

A PRIMER ON REMOVAL: DON'T LEAVE STATE COURT WITHOUT IT

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As most practitioners know, strict compliance with removal statutes is required to successfully remove an action from state to federal court. It goes without saying that courts heavily scrutinize removal documents to ensure not only that jurisdiction is established, but also that the removing party complied with the removal statutes in establishing jurisdiction. If the removing documents do not strictly comply with the removal statutes, courts are apt to remand the action, even if the defect in the removing documents is a minor technical defect of little substance. This is particularly so in the case of removals based on diversity jurisdiction. To avoid remand in this context, it is vital that practitioners approach removal with caution and an awareness of some common defects that can result in remand. This article addresses some of these defects and provides suggestions to removing defendants to avoid remand.

BACKGROUND

A party may remove an action from state to federal court; however, “[f]ederal courts are courts of limited jurisdiction.”¹ Consequently, federal courts are empowered to hear only those cases that the Constitution or the Congress of the United States has authorized the federal courts to hear.² Specifically, federal courts are empowered to hear those cases in which exclusive federal question jurisdiction lies, or alternatively where there is a complete diversity among the parties and the amount in controversy exceeds \$75,000.

Generally speaking, 28 U.S.C. §§ 1441 through 1452, govern the procedure for removal. “Removal is a statutory privilege, rather than a right, and the removing party must comply with the procedural requirements mandated in the statute when desirous of availing the privilege.”³ “After a case has been removed from state to federal court, the non-removing party may move

for remand . . . on the grounds that the removing party has failed to comply with the statutory requirements for removal.”⁴ Section 1447(c) of Title 28 of the United States Code authorizes remand if a “procedural defect in the removal of the case” exists.⁵ Due to the limitations on federal court jurisdiction, “the Eleventh Circuit favors remand of removed cases where federal jurisdiction is not absolutely clear.”⁶

With these limitations on jurisdiction, the necessity of strict compliance with the statute, and the fact that parties rarely – if ever – get a “second bite at the apple”, it is vital for a removing party to be aware of the most common defects and grounds for remand. The remainder of this article touches on the law relating to the most common grounds for remand in removals based on diversity jurisdiction.

AVOIDING REMAND

To avoid remand of an action removed on grounds of diversity jurisdiction, at a minimum, a removing party must:

- 1. File a notice of removal in a timely manner, which is within thirty (30) days after receipt of a document from which the defendant could first ascertain that the case is or has become removable.**

The removing defendant “has the task of proving to the court that the removal was timely.”⁷ Certain courts have not hesitated to remand cases to state court if a defendant fails to meet this burden.⁸ To guard against remand, a removing party should file a notice of removal within thirty (30) days of receipt of a document, “other paper” or information that leads the removing party to believe that the case is or has become removable.⁹ Specifically, compliance with 28 U.S.C. § 1446 mandates that - if a defendant elects to proceed in federal court - that defendant remove the case within a specified time period “after receipt [of a document or evidence] by the defendant, through service or otherwise . . . from which the defendant first

ascertained that the case is one which is or has become removable.”¹⁰ Under 28 U.S.C. § 1446, in terms of timing, two alternatives exist: (1) the case must be “removable on the basis of an initial pleading;” or (2) the case must be “later become removable on the basis of a ‘copy of an amended pleading motion, or other paper.’ ”¹¹ “Regardless of the type of case, a defendant must remove within thirty days of receiving the document that provides the basis for removal.”¹²

“Where a plaintiff timely alleges and proves that a defendant has not timely filed a removal petition in accordance with statutory procedures, the district court, as a court of limited jurisdiction, cannot disregard an evident procedural defect regardless of the triviality or inadvertent nature of the defect.”¹³ Consequently, remand may result if a defendant fails to remove the case within the statutorily imposed thirty-day deadline.¹⁴

2. Attach process, pleadings and orders served upon defendants.

Section 1446(a) requires that a removing party file together with its notice of removal “a copy of all process pleadings, and orders served upon such defendant or defendants in [the state court] action.”¹⁵ Courts have interpreted this mandate to require that the removing party attach *all* (not just part) of the process, pleadings and orders that have been served in the state court action *at the time* the notice of removal is filed.¹⁶ Thus, to avoid remand, a removing party should file together with the notice of removal a copy of all process, pleadings and orders that have been served.

3. Obtain and evidence consent of co-defendants to removal

“Beginning with United States Supreme Court’s decision in *Chicago R.I. & Pac. Ry. Co.*, 178 U.S. at 248, federal courts have universally required unanimity of consent in removal cases involving multiple defendants.”¹⁷ “Like all rules governing removal, this unanimity

requirement must be strictly interpreted and enforced because of the significant federalism concerns arising in the context of federal removal jurisdiction.”¹⁸

The rule of unanimity requires in the case of multiple defendants that all defendants consent to the removal. If consent of a served codefendant is not evident on the face of the removal papers, then the removing party is obligated to explain the absence of that consent or the removal is defective.¹⁹ “A petition for removal is considered defective if it fails to explain why all defendants have not joined therein.”²⁰

Where possible, it is wise to obtain the consent of all defendants, even those not yet served, before the Notice of Removal is filed²¹ and to evidence such consent on the Notice of Removal. Courts have rejected arguments made by parties that a co-defendants’ subsequent filing of a notice of joinder and consent excuses them from the obligation to obtain consent in advance of filing the removal petition.²² Courts have similarly rejected removal efforts when a removing party failed to obtain consent of a co-defendant in advance of filing a notice of removal because the removing party did not know with certainty whether a co-defendant had been served.

4. Take care with terms of art in diversity removal allegations

A. Terms of art: “Citizen” versus “resident”

The burden falls on the removing party to prove complete diversity.²³ “The allegations must show that the citizenship of each plaintiff is different from that of each defendant.”²⁴ Some courts have found that the requisite specificity is lacking where a party alleges residency instead of citizenship.²⁵ In fact, such courts have held that “[a]verments of residence are wholly insufficient for purposes of removal.”²⁶ The reason enunciated by the courts for such a holding is that “[a]lthough ‘citizenship’ and ‘residence’ may be interchangeable terms in common

parlance, the existence of citizenship cannot be inferred from allegations of residence alone.”²⁷ Simply put, in a diversity removal, it may not be enough to allege only the *residence* of party; instead, the wiser practice for the party attempting to establish federal jurisdiction is to allege the *citizenship* of the diverse parties.²⁸

B. Conclusory allegations of citizenship

Similarly, some courts take the position that merely alleging that an action is between citizens of different states is insufficient to establish that the parties are diverse for the purposes of supporting a diversity removal; instead, “specific facts must have been alleged so that [a] Court itself will be able to decide whether such jurisdiction exists.”²⁹ Consequently, conclusory assertions that diversity of citizenship exists without accompanying factual support about a parties’ citizenship as opposed to residency may result in remand.³⁰ For example, where the removing party states only the residence of an allegedly diverse party, and fails to include allegations regarding an allegedly diverse parties’ citizenship, that failure has been used to justify remand.³¹ The safer practice is for a removing party to allege diversity of citizenship and to specify in its removal documents the factual basis supporting the allegation that the parties are in fact diverse.

C. Timing of diversity

“[A] removing party must allege diversity both at the time of the filing of the suit in state court and at the time of removal”³² Failure to specifically allege diversity at both times may be fatal to the petition and should result in remand.³³

5. Provide the court with sufficient evidence establishing the jurisdictional threshold³⁴

To establish federal diversity jurisdiction, section 1332 of Title 28 of the United States Code³⁵ requires that “the matter in controversy exceeds the sum or value of \$75,000, exclusive

of interest and costs”³⁶ Ultimately, because a removing defendant bears the burden of proving federal jurisdiction exists,³⁷ it falls upon the defendant to evidence in the removing documents³⁸ that the amount in controversy meets the jurisdictional threshold. This jurisdictional amount must be “either stated clearly on the face of the documents before the court, or readily deducible from them . . . [i]f not, the court must remand.”³⁹

Historically, the amount in controversy identified in the plaintiff’s complaint controls.⁴⁰ Thus, if a plaintiff specifies in the complaint that he or she seeks in excess of the jurisdictional minimum and the defendant does not dispute the plaintiff’s claim, the amount in controversy is satisfied. If a plaintiff fails to specify his or her damages at all,⁴¹ however, a defendant bears the burden of establishing that the amount in controversy has been met by a preponderance of the evidence.⁴²

The Eleventh Circuit recently reiterated its expectations relative to a defendant’s obligation to evidence that the amount in controversy is satisfied so as to avoid having the action remanded to state court and confirmed once again that conclusory allegations that the amount in controversy is met do not meet the removing party’s burden.⁴³ Instead, a removing party must provide evidence to the court. The sort of evidence the court may consider includes “summary-judgment-type evidence relevant to the amount in controversy at the time of removal.”⁴⁴ When such evidence is presented to the court, the Eleventh Circuit applies the following standard to determine whether the removing party has met the requisite burden: “[T]he removing defendant must establish the amount in controversy by ‘the greater weight of the evidence, . . . a superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.’”⁴⁵

More recently, the Eleventh Circuit identified with precision certain examples of evidence it contemplates and that are permissible for use in supporting removal. For example, the Eleventh Circuit stated that “[a] defendant would be free to introduce evidence regarding damages arising from a source such as a contract provision whether or not the defendant received the contract from the plaintiff. In such situations, the underlying substantive law provides a rule that allows the court to determine the amount of damages. For example, in contract law, the default measure of damages is expectation damages; a court may look to the contract and determine what those damages would be.”⁴⁶ Thus, under existing law, where the plaintiff fails to specify his or her damages in the complaint, a party may couple its evidence with legal arguments to meet its burden of evidencing the amount in controversy exceeds the jurisdictional minimum.

Removing defendants are presented with a different burden if a plaintiff affirmatively pleads or otherwise stipulates that the amount in controversy is less than the jurisdictional minimum. In this circumstance, the removing party must prove “to a legal certainty that plaintiff’s claim must exceed” the jurisdictional minimum. Although the burden has been described as “strict”, “heavy” and “daunting”,⁴⁷ it is not insurmountable.⁴⁸ To the contrary, a removing party need only show that if a plaintiff prevails, an award below the jurisdictional amount would be outside the range of permissible awards because the case is clearly worth more than the jurisdictional minimum.

The Eleventh Circuit views this standard through an objective lense.⁴⁹ Thus, for example, “where a plaintiff makes a contract-based claim and it is shown that he would, as a matter of law, be entitled to a fixed amount in excess of the jurisdictional amount upon prevailing, then such a claim would be sufficient to confer removal jurisdiction.”⁵⁰ Similarly,

irrespective of a plaintiff's denial that the jurisdictional threshold is satisfied, "where a plaintiff brings a tort claim for physical injuries and seeks to recover the value of medical bills that exceed the jurisdictional amount."⁵¹

The lesson from the multitude of cases addressing the proof necessary to establish the jurisdictional threshold is that it is not enough to merely allege that the amount in controversy meets the jurisdictional threshold. To avoid remand in a diversity action, a removing party in the removal documents must supply the court with concrete documentary evidence and a sound basis in law that is clearly and plainly articulated in the Notice of Removal and that proves the jurisdictional threshold is met by a preponderance of the evidence.

CONCLUSION

Simply put, many courts exhibit a low tolerance for removal documents that do not strictly comply with the removal statutes or that contain only conclusory allegations in support of the removing party's claim that federal jurisdiction exists. This level of tolerance may result in remand if a party's removal documents are not in strict compliance with the statute and inclusive of facts and evidence from which a federal court can conclude it has jurisdiction as opposed to merely guessing or speculating about what sort of evidence the party may have or likely has to support its allegations. If a removing party errs on the side of inclusiveness of facts and evidence, while strictly adhering to the statutory requirements, that party is likely to stand a better chance of avoiding remand.

¹ *Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

² *See Kokkonen*, 511 U.S. at 377.

³ *Adams v. Charter Communications VII, LLC*, 356 F. Supp. 2d 1268, 1271 (M.D. 2005); *see also Landman v. Borough of Bristol*, 896 F. Supp. 406, 409 (E.D. Pa. 1995) ("Because courts strictly construe the removal statutes, the parties must meticulously comply with the requirements of the statute to avoid remand.")

⁴ *Id.*

⁵ *Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1043 (11th Cir. 2001)

⁶ *Beard v. Lehman Brothers Holdings, Inc.*, 458 F. Supp. 2d 1314, 1317 (M.D. Ala. 2006); *see also Russell Corp.*, 264 F.3d at 1050 (“[T]here is a presumption against the exercise of federal jurisdiction, such that all uncertainties as to removal jurisdiction are to be resolved in favor of remand.”)

⁷ *Crews v. National Boat Owners Ass’n*, 2006 WL 902269, *1 (M.D. Ala. April 6, 2006)(concluding removal was untimely because any of the defendants could have intelligently ascertained from a review of the initial pleading that the case was removable and thus could not rely on the date of receipt of “other paper” from which to start the clock).

⁸ *See, e.g., id.*; *see also Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1321 (11th Cir. 2001); *Arnold, et al. v. Guideone Specialty Mut. Ins. Co.*, 142 F. Supp. 2d 1319, 1323 (N.D. Ala. 2001).

⁹ With respect to service of the summons and complaint, the thirty day time period for removal begins to run from the date of *formal* service that complies with the rules of the state governing service of the summons and complaint. *Murphy Bros, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)(holding that thirty-day removal period runs from the date of formal service as opposed to the date on which the defendants received the complaint through informal means). Of course, this rule relating to formal service is inapplicable in the context of “other paper” removals.

¹⁰ 28 U.S.C. § 1446.

¹¹ *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007).

¹² *Id.* at 1213.

¹³ *Beard*, 458 F. Supp. 2d at 1318 (citing and quoting *Kisor v. Collins*, 338 F. Supp. 2d 1279, 1281 (N.D. Ala. 2004); *Prod. Stamping Corp. v. Md. Cas. Co.*, 829 F. Supp. 1074, 1077-78 (E.D. Wis. 1993)(“The view that technical flaws in a removal petition ‘can be swept away like so much dust seriously misunderstands the conditions under which the formidable power of the federal judiciary can-and should-be invoked’”(omitting citations))(emphasis added).

¹⁴ *Crews*, 2006 WL 902269 at *1 (concluding removal was untimely because any of the defendants could have intelligently ascertained from a review of the initial pleading that the case was removable and thus could not rely on the date of receipt of “other paper” from which to start the clock).

¹⁵ 28 U.S.C. § 1446(a).

¹⁶ *See Andalusia Enterprises, Inc. v. Evanston Ins. Co.*, 487 F. Supp. 2d 1290, 1300 (N.D. 2007)(remanding action because, among other reasons, the removing party failed to include in the notice of removal copies of the summonses served on the defendants).

¹⁷ *Russell Corp.*, 264 F.3d at 1050 (noting that [t]here are several bright line limitations on federal removal jurisdiction . . . that some might regard as arbitrary or unfair . . . [s]uch limitations, however, are an inevitable feature of a court system of limited jurisdiction that strictly construes the right to remove.”).

¹⁸ *Id.*

¹⁹ *P-Nut Carter’s Fireworks, Inc. v. Carey*, 685 F. Supp. 952, 953 (D.S.C. 1988).

²⁰ *Johnson v. Nutrex Research, Inc. et al.*, 429 F. Supp. 2d 723 (D. Md. 2006)(quoting *Brantley v. Vaughan*, 835 F. Supp. 258, 260 fn 2 (D.S.C. 1993)); *see also Egle Nursing Home, Inc. v. Erie Insurance Group, et al.*, 981 F. Supp. 932, 933 (D. Md. 1997)(remanding case when removal notice failed to state why all defendants did not join in or consent to removal).

²¹ Failure to obtain consent from each of the served co-defendants before filing a Notice of Removal has been fatal to some removal efforts. *See, e.g., Harlow Aircraft Manufacturing, Inc. v. Dayton Machine Tool Co.*, 2005 WL 1153600, *4 (D. Kan 2005)(finding defendant “violated the rule of unanimity by not obtaining consent from [the co-defendant] before filing the notice of removal”); *see also Anglada v. Roman*, 2006 WL 3627758 (S.D.N.Y. 2006)(remanding an action where it was evident the removing defendant “did not have the consent of its duly-served co-defendant at the time of the Notice of Removal” (emphasis added)); *Powell v. West Chemical Products*, 678 F. Supp. 553 (E.D. Pa. 1988)(stating that “even though the defendants eventually joined the petition for removal, where the original moving defendant did not have the consent of its co-defendants at the time of its petition,” remand is required.)

²² *See, supra*, note 16.

²³ *Lamm v. Bekins Van Lines, Co.*, 139 F. Supp. 2d 1300, 1314 (M.D. Ala. 2001)(“To invoke removal jurisdiction on the basis of diversity, a notice of removal must distinctly and affirmatively allege each party’s citizenship.”)(citing *McGovern v. American Airlines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975)(*per curiam*)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Wenger v. Western Reserve Life Assur. Co.*, 570 F. Supp. 8, 10 (M.D. Tenn. 1983)(citing *Realty Holding Co. v. Donaldson*, 268 U.S. 398, 399 (1925), *Neel v. Pennsylvania Co.*, 157 U.S. 153 (1895)).

²⁷ See, e.g., *Johnson, supra*, note 19 (remanding case due to removing parties failure to allege citizenship in case removed on diversity jurisdiction grounds and holding allegation of residence was insufficient to evidence citizenship).

²⁸ *J.C. Whitney & Co. v. Renaissance Software Corp.*, 98 F. Supp. 2d 981 (N.D. Ill. 2000) (“allegations of residence are insufficient to establish diversity jurisdiction”).

²⁹ *Id.*

³⁰ *Nasco, Inc. v. Norsworthy*, 785 F. Supp. 707 (M.D. Tenn. 1992). In *Nasco*, the United States District Court for the Middle District of Tennessee remanded an action to state court where the defendants failed to adequately allege citizenship as opposed to residency. *Id.* In *Nasco*, the defendants made the conclusory allegation that complete diversity of citizenship among the parties existed. *Id.* at 709. However, the defendants’ factual assertions related only to the residency, not citizenship. *Id.* The Court remanded the action and stated that “[a]llegations of residence are wholly insufficient for purposes of removal.” *Id.* (quoting *Wenger v. Western Reserve Life Assurance Co. of Ohio*, 570 F. Supp. 8, 10 (M.D. Tenn. 1983)).

Similarly, the United States Court of Appeals for the Eleventh Circuit agrees that the failure to properly list citizenship in a removal petition is fatal to removal and warrants remand. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020 (11th Cir. 2004)(affirming district court’s order remanding action due to defendant’s failure to properly allege the citizenship of the parties in removal petition); cf. *Ervast v. Flexible Products, Co.*, 346 F.3d 1007 (refusing to exercise jurisdiction on basis of diversity where defendant failed to plead basis in removal petition).

³¹ *Johnson, supra*, note 19.

³² *Estate of Fitzpatrick*, 580 F. Supp. at 734 (remanding action and finding defendant’s allegations were defective because the removal petition failed to state the diversity existed at the time of the filing of the suit and at the time of removal).

³³ *Kellam v. Keith*, 144 US. 568 (1892)(ordering remand and holding it must affirmatively appear from the removal petition, or elsewhere in the record that diversity existed at the commencement of suit, not merely at the time of removal).

³⁴ Due to the vast amount of case law on this topic, a full analysis of the amount or type of evidence necessary for a party to establish the amount in controversy, is beyond the scope of this article. For a more extensive analysis, see Gregory C. Cook and Scott B. Grover, *Recent Developments in Proving the Amount in Controversy*, 22 American Defense Lawyers Journal 2 (October 2006).

³⁵ 28 U.S.C. § 1332 is the most commonly encountered amount-in-controversy requirement. This article does not discuss other amount-in-controversy requirements.

³⁶ 28 U.S.C. § 1332(a). Other statutes with amount-in-controversy requirements include 15 U.S.C. § 2072, 15 U.S.C. § 6104, and 22 U.S.C. § 6082.

³⁷ *Leonard v. Enterprise Rent-A-Car, et al.*, 279 F.3d 967, 972 (11th Cir. 2002).

³⁸ “[I]t is undoubtedly best to include all relevant evidence” supporting removal (or remand) with the respective filings.” *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11th Cir. 2000). However, the Eleventh Circuit has authorized “district court[s] when necessary [to] consider post-removal evidence in assessing removal jurisdiction.” *Id.*; see also *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (“When the complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement. If the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed.”).

³⁹ *Lowery, supra*, note 10.

⁴⁰ See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938).

⁴¹ “When a complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional threshold.” *Ellis Motor Cars, Inc. v. Westport Insurance Corp., et al.*, 2007 WL 1991573, *1 (M.D. Ala. July 5, 2007)(quoting *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001)). If a plaintiff “has not pled a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement.” *Id.* (remanding action and refusing to allow discovery or to “speculate in an attempt to make up for the notice [of removal’s] failings”); see also *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996). In a recent case, the Eleventh Circuit did not change this standard, but it did question how it could meaningfully apply the preponderance of evidence standard if the amount in controversy is not clearly identified on the face of the complaint. *Lowery, supra*, note 10.

⁴² See, e.g., *Friedman v. New York Life Ins. Co.*, 410 F.3d 1350, 1353 (11th Cir. 2005).

⁴³ *Lowery*, *supra*, note 10.

⁴⁴ *Williams*, *supra* (quoting *Sierminski*, *supra*, and *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997), and approving procedure described in *Singer*). In holding that summary judgment type evidence could be considered, the Eleventh Circuit remanded the case to the district court because the only fact supporting the amount in controversy requirement was the refusal by the plaintiff to stipulate that her claim was worth less than \$75,000. *Id.* This evidence was insufficient. *Id.* However, in *Sierminski*, the Eleventh Circuit affirmed the district court's jurisdiction relying on a post-removal declaration submitted by the defendant containing facts supporting a damage calculation in excess of the jurisdictional threshold, together with requests for admission concerning the amount in controversy that the plaintiff failed to answer within the requisite period of time.

⁴⁵ *Lowery*, *supra*, note 10 (quoting Black's Law Dictionary, 1220 (8th ed. 2004)).

⁴⁶ *Id.* at 1215 fn 66.

⁴⁷ *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d at 1357.

⁴⁸ *Burns*, 31 F.3d at 1096.

⁴⁹ *Id.*

⁵⁰ *Lindsay v. Am. Gen. Life & Accident Ins. Co.*, 133 F. Supp. 2d 1271, 1277 (N.D. Ala. 2001).

⁵¹ *Id.*