforts to reach out to them prior to removal to see if they have been served and to obtain their affirmative consent to removal. The proper way for a removing defendant to document the consent of all defendants is an unsettled issue. At a minimum, the notice of removal should expressly state that all other defendants have either consented to removal or have not been served, obviating the need for their consent. However, there have been cases where judges have required the written consents of other defendants to be filed along with the notice of removal, so the safest course of action is to obtain written consents from all served defendants prior to filing the notice of removal.¹⁵

Diversity removal complications can also arise when parties are added to or dismissed from pending cases, which can suddenly render the cases removable or non-removable, depending on the circumstances. Practitioners must, therefore, pay close attention when the parties change in cases pending in state court because, as discussed below, the strictly construed 30-day period to remove may expire before a defendant realizes it had a removal opportunity. Conversely, defendants in removed cases pending in federal court may suddenly face remand motions due to changes in parties that destroy diversity jurisdiction. Another tricky jurisdictional element in diversity removal cases concerns computation of the amount in controversy, because many complaints filed in state

court do not contain a demand for a specific amount of money damages. This situation often requires district courts to make independent appraisals of the value of removed claims to ensure the existence of diversity jurisdiction.¹⁶

How is a Case Removed?

A case is removed when a defendant files a notice of removal with the district court and ‘promptly’ serves it on counsel of record and files it with the state court.¹⁷ In the District of New Jersey, the notice of removal must be filed electronically and the appropriate filing fee must be paid by credit card pursuant to the court’s electronic case filing policies and procedures, similar to the electronic filing of a complaint. A civil cover sheet must be electronically filed along with the notice of removal. The removed case will be allocated by the clerk’s office to one of the court’s three vicinages, typically based on the county from which the case was removed.

The notice of removal is a signed pleading subject to Rule 11, which must contain a short and plain statement of the grounds for removal, and which must attach a copy of the complaint and any other state court pleadings or orders.¹⁸ To limit the possibility of remand, the notice of removal should set forth sufficient factual and legal allegations to justify invocation of the district court’s removal jurisdiction (such as by identifying the specific type of federal question jurisdiction or the requisite elements for diversity jurisdiction). As discussed below, it is critical that the notice of removal be timely filed, so it should expressly state that removal is timely (such as by identifying when the removing defendant was served with the summons and complaint). Additionally, when there are multiple defendants, the notice of removal should make clear that the ‘all defendants rule’ has been satisfied by sufficiently indicating that all defendants properly served in the

case join in or consent to removal.

Notification of the state court should be done as soon as possible after the notice of removal has been filed with the district, preferably by hand. No specific notification form is required, but many practitioners attach a covering pleading addressed to the state court clerk, called a notice of filing of notice of removal, which warns against further proceedings in state court.

When Must a Case be Removed?

One of the most common ways practitioners bungle the removal process is through failure to timely remove a case. The removal statute mandates that a notice of removal shall be filed within 30 days after the defendant receives the summons and complaint in a removable case, or within 30 days after the defendant receives an amended pleading, motion, order or “other paper” indicating that a previously non-removable case has become removable.¹⁹ This timing provision is strictly construed by the district court, cannot be waived by consent or otherwise, and has several nuances. Therefore, as a general rule a defendant wishing to remove a case should not hesitate to do so at the earliest possible time.

Regarding the initial time period to remove a case, the Supreme Court has ruled that the 30-day removal period does not start until a defendant is actually served with a summons and complaint; mere receipt of a courtesy copy of a complaint unaccompanied by a summons does not trigger to 30-day period to remove.²⁰ However, if a defendant learns of a case prior to being served, it may remove the case before service if it chooses.

Timing issues can be complicated in multiple-defendant cases in which the defendants are served at different times. There had been a circuit split on this issue, with some courts holding that the 30-day removal period started to run for

all defendants when the first defendant was served and other courts holding that each defendant got 30 days to remove from the time it was served, regardless of when the other defendants were served. In 2012, the clarification act codified the so-called ‘last-served defendant’ rule, so it is now clear that each defendant has 30 days after service of the summons and complaint upon it to file a notice of removal.²¹ The clarification act also makes clear that earlier-served defendants can consent to a removal by a later-served defendant even if their own time to remove has expired.²²

The removal statute contains a second window for removal within 30 days after a defendant receives an amended pleading, motion, order or “other paper” indicating that a previously non-removable case has become removable.²³ As noted above, this section generally comes into play when parties are added to or removed from cases pending in state court, which can give rise to diversity removal jurisdiction. It also can arise when discovery reveals for the first time that the amount in controversy exceeds the jurisdictional minimum of \$75,000. Practitioners must pay careful attention in these situations because this secondary removal opportunity is strictly construed and often goes unnoticed until after the 30-day period has expired.

In any event, a case cannot be removed based on diversity jurisdiction more than one year after the case was commenced, unless the district court finds the plaintiff acted in bad faith to prevent removal.²⁴

Why is a Case Remanded?

Remand is the process through which an improperly removed case is sent back to state court. The removal statute states that a motion to remand a case “on the basis of any defect other than lack of subject-matter jurisdiction must be

made within 30 days.”²⁵ Therefore, practitioners must carefully examine the removal papers for deficiencies and assert any possible remand basis within 30 days of removal. The general trend has been to find that any procedural (non-jurisdictional) defect is waivable, and that the district court may not *sua sponte* remand a case based on a procedural defect that no party has timely challenged.²⁶ Thus, procedural challenges to removal based on issues such as timeliness, the forum defendant rule or the all defendants rule must be raised by the plaintiff within 30 days of removal or they may be deemed waived. Of course, a district court retains the ability to *sua sponte* remand a case at any time if it finds it lacks federal subject matter jurisdiction.²⁷

Motions to remand are deemed to be dispositive motions, so they must be decided by district judges, although they are frequently handled by magistrate judges as reports and recommendations to district judges. As a general rule, a district court order remanding a case to state court cannot be appealed to the circuit court, although it can be reviewed by *writ of mandamus* in extraordinary circumstances.²⁹ According to one nationwide study, about 20 percent of all cases removed on diversity grounds are remanded to state court.²⁹ ☞

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1. See generally 28 U.S.C. §1441, *et seq.*
2. Pub. L. 112-63.
3. 28 U.S.C. §1441(a).
4. See 28 U.S.C. §1445.
5. See 28 U.S.C. §1441(b)(2).
6. See, e.g., *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987).
7. 28 U.S.C. §1441(a).
8. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).
9. *Id.*
10. *Gully v. First Nat’l Bank*, 299 U.S. 109, 112-13 (1936).
11. *United States Express Lines v. Higgins*, 281 F.3d 383 (3d Cir. 2002).
12. *Bauman v. U.S. Healthcare*, 193 F.3d 151, 160 (3d Cir. 1991).
13. 28 U.S.C. §1441(b)(2).
14. 28 U.S.C. §1446(b)(2)(A).
15. See, e.g., *Michaels v. State of New Jersey*, 955 F. Supp. 315 (D.N.J. 1996).
16. See *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007).
17. 28 U.S.C. §1446(d).
18. 28 U.S.C. §1446(a).
19. See generally 28 U.S.C. §1446(b).
20. *Murphy Brothers v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999).
21. See 28 U.S.C. §1446(b)(2)(B).
22. See 28 U.S.C. §1446(b)(2)(C).
23. 28 U.S.C. §1446(b).
24. 28 U.S.C. §1446(b)(3)(C)(1).
25. 28 U.S.C. §1447.
26. See, e.g., *In re FMC Corp.*, 208 F.3d 445, 451 (3d Cir. 2000).
27. See, e.g., *Zelma v. Toyota Fin’l Services Americas Corp.*, No. 13-2698, 2013 WL 6858965 *3 (D.N.J. Dec. 23, 2013).
28. See, e.g., *Thermatron Prods. V. Hermansdorfer*, 423 U.S. 336 (1976).
29. Theodore Eisenberg and Trevor Morrison, *Fleeing the State Court Jury*, www.allacademic.com/meta/p117416_index.html (2006).

ENDNOTES