

OAJ Federal Courts Section Article April 2014

Removal to Federal Court: How to Identify, How to Attack, and How to Remand

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When you represent plaintiffs, some cases are just better off in state court. Whether it is your aversion to *Twombly* and *Iqbal*'s pleading standards or just your personal preferences as a lawyer, you as the plaintiff's attorney are master of the complaint. However, if you want to remain in state court, you must properly identify whether removal to federal court is possible before you file the original complaint. Then, you must decide what you need to do to prevent removal. The purpose of this article is to discuss some common situations that can lead to removal, what is generally required for removal, some methods to avoid removal, and some considerations on whether to file a motion for remand. This article is not intended to be exhaustive, but instead will discuss some of the more common themes.

The Threat of Removal: How to Identify Cases That Can Be Removed to Federal Court

Before you file, it is imperative you identify whether your case can be removed to federal court. Cases are only removable if the case could have originally been filed in federal court. The two most common types of federal court jurisdiction are (a) diversity jurisdiction and (b) federal question jurisdiction.

Diversity jurisdiction requires complete diversity among the opposing parties. Complete diversity occurs when none of the plaintiffs have the same citizenship as any of the defendants. If even one plaintiff has the same citizenship as a defendant, the case is *not* removable under diversity jurisdiction. Second, the amount in controversy for the plaintiff's claims must exceed \$75,000.00. It is the removing defendant's burden to establish that the plaintiff's claims can provide for liability in excess of this amount. If the complaint specifically pleads that the damages are equal to or less than \$75,000.00 and that is fairly supportable by evidence, the case is also not removable under diversity jurisdiction. An important reminder: if the defendant is sued in a state court in its state of residence, the defendant cannot remove the case to federal court under the forum defendant rule. Finally, keep in mind that suing a John or Jane Doe residing in the forum state will not affect removal because fictitious defendants are ignored for purposes of complete diversity.

Federal question jurisdiction is more complicated than diversity jurisdiction. Federal question jurisdiction generally holds that if the civil action arises under the Constitution, laws, or treaties of the United States, then the case can be removed to federal court. Obviously, if you plead a claim under a federal statute, such as the Americans with Disabilities Act, then the case can be removed to federal court. There are also other circumstances under which federal question jurisdiction may apply. For example, if your claims are completely preempted by a federal statute, such as the Employee Retirement Income Security Act ("ERISA"), then your case is removable under federal question jurisdiction. The term "complete preemption" is different from just normal preemption, and the U.S. Supreme Court has identified only certain areas of law that provide for complete preemption. Another exception is the "artful pleading" rule where a claim identified under state law is actually a federal claim. You should examine

federal case law for specifics on how federal question jurisdiction can apply. Also note that if there is federal question jurisdiction, then the federal court will have supplemental jurisdiction over any state law claims in your complaint that are part of the same case or controversy as your claims under federal law. Review your case carefully and evaluate not only what claims you would like to assert, but also what responses you can expect from the defendant.

Lastly, there are other bases for federal court jurisdiction under 28 U.S.C. §§ 1330, *et seq.* It is beyond the scope of this article to discuss all of these bases for jurisdiction, but take a look through these statutes to determine if your case would be removable under any of them. Also note that under the statutes some cases cannot be removed, such as workers' compensation claims.

The Proper Procedure for a Notice of Removal

The procedure for removal is governed by 28 U.S.C. §§ 1441-1455. Understanding the proper procedure is crucial, as identifying a procedural error may provide an easy way to ensure a remand to state court.

First, under 28 U.S.C. § 1446(b) and Sixth Circuit case law the deadline for a defendant to remove the case to federal court is thirty days from the date that the last defendant was served with an initial pleading. If the plaintiff amends the complaint and in doing so makes the case removable at some juncture, then defendants have another thirty days from the date that the last defendant was served to file a removal notice.

Essentially all federal courts hold that Federal Rule of Civil Procedure ("FRCP") 6(a) applies to the thirty-day calculation. *See, e.g., Hardy v. Square D Co.*, 199 F. Supp. 2d 676, 679-82 (N.D. Ohio 2002); *see also Froelich v. CACH, LLC*, 289 F.R.D. 454, 455 (S.D. Ohio 2013). If the last day for removal falls on a weekend or holiday, the removal notice can be filed the next day that the court is open for business. The terms "open for business" are also important because if for some reason the court was to close for inclement weather or some anomaly, the removal notice can be filed the next business day.

In contrast, there is a split among the federal courts on whether FRCP 6(d) (i.e. the 3-day mail rule) applies. *See Hardy*, 199 F. Supp. 2d at 681-82; *see, e.g., Flora v. LG Elec. U.S.A., Inc.*, No. 13-cv-13362 (E.D. Mich. Sep. 9, 2013). The Northern District of Ohio, the Eastern District of Michigan, and the Eastern District of Kentucky have explicitly held that FRCP 6(d) does not apply to extend the removal deadline. *See id.*; *see also Freedom Steel, Inc. v. Senn Freight Lines, Inc.*, No. 1:09-cv-2750, 2010 WL 295228, n.1 (N.D. Ohio Jan. 26, 2010); *Mitchell v. Ky-Am. Water Co.*, 178 F.R.D. 140, 142 (E.D. Ky. 1997). Quite frankly, those courts that decline to apply FRCP 6(d) have the better argument, and they are the majority on this issue. Because many defendants often assume FRCP 6(d) applies, this might be an easy way to catch an untimely removal and obtain remand. Lastly, 28 U.S.C. § 1446(c)(1) imposes a one-year statute of repose for removals based upon diversity jurisdiction unless there is a finding of bad faith.

Second, if there are multiple defendants, the decision to remove a case to federal district court must be unanimous; all defendants must consent to removal prior to any defendant filing

the removal notice. This situation most commonly arises when the defendants are represented by different counsel. It also provides an easy way to attack the removal notice. However, note that if a removal notice fails to allege all defendants consented (even though they actually all agree), that is a mere technicality that can be fixed.

The Contents of the Notice: What is Required for Removal

The Notice of Removal must strictly comply with all provisions for the federal removal statutes. *See Freedom Steel*, 2010 WL 295228. This is because removal jurisdiction encroaches upon a state court's jurisdiction. *See Holdren v. Holdren*, No. 2:12-cv-428, 2013 WL 941402, at *2 (S.D. Ohio Mar. 8, 2013). The removing party always bears the burden to demonstrate that removal was proper; all ambiguities must be resolved in favor of remand. *See Freedom Steel*, 2010 WL 395228, at *2.

The applicable removal statute, 28 U.S.C. § 1446(a), states that a removal notice must include a short and plain statement of the grounds for removal. Given that the language is identical to the general rules of pleading under FRCP 8(a), it is likely that the *Twombly* and *Iqbal* pleading standards apply to the contents of the removal notice. Though it would seem logical to hold defendants to the same standard as the plaintiff since a removal notice is akin to a complaint, the Sixth Circuit has not ruled on the issue. It is possible the issue could go the other way because there is case law holding that *Twombly* and *Iqbal* do not apply to a defendant's affirmative defenses in an answer. *See, e.g., Hcri Trs Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 690-92 (N.D. Ohio 2010) (collecting cases). However, that is unlikely. In these cases, the basis for distinguishing the pleading requirements for affirmative defenses under FRCP 8(c) from the pleading requirements for complaints under FRCP 8(a) is that FRCP 8(c) lacks the "short and plain statement" language. *See, e.g., Chiancone v. City of Akron*, No. 5:11-cv-337, (N.D. Ohio Sep. 23, 2011). As a result, it is almost certain that *Twombly* and *Iqbal* apply to removal notices.

This is extremely important because removing defendants must plead all of their substantive arguments for removal in the notice prior to the expiration of the thirty-day deadline to remove under 28 U.S.C. § 1446(b). Past this deadline, a removing defendant cannot amend the removal notice to add new substantive arguments for removal. *See, e.g., Uppal v. Electronic Data Sys.*, 316 F. Supp. 2d 531, 533-36 (E.D. Mich. 2004); *see also Hahn v. Rauch*, 602 F. Supp. 2d 895, 909 n.6 (N.D. Ohio 2008). Since your motion to remand, if any, will come after this thirty-day deadline that means the removing defendant cannot enlarge their arguments in response to your motion. Instead, they will have to pigeonhole any new arguments they did not originally contemplate into the removal notice's allegations subject to *Twombly* and *Iqbal*'s standards, a difficult and potentially impossible task.

Filing a Motion to Remand: Is it Worth Your Time and Resources?

Filing a properly-supported motion to remand is time-consuming. Thus, you must evaluate whether it is worth your time and resources to file the motion or simply litigate your case in federal court. Consider the following in evaluating your decision. First, do you have a legitimate argument that the defendant failed to follow proper procedure in removing the case? If so, wait until the thirty-day deadline for removal has expired and file a motion to remand.

Waiting the entire thirty days will foreclose the removing party from amending the removal notice to add new substantive allegations. Second, is there a sufficient legal basis for which defendant filed the removal notice? Is the removal notice fully-supported by case law? Did the defendants assert the proper justification for the removal? If the answer is yes, it is best to just preserve your resources and litigate the case in federal court. If the answer is no to any of these questions, file the motion to remand and defend your choice of forum.

In seeking remand, consider the following points of attack. First, as a matter of right, you can file a first amended complaint within twenty-one (21) days after receiving defendant's answer to the original complaint. *See* FED. R. CIV. P. 15(a)(1)(b). That initial complaint is also substituted for the original complaint for purposes of the Notice of Removal. *See Duncan v. Wal-Mart Stores, Inc., et al.* SD OH Case; *Wallace v. Dolgen Midwest, LLC*, No. 5:12-cv-2945, 2013 WL 557232, at *2 (N.D. Ohio Feb. 12, 2013). It therefore makes sense to immediately file a first amended complaint with additional detail to preemptively defend against the inevitable *Twombly* and *Iqbal* assault on your factual allegations. Although the initial complaint was originally filed with state court pleading standards in mind, once the case is removed to federal court, it will be subject to the federal court pleading standards for motions to dismiss. The federal district court must resolve the jurisdictional issues before addressing a motion to dismiss, but it is still worth taking this additional step if the motion to remand is unsuccessful.

Second, make sure that you do not file any additional pleadings or responses prior to defendant's thirty-day deadline for removal expiring. You do not want the defendant to take the advantage of your hard work by amending their notice to moot your arguments.

Third, carefully review the removal notice. I have defense attorney friends that admitted making tenuous arguments in notices of removal because they strategically wanted to be in federal court. And in most cases, those attorneys were never even challenged by a motion to remand. If the law is ambiguous or if the defendant's legal arguments do not justify their bases for removal, file the remand motion.

Finally, make sure you record all of your time spent on the remand issue. The court may award you fees if you are remanded. The standard for which a court assesses fees is whether the basis for removal was "objectively reasonable." *See Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). There is no bias for or against awarding fees for a motion to remand. *See id.* The standard only requires the court to assess whether defendant's arguments were "fairly supportable"; it does not require a showing of frivolousness or bad faith. *See e.g., Nat'l City Bank v. Aronson*, 474 F. Supp. 2d 924, 933 (S.D. Ohio 2007). However, practically, it seems federal district court are treating the issue of fees like sanctions, even though the two are different.

In conclusion, choose your forum. In doing so, make sure to consider whether defendants have a basis for which to file a notice of removal. If a removal notice is filed, review it carefully for procedural errors and lack of substance. If a motion to remand is warranted, file it. In the end, it may very well benefit both the client and you.

