

TO REMOVE OR NOT TO REMOVE FEDERAL COURT, VENUE, AND OTHER JURISDICTIONAL CONSIDERATIONS

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I. WHO CAN REMOVE?

A. Only Defendants of the Plaintiff's Claims

The removal statutes vest the right of removal exclusively in the “the defendant or the defendants” of a civil action brought in state court. 28 U.S.C. §1441(a). The term “defendant” has been construed narrowly to apply only to “true defendants” – those made defendants by the initiation of the Plaintiff’s complaint, not parties who acquired the litigation position of “defendant” through counterclaims or cross-claims. *First Nat’l Bank of Pulaski v. Curry*, 301 F.3d 456, 462 (6th Cir. 2002); *Young v. Cach LLC*, N.D. Ohio No. 4:12CV0399, 2013 U.S. Dist. LEXIS 40413 (Mar. 13, 2013).

B. Plaintiffs Cannot Remove, Even in Response to a Counterclaim

As Plaintiffs initially choose where to initiate their case, they do not get a second bite at the apple via the removal statutes. Furthermore, as Plaintiffs are not “true defendants” as interpreted by the courts, they may not seek removal in response to a counterclaim asserting an otherwise removable cause of action. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Deutsche Bank Nat’l Trust Co. v. Weickert*, 638 F. Supp. 2d 826 (N.D. Ohio 2009).

C. Third-Party Defendants Cannot Remove

The majority view is that the question of who is a defendant is determined by the original complaint. As such, third-party defendants are not considered true defendants for purposes of removal. *First Nat’l Bank of Pulaski v. Curry*, 301 F.3d 456 (6th Cir. 2002).

II. IS YOUR CASE SUBJECT TO REMOVAL?

A. Federal Question Jurisdiction

If the Plaintiff’s claims arise pursuant to federal law (i.e. the resolution of the case depends on the application of federal law), federal question jurisdiction exists.

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This includes claims arising under the Constitution, treaties, and federal statutes. 28 U.S.C. §1441(a); 28 U.S.C. §1331.

1. *Based Only on Claims in Complaint:* Federal question jurisdiction is based on the “well-pleaded complaint rule,” which holds that a federal question must be presented on the face of the Plaintiff’s complaint. *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (U.S. 1986).
 - a. Defenses Not Considered: Defenses raising federal questions cannot make a case removable.
 - b. No Artful Pleading: If a Plaintiff’s claim raises a federal question, the Plaintiff cannot avoid removal by attempting to plead the action only under state law. *City of Warren v. City of Detroit*, 495 F.3d 282 (6th Cir. 2007).
2. *If Complaint Asserts both Federal and State Claims, Removable but may be Severable:* When a complaint alleges both federal and state law claims, the entire case can be removed to federal court under federal question jurisdiction.
 - a. Supplemental Jurisdiction over Related Claims: Federal courts have supplemental jurisdiction to decide all state law matters that are so related to the federal claims that they form part of the same case or controversy. 28 U.S.C. §1367.
 - b. Unrelated State Law Claims will be Severed and Remanded: Pursuant to recent statutory amendments, federal courts no longer have discretion to hear state law claims that are unrelated to the removable federal claims. Therefore, after removal, federal courts are now required to sever and remand unrelated state law claims. 28 U.S.C. §1441(c).

B. Diversity of Citizenship Jurisdiction

Even when the Plaintiff’s claims do not present questions of federal law, original federal court jurisdiction still exists if there is complete diversity amongst the parties, and the minimum monetary amount in controversy is satisfied. 28 U.S.C. §1441(a); 28 U.S.C. §1332.

1. *Minimum Amount in Controversy:* The amount in controversy must exceed \$75,000, excluding interests and costs.
 - a. Defendant Bears Burden of Proof: If it is not clear from the complaint that the Plaintiff seeks in excess of \$75,000, the defendant bears the burden to prove an adequate amount in

controversy by a preponderance of the evidence in its removal petition.

- b. Counterclaims not Considered: The alleged damages or setoffs asserted in a counterclaim are not added to or subtracted from the value of the Plaintiff's claim in determining the amount in controversy. *Rosen v. Chrysler Corp.*, 205 F.3d 918 (6th Cir. 2000); *Firestone Fin. Corp. v. Syal*, 327 F. Supp. 2d 809 (N.D. Ohio 2004).

2. *Diversity of Citizenship*:

- a. Complete Diversity Required: No two citizens of the same state may be on opposing sides of the lawsuit. 28 U.S.C. §1332(a).
- b. Citizenship of Corporation: A corporation is a citizen of (a) each state of incorporation; and (b) the state containing its principal place of business, i.e. corporate headquarters. 28 U.S.C. §1332(c); *Hertz Corp. v. Friend*, 559 U.S. 77 (U.S. 2010).
 - i. *Exception*: In a direct action against a liability insurer in which the insured is not joined as a party-defendant, the insurer is also deemed a citizen of the state in which the insured is a citizen. 28 U.S.C. §1332(c).
- c. LLC's and Unincorporated Entities: LLC's are treated the same as unincorporated entities, and have the citizenship of each partner or member. Thus, when an LLC has many members, it may have multiple citizenships. *Delay v. Rosenthal Collins Group, Inc.*, 585 F.3d 1003 (6th Cir. 2009).
- d. No Fraudulent Joinder: A Plaintiff cannot avoid diversity jurisdiction by fraudulently joining a non-diverse party. The burden rests on the defendant to show that the complaint does not state a viable claim against the joined party. *Alexander v. Electronic Data Sys. Corp.*, 13 F.3d 940 (6th Cir. 1994).

III. PROCEDURE FOR REMOVAL

A. 30-Day Time Frame

A defendant has 30 days from the receipt of the complaint, "through service or otherwise" to file a notice of removal. 28 U.S.C. §1446.

1. *Clock Starts Separately for each Defendant:* The recent statutory amendments clarify that each defendant has 30 days to seek removal from the date that specific defendant was served, rather than from the date the first defendant was served. 28 U.S.C. §1446(b)(2)(B).
2. *Subsequent Removability:* If a case is not initially removable, but later becomes removable, then each defendant has 30 days from the date the case becomes removable (i.e. non-diverse defendant is dismissed; amended pleadings, ect.). 28 U.S.C. §1446(b).
3. *One Year Limit on Diversity, Unless Bad Faith:* Regardless of whether a case subsequently becomes removable, a defendant cannot remove a case based on diversity jurisdiction more than one year after commencement of the action, unless the district court finds that the plaintiff acted in bad faith to prevent removal. 28 U.S.C. §1446(b).

B. Filing Notice of Removal

The defendant must file a notice of removal containing the grounds for removal along with a copy of all process pleadings in the appropriate federal district court. 28 U.S.C. §1446. Note that if the defendant is a corporate entity, corporate disclosures must also be filed with the notice of removal in accordance with Fed.R.Civ.P 7.1 and applicable local rules.

1. *All Defendants Must Agree to Removal:* The notice of removal must indicate that all defendants who have been joined and served consent to the removal. An earlier-served defendant may consent to removal even though that defendant did not seek removal within 30 days of being served.
2. *Defendant Bears the Burden of Establishing Removability:* Removal is a statutory privilege, not a right. If it is not apparent from the face of the plaintiff's complaint, the defendant must demonstrate that removal is appropriate. Remand may occur if any of the following are not properly established in the notice of removal: (a) timeliness, (b) basis of jurisdiction (federal question or diversity), and (c) consent of all defendants.
3. *Notice must be Signed Pursuant to Rule 11:* Note that Civ.R. 11 applies to notices of removal, and sanctions may be imposed on defendants seeking an improper removal.
4. *Notice must be Provided to State Court:* The removing defendant must file a copy of the notice of removal in the state court, and provide notice of the same to all parties. It is the filing in state court that actually effects the removal. 28 U.S.C. §1446(d).

5. *Effect:*

- a. In State Court: Upon filing the notice in state court, the removal is effected, and the state court loses all jurisdiction over the case unless and until it is remanded.
- b. In Federal Court: Unless modified by the federal court, all preexisting state court rulings and orders remain in effect.

C. Removal to Proper Venue

The state court action must be removed to the proper federal district court, as determined by county. Once removed, however, recent amendments allow the parties to consent to transfer the case to a different district in the interests of convenience and justice. 28 U.S.C. §1441(a); 28 U.S.C. §1404.

IV. FACTORS TO CONSIDER WHEN EVALUATING REMOVAL

A. Advantages of Removal to Federal Court

1. *Potential Advantages Regarding Judges:*

- a. More Familiar with Issues of Federal Law: This in turn may make them more likely to grant summary judgment on difficult issues.
- b. Quicker Resolution: Federal judges are generally considered to push the pace of the case, more strictly adhere to discovery and dispositive motion deadlines, and actively advocate for settlement.
- c. Potential for Referral of Case to Magistrate Judge: This can provide another aspect of control regarding who will be presiding over and ruling on key aspects of the case, and can lead to a more expedient resolution. Fed.R.Civ.P. 72, 73.

2. *More Expedient/Transparent Discovery Process*: The Federal Rules of Civil Procedure largely provide for automatic production and supplementation of discoverable information, which can save defendant both time and money in regard to the discovery process.

- a. Rule 26 Pre-Discovery Disclosures: Federal Rule of Civil Procedure 26 mandates that parties automatically provide opposing counsel with information regarding witnesses, location and content of documents, and damage calculations. Parties must also

automatically disclose expert reports and the basis and documentation that formulated expert opinions.

b. Required Supplementation: A party in federal court that has provided initial disclosures, or has responded to discovery requests, must automatically supplement its responses if the party learns that in some material respect the disclosure or response is incomplete or incorrect.

i. *Compare*: Under Ohio Civ.R. 26 while a party must correct a discovery response known to be incorrect, a party who has responded to discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired except as to the identity of witnesses.

3. *Federal Courts have Nationwide Subpoena Power*: Comparatively, subpoenas issued under authority of Ohio state courts may not be enforceable against individuals outside of Ohio.

4. *Reasonable Settlements are Strongly Incentivized*:

a. Rule 68 Offer of Judgment: At least 14 days before trial, a defendant may serve on the plaintiff an offer to allow judgment on specified terms, with the costs then accrued. If the Plaintiff does not except the offer within 14 days, it is considered withdrawn. If the ultimate judgment that the plaintiff obtains is less than the unaccepted offer, the plaintiff must pay the costs incurred after the offer was made. Fed.R.Civ.P 68.

b. Plaintiffs May Otherwise Bear Costs: If a plaintiff has alleged an amount in controversy in excess of \$75,000 for purposes of diversity jurisdiction, and the ultimate judgment is below that amount, the plaintiff may be ordered to pay costs. 28 U.S.C. §1332(b).

5. *Potentially More Favorable Jury*:

a. More Diverse Jury Pool: A federal district court jury pool is comprised of individuals from multiple counties, whereas a state court jury is made up only of individuals from the county in which the state court sits.

b. Unanimous Verdicts are Required: In federal court, civil jury verdicts must be unanimous unless otherwise agreed to by the parties. Fed.R.Civ.P. 48.

- (i) *Compare:* Ohio Civ.R. 48 requires only that three-fourths or more the jury agree.
6. *Easier Access to District Court's Prior Rulings:* Unlike state trial court decisions, district court rulings are generally accessible on Lexis and Westlaw, allowing a defendant to gain insight into the court's prior rulings on the legal issues presented, as well as other pertinent issues such as the court's handling of discovery disputes.

B. Potential Disadvantages of Removal to Federal Court

1. *Losing a Well-Respected or Favorable State Court Judge:* There is no way of knowing what federal district court judge you will be assigned to upon removal. If the state court action is assigned to a judge with a strong reputation, or one who has ruled favorably on similar issues in the past, it may well be worth remaining in state court rather than rolling the dice on which federal judge you will draw by removing the case.
2. *Required Corporate Disclosures:* A corporate defendant removing to federal court must file a disclosure statement contemporaneously with its notice of removal identifying pertinent parent companies or publicly traded companies with non-nominal ownership interests. Fed.R.Civ.P. 7.1. A district court's local rules may impose additional disclosure requirements. *See* N.D. Ohio Loc.R. 7.1.1; S.D. Ohio Loc.R. 7.1.1.
3. *Potential Remand of All or Some of the Claims:* A plaintiff's motion to remand may lead to an expensive briefing battle, and if a case is remanded in whole or in part, there is generally no recourse, and the time and expense of seeking removal becomes a sunken cost.
 - a. Based on Procedural Defects: Defects in notices of removal are generally strictly construed against the defendant. A plaintiff has 30 days to file a motion to remand based on procedural defects. 28 U.S.C. §1447.
 - b. Based on Subject Matter Jurisdiction: Either the plaintiff or the court may raise the issue of remand at any time prior to final judgment if based on subject matter jurisdiction.
 - c. Based on Mandatory Severance: As noted above, when jurisdiction is based on a federal question, district courts are now required to sever and remand unrelated state law claims.
 - d. Sanctions and/or Costs: "An order remanding the case may require payment of just costs and any actual expenses, including attorney

fees, incurred as a result of the removal.” 28 U.S.C. §1447(c). Costs are awarded at the discretion of the court, and generally require some showing of frivolousness or bad faith. *Paul v. Kaiser Found. Health Plan of Ohio*, 701 F.3d 514 (6th Cir. 2012).

4. *Faster Pace of Litigation and Stricter Discovery Deadlines:* This is a double-edge sword. While defense counsel generally like to push the pace of litigation, if your insured/client is difficult to deal with or nonresponsive, and the case is fact or document intensive, it may be more beneficial to opt for the slower schedule of state court litigation.

C. Other Considerations

1. *Whether Attorney is Admitted to Federal District:* Each federal district and appellate court has separate admission requirements for an attorney to appear and practice before the court, which almost always includes a fee. An attorney not currently licensed in a specific court will need to either take the necessary steps to gain admission to practice before the court, seek *pro hac vice* admission, or retain licensed co-counsel.
2. *Page Limits and Response Times:* Page limits for dispositive motions, and the time limits to file oppositions thereto can vary widely among the various state counties and federal district courts.
 - a. Southern District of Ohio: 20-page limit on motions; 21 days to file opposition brief; 14 days to file reply brief. Local Rule 7.2.
 - b. Northern District of Ohio: 20-page limit on motions (30 pages for complex cases); 30 days to file opposition brief; 14 days to file reply brief. Local Rule 7.2.
 - c. Cuyahoga County: No page limit on motions; 30 days to file opposition brief; 10 days to file reply. Local Rule 11.
 - d. Lake County: No page limit; 14 days to file opposition brief; 5 days to file reply. Local Rule 3.04.
 - e. Medina County: 15-page limit on motions; opposition briefs may be filed any time prior to date of non-oral hearing, no procedure for reply briefs. Local Rules 5 and 6.
3. *Waiver of Service in Federal Court:* Under the Federal Civil Rules, a plaintiff may notify a defendant that an action has been commenced, provide the defendant with pertinent documentation, and request that the defendant waive service of a summons. If a defendant refuses to waive

service, the plaintiff is entitled to recover the expense incurred in making service. Fed.Civ.R.P. 4(d).

4. *Differences in Discovery Procedures and Trial Conduct:* Consider the discovery and trial procedures specific to each court. Differences often arise with regard to discovery (limits on interrogatories or requests for admission), pretrial motions and briefing, *voir dire*, and trial procedures.
5. *Preferences Regarding Alternative Dispute Resolution:* Court involvement in the ADR process can vary significantly depending on the jurisdiction.
 - a. Southern District: Court may refer case, without party consent, to settlement week mediation, attorney-based mediation, judicial-based mediation, or summary jury trial. Local Rule 16.3; Supplemental Procedures for Alternative Dispute Resolution for civil cases effective February 21, 2013.
 - b. Northern District: Court utilizes “Early Neutral Evaluation,” a pre-trial process involving a neutral who meets with the parties early in the course of the litigation to help them focus on the issues, organize discovery, work to prepare the case for trial, and if possible, settle all or part of the case. Local Rules 16.