



The Nuts and Bolts of Removal

by Steven H. Steinglass

The removal jurisdiction of the federal courts permits state court defendants to remove civil actions to federal courts. Though not mentioned in the Constitution, removal has been a feature of our federal judicial system since the Judiciary Act of 1789, and it is one of the most complex areas of federal practice.

Owing in part to the limited availability of appellate review of decisions remanding removed cases to the state courts, removal is burdened by an unusually large number of unresolved issues.

Removal is governed by a detailed set of statutory provisions in 28 U.S.C. §§1441 et seq. (hereafter referred to only by sections of Title 28). In addition, there are special policies governing removal in selected areas, including bankruptcy litigation, class actions, securities litigation, and suits against foreign sovereigns, federal agencies, and federal officials. Congress has also expressly barred removal of certain cases, including for

example FELA actions (§ 1445), and it has created a narrowly-construed and rarely-used removal provision for civil rights cases.

This article reviews the general principles involving removal as well as many of the unresolved issues and attempts to provide practical guidance to lawyers and judges. It does not cover the specialized removal policies.

Basic Principle

The basic principle of removal jurisdiction is that state court defendants may only remove cases that plaintiffs could have originally filed in federal court. §1441(a).

In federal question cases (§1331), original jurisdiction (and thus removal jurisdiction) must appear on the face of a well-pleaded complaint. Consequently, state court defendants with only federal defenses, such as ordinary preemption defenses in actions between Ohio citizens, cannot remove to federal court. On the other hand, when federal law completely occupies

a field, the doctrine of complete preemption classifies even traditional state law causes of action as federal and permits removal.

In diversity cases, with a significant exception involving defendants who are citizens of the forum state, state court defendants in cases that meet the jurisdictional amount requirement and the requirement of complete diversity (*i.e.*, none of the plaintiffs or defendants are citizens of the same state as any of their opponents) may remove to federal court.

Avoiding Removal

State court plaintiffs can structure their cases to avoid or minimize the possibility that their cases will be removed to federal courts.

In potential diversity cases, state court plaintiffs can join non-diverse plaintiffs (with colorable claims), can sue non-diverse defendant (against whom there are colorable claims) or can disclaim damage demands above the jurisdictional amount threshold (which is cur

rently \$75,000 exclusive of interest and costs). In potential federal question cases, state court plaintiffs can abandon their federal claims and avoid even a hint that their claims are based on federal law.

Availability of Removal

Only defendants may remove civil actions. Plaintiffs who select state courts may not remove federal counterclaims even when the counterclaims raise claims that could support original or even exclusive federal court jurisdiction. And most courts (other than in suits against federal officers) do not permit third-party defendants to remove third-party claims over which there is no independent basis of federal jurisdiction.

In diversity cases, the **forum defendant rule** bars "forum defendants" (i.e., defendants who are citizens of the state in which the action is brought) from removing, but this non-jurisdictional limitation does not apply in federal question cases.

Federal courts have removal jurisdiction over state law claims when the statutory requirements of **supplemental jurisdiction** are met, but they have discretion to remand (not dismiss) supplemental state law claims in circumstances in which they would have had discretion under §1367(c) to decline to exercise supplemental jurisdiction.

Removal Procedures

State court defendants wishing to remove civil actions to federal court need only file a "notice of removal" in federal court. §1446(a). Defendants are no longer required to file a "verified petition" or a bond, and the notice of removal need not be a detailed pleading. In fact, Congress borrowed the liberal pleading standards of the federal rules and only requires the notice of removal to contain "a short and plain statement of the grounds for removal." §1446(b). It is not clear, however, whether the rigorous pleading standards adopted in recent years by the Supreme Court also apply to notices of removal.

Under the **rule of unanimity**, all defendants in multi-defendant cases must agree to removal. Some Circuits require each co-defendant to either sign the notice of removal or submit a timely notice of consent in writing, but the Sixth Circuit also permits defendants to satisfy this requirement by opposing a motion to remand.

The notice of removal must "be filed within thirty days after the receipt by the defendant,

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through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ..." §1446(b). The Supreme Court has rejected the "courtesy copy" trap under which some courts permitted the time for removal to begin running before formal service, but it has not addressed whether the clock begins running upon service of the first-served or last-served defendant. The Sixth Circuit, however, follows the last-served defendant rule, thus giving earlier-served defendants extra time to make decisions concerning removal.

Courts are split as to whether the 30-day time limit for removal is extended by three days under FRCP 6(d) when service of the summons and complaint is made by mail. The Sixth Circuit has not addressed this issue, and district courts in the Northern District of Ohio have taken different positions on it. Thus, risk-adverse defendants contemplating removal should assume that service by mail will not extend the time to remove.

Congress has limited the availability of removal in diversity cases by adopting a one-year cap on removal in diversity cases that were not initially removable. §1446(b). Thus, state court plaintiffs may thwart removal by dismissing non-diverse parties after the expiration of one year. Some courts have read an equitable exception into the statute, but the Sixth Circuit has not decided this issue.

In federal question cases, the 30-day time limit for removal does not begin to run until service of the pleading that makes the case removable. In some cases, it is not apparent from the complaint that a state court plaintiff is bringing a federal claim, and courts have recognized that the time limit should not begin to run until the nature of the claim becomes clear. And in one of the more unusual removal decisions, the Sixth Circuit has held that the time for removal under § 1446(b) may also run from deposition

testimony that revealed for the first time the federal nature of the claim.

Once an action has been removed, federal law governs service of process, and the federal rules expressly address the time limits for filing responsive pleadings or motions in removed cases. FRCP 81(c).

The notice of removal is subject to the requirements of FRCP 11, and federal courts remanding cases to state courts may award costs and attorney fees incurred as a result of removal, (§1446(a)) but only when the removing-defendant did not have an objectively reasonable basis for removal.

Pre-Service Removal

Increasingly, state court defendants in otherwise removable cases that meet the requirements of complete diversity seek to avoid the **forum defendant rule** by removing prior to service on the forum defendant. Reading literally the statutory requirement of "properly served" in §1441(b) and aware that the forum defendant may only be a jurisdictional spoiler who may never be served, these defendants remove cases prior to service on their co-defendant. Remarkably, however, creative defendants have taken pre-service removal even further and in some jurisdictions regularly remove cases in which they are the forum defendants prior to their having been served. No federal court of appeals has addressed this issue of pre-service removal, and the lower federal courts are split as to its propriety. Given this uncertainty state court plaintiffs should make a special effort to expeditiously effectuate service on forum defendants.

Burdens

Removal jurisdiction is determined at the time of removal, and a defendant seeking to remove a case to federal court has the burden of proving that the district court has jurisdiction; in diversity cases the removing defendant also

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has the burden of showing by a preponderance of the evidence that the allegations in the complaint at the time of removal satisfied the amount-in-controversy requirement. Post-removal events, whether beyond the plaintiff's control or the result of his volition (such as post-removal reductions in the damages being sought), do not deprive the district court of removal jurisdiction.

Remands—Generally

In §1447(c), Congress gave district courts the power to remand removed actions, but it is an oddly-worded (and frequently amended) provision that on its face appears primarily to govern time limits for motions to remand. In relevant parts, it provides that

[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section §1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Under the jurisdictional leg of §1447(c), federal courts are required to remand removed actions for lack of subject matter jurisdiction (whenever its absence becomes apparent), and this can be done in response to a motion by the non-removing party or sua sponte. Such remands cover a wide range of jurisdictional defects, including complete preemption, the absence of an Article III-required case or controversy such as a lack of standing, or the Eleventh Amendment. Moreover, even removing defendants (who lose on the merits) can ironically raise the absence of subject matter jurisdiction by changing positions and arguing that the action that they removed had been improperly removed for jurisdictional reasons. Finally, appellate courts give great,

though not complete, deference to district courts' colorable characterizations of remands as jurisdictional.

When plaintiffs attempt to avoid removal by naming non-diverse parties as plaintiffs or defendants, diverse defendants will often remove and rely on the well-established doctrine of **fraudulent joinder** to argue that the citizenship of the non-diverse party should be ignored because of the absence of a colorable claim on its behalf or against it. To avoid removal in such cases, plaintiffs should take care not to file frivolous claims on behalf of or against properly joined non-diverse parties.

Some federal courts have gone beyond **fraudulent joinder** and relied on the emerging doctrine of **fraudulent misjoinder** to perfect jurisdiction over a removed actions by dropping a properly joined jurisdictional spoiler (i.e., a non-indispensable non-diverse party) who has brought a colorable claim or has been sued on a colorable claim, but neither the Supreme Court nor the Sixth Circuit has approved **fraudulent misjoinder**.

The courts in the Northern District of Ohio have not embraced **fraudulent misjoinder**. However, some have relied on the seemingly open-ended language of FRCP 21 to reach similar results by dropping non-diverse parties (and thus perfecting diversity jurisdiction) in cases involving colorable claims notwithstanding compliance with the joinder requirements of Rule 20.

Non-Jurisdictional Remands

Under §1447(c), federal courts may remand cases for non-jurisdictional reasons such as defects in removal procedure, untimely removal, violations of the rule of unanimity, and violations of forum selection clauses. In addition, the Supreme Court has held that district courts may remand cases based on *Burford* abstention and on the court's refusal to exercise pendent

(now supplemental) jurisdiction.

Remands—Timing

Congress has addressed the timing of remand motions by requiring that motions to remand based on defects in removal procedures be made within 30 days of the filing of the notice of removal. When the basis for remand is subject matter jurisdictional, motions to remand may be made at any time.

Read literally, the 30-day time limit for motions to remand also applies to motions based on non-jurisdictional grounds such as abstention and the discretionary refusal to exercise jurisdiction over supplemental state law claims, but the basis for such remands often does not appear until after the expiration of the 30-day period. Few courts have addressed this conundrum, but the best advice for plaintiffs seeking remands on non-jurisdictional grounds is to make their motions within the 30-day period.

Remands—Appellate Review

Congress has adopted a statutory provision that, on its face, seems to bar appellate review of orders remanding removed cases to state courts. See §1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ."). The Supreme Court, however, has avoided this apparent bar by reading §1447(c) and §1447(d) "*in pari materia*" and by limiting the bar to remands based on §1447(c). Thus, remands not expressly authorized by §1447(c) are reviewable. For example, the Court has permitted appellate review of remands based on crowded dockets, *Burford* abstention, and the refusal to exercise discretion to hear supplemental state law claims. Decisions to deny motions to remand, on the other hand, are not final orders but are ultimately appealable.

Conclusion

This article barely scratches the surface of the removal-related issues that lawyers and judges must confront. But hopefully it will provide both experienced and inexperienced litigators with a useful overview of this complex and important area of federal practice. ♦

A more complete version of this article with citations is available from the author.



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