

REMOVAL TO FEDERAL COURT

Seminar Presentation

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➤ **Attorney Strategy**

- The removal of cases from state to federal courts cannot be found in the Constitution of the United States; it is purely statutory in nature.
- It is vital for civil litigators to know the rules for removing an action from state to federal court, as well as the procedures for challenging a removal and remanding the case back to state court.
- Usually, a number of strategies are adopted by the plaintiff and defendant, even before the state court action is filed, as the parties jockey for the most favorable forum in which to litigate their case.
 - A plaintiff wanting to avoid federal court may assert a damages claim that falls below the federal jurisdictional amount of \$75,000, name a nondiverse defendant as a party to the original state court action, or avoid asserting claims that are completely preempted by federal statutory schemes.
 - A defendant wanting to remove the action to federal court must pay careful attention to the statutory time limits for taking a removal, and must make sure that the removal papers follow the strict letter of the removal statutes.
 - In a fairly short amount of time, after the state court action has been served on the defendants, the removing defendant must verify the citizenship of all parties, obtain the consent to removal from other defendants named in the state court action, establish, if applicable, a basis for alleging an adequate jurisdictional amount, and prepare and file the removal papers. The failure to accomplish any of these tasks may result in the federal court remanding the matter to the state court originally selected by the plaintiff.

➤ **Cases That May Be Removed**

- Any civil action commenced in a state court, in which the district courts of the United States have original jurisdiction, may be removed by the defendant to the district court in which the state court action is pending. 28 U.S.C.A. § 1441(a).
- Some of the jurisdictional bases permitting a defendant to remove an action to federal court include:
 - (1). Diversity of citizenship – when diversity is the basis of jurisdiction, removal is permitted only if none of the parties in interest properly joined and served as defendants is a citizen of the state of Indiana. 28 U.S.C.A. § 1332.
 - (2). Federal question cases. 28 U.S.C.A. § 1331; 28 U.S.C.A. § 1441(b).
 - You may file your lawsuit in federal court if your case is based on a violation of federal law. The law involved may be the United States Constitution or it may be a statute passed by Congress. If your lawsuit is based on a violation of federal law, it generally does not matter how much or how little you claim in damages. Here are a few examples of cases that involve a "federal question"
 - **Example 1: Employment Discrimination:** If you believe that an employer has taken an adverse employment action against you because of unlawful discrimination, then you may be able to bring a lawsuit in federal court. This is a "federal question" case because there are federal laws that prohibit employment discrimination based on race, sex, religion, or national origin [42 U.S.C. § 2000(e)]. Note: generally you must exhaust your administrative remedies with the Equal Employment Opportunity Commission (EEOC), the State Division on Human Rights or the City Commission on Human Rights before filing such a claim in federal court.)
 - **Example 2: Prisoner Civil Rights.** If you are a prisoner and claim that defendant corrections officers have subjected you to excessive force, you may sue in federal court. This

claim involves a federal question because the United States Constitution prohibits "cruel and unusual punishment" [Amend. VIII] and because a federal statute, 42 U.S.C. § 1983, allows the federal court to hear claims against persons acting under color of state law.

- **Example 3: Income Tax Refunds**. If you have paid your federal income tax, but you believe the government required you to pay more taxes than the federal laws require and you have exhausted your remedies by disputing the claim through the IRS, you may file a suit in federal court. The claim involves a federal question because it involves the federal tax laws [26 U.S.C. § 1].
- (3). Cases in which a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action. Under these circumstances, the District Court may determine all issues removed or, in its discretion, remand all matters in which the State law predominates. 28 U.S.C.A. § 1441(c).
- (4). Any civil action brought in a state court against a foreign state as defined by 28 U.S.C.A. § 1603(a). 28 U.S.C.A. § 1441(d).
- (5). Actions involving federal officers, agencies and persons claiming under them, as well as members of the armed forces, sued or prosecuted in state court for things done under federal authority. 28 U.S.C.A. §§ 1442 and 1442(a).
- (6). Certain civil rights cases. 28 U.S.C.A. § 1443.
 - Race discrimination
 - State laws that come into contact with the federal Civil Rights Act
- (7). Foreclosure actions to which the United States is a party. 28 U.S.C.A. § 1444.
- (8). Actions arising under 28 U.S.C.A. 1369 and allowed by 28 U.S.C.A. 1441(e).

- Multiparty, multi-forum jurisdiction
 - (9). Removal of class actions arising under the Class Action Fairness Act of 2005, as allowed by 28 U.S.C.A. 332(c) and 28 U.S.C.A. 1453.
- Under § 1441, only defendants are permitted to remove a civil action from state to federal court. This is because the plaintiff chose the forum when he filed the action in state court. The prohibition, placed on the plaintiff, also applies even though the defendant has filed a counterclaim which otherwise might afford the plaintiff a jurisdictional basis for removal.
- In diversity of citizenship cases, removal is permitted only where none of the defendants is a citizen of the State of Indiana. 28 U.S.C.A. § 1441(b).
 - Moreover, all defendants in the state action must join in the petition for removal, except possibly for nominal, unknown, or fraudulently joined defendants. Because of this unanimity requirement, any defendant may effectively veto removal by refusing to consent, and, thereby, dictate that the action will remain in state court.
- The district court is not precluded from resolving a removed claim merely because the State court did not have jurisdiction over that action. 28 U.S.C.A. § 1441(f). Federal Rules of Civil Procedure Rules 18, 20, and 23 contemplate a liberal joinder of parties, claims and remedies in civil actions. Therefore, there should be no procedural difficulty associated with the removal of the entire action. Conversely, if the court so desires, it may remand to the State court all nonremovable matters.
- All injunctions, orders and other proceedings had in the state court action shall remain in full force and effect after the case is removed until dissolved or modified by the district court. 28 U.S.C.A. § 1450. Additionally, all bonds, undertakings, or security given by either party in such action prior to its removal will remain valid and in effect notwithstanding a removal. 28 U.S.C.A. § 1450.
- Lastly, in all cases, the defendant has the burden of establishing federal jurisdiction over an action filed in state court. The defendant also has the burden of establishing that it has complied with the removal procedures.

➤ **Nonremovable Actions**

- 28 U.S.C.A. § 1445 identifies three (3) categories of actions which may not be removed even if diversity of citizenship exists:
 - (1). A civil action against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45. 28 U.S.C.A. § 1445(a).
 - (2). A civil action against a common carrier, or its receivers or trustees, to recover damages for delay, loss, or injury of shipments, arising under Title 49, Section 11707, may not be removed unless the matter in controversy exceeds \$10,000 exclusive of interest and costs. 28 U.S.C.A. § 1445(b).
 - (3). A civil action arising under a State’s worker’s compensation laws. 28 U.S.C.A. § 1445(c).

➤ **PROCEDURE – Notice of Removal**

- The first procedural step in removing an action to federal court is to file a notice of removal in the district court in which the state court action is pending. 28 U.S.C.A. § 1446(a). The notice must contain a “short and plain statement of the grounds for removal,” and attach a copy of all process, pleadings and orders served upon the defendant in the state court action. 28 U.S.C.A. § 1446(a). The notice must be signed in accordance with Federal Rule of Civil Procedure 11. 28 U.S.C.A. § 1446(a).
- Section 1446(b) provides that the defendant must file the notice of removal “within thirty (30) days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C.A. § 1446(b).

➤ **Amending Notice of Removal**

- A defendant may amend the notice of removal to correct certain deficiencies within the 30 day period allowed for removing the action under Section 1466(b). After the end of that period, there is no automatic right to amend a defective notice of removal. However, 28 U.S.C.A. 1653 allows a party to amend incomplete or defective jurisdictional allegations in instances in which the non-removing party is not prejudiced by the amendment.

- Generally, the notice may be amended after the 30 day removal period only to set out more specifically the grounds for removal that were stated imperfectly in the original notice, and not to assert new or missing jurisdictional allegations.
 - Examples of jurisdictional defects include:
 - 1. Failure to allege a corporate defendant's state of incorporation or principal place of business.
 - 2. Failure to allege the name and citizenship of each partner of a partnership.
 - 3. Failure to allege that all defendants have joined in and consented to the removal.
- Factors that the district court may consider in exercising the discretion to allow an amendment to the notice of removal include:
 - 1. Length of delay between the original filing and the request for amendment.
 - 2. The reason that the removing party failed to plead the jurisdictional facts correctly in the first place.
 - 3. The nature of the pleading defect.
 - 4. The prejudice to the non-removing party if the amendment is allowed.
- Note: where an action is removed prematurely, the district court will lack subject matter jurisdiction and will be required, as a general rule, to remand the action to state court.

➤ **Notice of Removal – Time for Filing**

- Notice of removal must be filed within thirty (30) days after the defendant receives, through service or otherwise, a copy of the initial state court pleading, or within 30 days after the service of the summons upon the defendant, if the initial pleading has been filed, but is not required to be served on the defendant, whichever period of time is shorter. 28 U.S.C.A. § 1446(b).
- Grounds for removal will typically be apparent from the face of the plaintiff's complaint. Where it is not, a notice of removal may be filed within 30 days after the defendant first ascertains facts that the case is proper for removal. However,

no action based on diversity of citizenship may be removed more than one (1) year after the commencement of the State court action. 28 U.S.C.A. § 1446(b).

- Unless the action is remanded to the state court, the case will proceed in federal court without a formal determination of the right to removal. A motion to remand must be made within thirty (30) days after the notice of removal is filed.

➤ **Notice of Removal – Contents**

- A notice of removal should state the following:
 - 1. A statement of the jurisdictional basis for removal.
 - 2. A description of the state action and a statement of facts which entitle the defendant to remove that action to federal court.
 - 3. An allegation showing the date that the complaint and process were served upon the defendant. This allegation will establish that the notice has been timely filed.
 - 4. A reference to all process, pleadings and orders which have been served upon the defendant in the state action and filed with the notice.
 - 5. An allegation that the plaintiff has been served with a notice that the notice of removal has been filed.
 - 6. An allegation that a copy of the notice of removal has been filed with the clerk of the state court.
 - 7. In the case of multiple defendants, an allegation that all defendants have joined in or consented to the removal.

➤ **Notice – Diversity of Citizenship**

- Removal based on diversity of citizenship requires complete diversity between the plaintiff and all defendants. However, the citizenship of defendant sued under fictitious names must be disregarded for purposes of determining removal jurisdiction. 28 U.S.C.A. § 1441(a).
- Notice of diversity actions should state that the action involves a matter in controversy which exceeds the sum of \$75,000 – it is easy to establish and allege in the removal papers that jurisdictional amount exists in accordance with 28 U.S.C.A. Section 1332. However, this determination may be difficult when the plaintiff does not state an amount of damages, such as in Indiana personal injury

actions¹, or where there are multiple plaintiffs and it is not clear from the complaint whether each plaintiff independently satisfies the jurisdictional amount requirement.² In these cases, there are a number of options available to the defendant, keeping in mind that the defendant in the Seventh circuit has the burden of establishing jurisdictional amount to a “reasonable probability.”

- Proving Jurisdictional Amount

- (1). The defendant can attach or reference in the removal papers any medical records, discovery responses, expert reports, settlement demands, or case evaluations, about the plaintiff’s damages, which establish that damages exceed \$75,000.
- (2). The defendant may remove an action alleging that plaintiff’s damages exceed \$75,000, without attaching any supporting information. Under this approach, the defendant should have a good faith basis for alleging jurisdictional amount. If the plaintiff takes issue with the allegation about damages, the plaintiff may request an order remanding the action to state court, stipulate that the plaintiff’s damages do not exceed \$75,000, and thereby, establish that the district court lacks subject matter jurisdiction. *Oder v. Buckeye State Mut. Ins.*, 817 F. Supp. 1413 (S.D. Ind. 1992).

- **Additional Procedural Steps to Effectuate Removal**

- Upon filing the notice of removal, a defendant must give notice to the adverse parties that the state court action has been removed to the district court, and file a copy of that notice with the clerk of the state court. 28 U.S.C.A. § 1446(d). The filing of the clerk with the state court effects the removal to federal court. After the notice is filed, the state court cannot take any further action unless and until the case is remanded to it by the district court. 28 U.S.C.A. § 1446(d).

¹ Indiana Trial Rule 8(A)(2) provides in part: “[I]n any complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount or figure shall be included in the demand.”

² Generally, separate and distinct claims of two or more plaintiffs cannot be aggregated to satisfy jurisdictional amount under 28 U.S.C.A. § 1332. However, in some instances, a claim that does not satisfy the amount standing alone, will not defeat the District Court’s subject matter jurisdiction if the requirements of 28 U.S.C.A. § 1367 (the supplemental jurisdiction statute) are satisfied.

➤ **Venue on Removal**

- Removal is always taken to “the district and division embracing the place where the action is pending” in the state court. 28 U.S.C.A. § 1441(a).

➤ **Procedure for Filing Answer After Removal**

- In removed actions in which the defendant has not filed an answer, the defendant must answer or respond within twenty (20) days after receiving a copy, through service or otherwise, of the plaintiff’s complaint; within 20 days after the service of a summons, when filed; or within 5 days after the filing of the notice of removal, whichever period is longer. F.R.C.P. Rule 81(c).

➤ **Jury Demand After Removal**

- If at the time of removal all necessary pleadings have been served, the removing party may request a trial by jury, pursuant to Federal Rule Civil Procedure Rule 38, if the demand is served within ten (10) days after notice of removal is filed, or within 10 days after service, if the requesting party is not the removing party.
- A party, who, prior to removal, has made an express demand for a trial by jury in accordance with Indiana Trial Rule 38(B), need not make another demand for trial by jury after the case has been removed. Fed.R.Civ.P. Rule 81(c).

➤ **Procedure After Removal**

- Removal is effective under 28 U.S.C.A. 1446(d) when the defendant has (1) filed notice of removal in federal court; (2) given written notice to all adverse parties, and (3) filed a copy of the notice with the clerk of the state court.
 - Once these conditions have been satisfied, the federal court has exclusive jurisdiction over the action, the state court is divested of jurisdiction, and the state court may take no further action in the state matter until it is remanded.
- When the defendant removes without answering the state court complaint, the defendant must answer or present its defenses and objections within 20 days of receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon the initial pleading, or within 5 days after

the filing of the notice of removal, whichever period is longest. Fed.R.Civ.P. Rule 81(c).

➤ **Remanding Action to State Court**

- A motion for remand is the proper method to challenge an improper removal. A motion to remand the case on the basis of any defect in the removal procedure must be made within thirty (30) days after the filing of the notice of removal under 28 U.S.C.A. § 1446(a)³.
- If at any time before final judgment, it appears that the federal court lacks subject matter jurisdiction, the court shall remand the action to the state court. 28 U.S.C.A. § 1447(c).
- 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.A. § 1447(c).
- A certified copy of the order of remand shall be mailed by the federal court clerk to the clerk of the state court. The state court may proceed with the action upon receiving that order. 28 U.S.C.A. § 1447(c). An order remanding the action to the state court, except in civil rights cases, is not generally reviewable by appeal or otherwise. 28 U.S.C.A. § 1447(c). An order denying remand is reviewable on appeal following a final judgment. 28 U.S.C.A. § 1447(d).
- Plaintiff is required to file a motion for remand based on defects in the removal procedure within thirty (30) days after the notice of removal has been filed in federal court. Where the plaintiff fails to object to a procedural defect within the 30 day limit, the plaintiff will generally be held to have waived the objection.

➤ **Correcting Defects in Removal Papers**

- The district court is vested with subject matter jurisdiction in a removal action only if the removing party satisfies the technical requirements stated in 28

³ 28 U.S.C.A. § 1447(c). That statute provides: “[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal. 7th Circuit case law interpreting that statute provides that a challenge to defects in the removal papers is waived unless asserted in a timely manner. *Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991). Cases interpreting that statute distinguish between an improper removal and a District Court’s lack of subject matter jurisdiction. The former is waivable, whereas the latter is not.

U.S.C.A. §§ 1446 and 1447. A defendant must remove the action within the 30 day period and during this period; a party may generally amend a notice of removal to correct omitted or improperly pleaded jurisdictional statements.

- After the 30 day period has lapsed, a party's right to amend removal papers to correct a jurisdictional defect is much more limited. However, if the court grants leave to amend, an amendment filed after the 30 days will relate back to the original filing for purposes of 28 U.S.C.A. § 1446(b).
- In the 7th Circuit, two theories support a removing party's request to amend removal papers after the 30 day removal period has expired:
 - (1). First, 28 U.S.C.A § 1653 provides that “defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.” Under this statute, the district Court may allow the removing party to amend the notice of removal to properly plead jurisdictional facts which were either omitted or incorrectly stated in the original notice.
 - The 7th Circuit Court of Appeals has affirmed the application of 28 U.S.C.A. § 1653 to allow a party to amend incomplete or defective jurisdictional allegations in instances in which the non-removing party is not prejudiced by the amendment. For example, in *Northern Illinois Gas Company v. Airco Indus. Gases*, the Court of Appeals affirmed the District Court's denial of a motion to remand after it had allowed the defendant an opportunity to cure a defect in the notice of removal. *Northern Illinois Gas Company v. Airco Indus. Gases*, 676 F.2d 270 (7th Cir. 1982).
 - (2). Second, the federal courts have recognized that Federal Rule of Civil Procedure Rule 15(a), which is made applicable to removal actions by Fed.R.Civ.P. Rule 81(c), allows pleadings to be amended and that “amendments to removal petitions should be subject to the same liberal rules employed in testing the sufficiency of other pleadings.”
- After the 30 day period has lapsed, there is no automatic right to amend a defective notice of removal, and, indeed, some Circuits disfavor amendments that are designed to belatedly vest the district court with jurisdiction over a state court

action. Nonetheless, both 28 U.S.C.A. § 1653 and Federal Rule of Civil Procedure Rule 15(a) afford the removing party, at least in the Seventh Circuit, two recognized bases for making such an amendment.

➤ **Defeating Jurisdiction**

- Join multiple defendants that are not diverse from one another.
 - Must be careful to avoid a fraudulent joinder accusation.
- Plaintiff can assert a damages claim that falls below the federal jurisdictional amount of \$75,000 or avoid asserting claims that are completely preempted by a federal statutory scheme.
- Plaintiff can also seek to remand after a claim has been removed based on a number of aforementioned rationales.
- Plaintiff can assert that Defendant has failed to follow the proper procedures for a successful removal. For example, the notice was not timely and no amendment ever took place.
- Corporations can (or have attempted) to realign in order to defeat diversity jurisdiction in stockholders' derivative action.
- Plaintiff can challenge that the amount in controversy is less than \$75,000; thereby forcing the Defendant to produce evidence that they have indeed crossed the \$75,000 threshold.

➤ **Conclusion**

- Many attorneys operate under the impression that federal courts tend to interpret state substantive laws narrowly and that removal to federal court can benefit a defendant sued in state court on a state law claim. At least this is the conventional wisdom – albeit right or wrong. Thus, many litigators are quick to consider removal as an initial step when representing defendants in state court. However, this decision should be taken with caution and never without an exact understanding of how removal is actually achieved. As you can see from above, there are many procedural and substantive steps that must be adhered to when one seeks to remove a case to federal court.
- The general removal statute, allowing the right to remove actions from state to federal court, falls under Section 1441 of Title 28 of the U.S. Code. This statute

permits removal only when the federal court would have had original jurisdiction of the action had the plaintiff brought it in federal rather than state court. Thus, cases raising federal questions and cases involving diversity of citizenship may be removed to federal court. If the initial complaint does not meet this litmus test, the case may still be removed if an amended pleading or other filing subsequently provides grounds for removal.