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What To Do When Your Case Is 'Removed' to Federal Court

By Craig S. Hilliard

Many New Jersey litigators practice primarily in the Superior Court and rarely choose to be in a federal district court. Sometimes, however, the choice is not theirs to make, and even seasoned state court litigators can get surprised when the case they filed gets removed to a federal district court. When the removal petition is filed, it should trigger a series of important inquiries which must be addressed quickly and correctly.

• *Does the federal district court have jurisdiction?*

The jurisdiction of a federal district court is far more circumscribed than the power of a state court, and removal jurisdiction is even narrower. Most lawyers are familiar with the two basic pillars of federal subject matter jurisdiction over civil disputes: federal question jurisdiction and diversity jurisdiction. But those same lawyers are often unaware of a few subtleties of removal jurisdiction.

The removal jurisdiction of the district courts is generally governed by 28 U.S.C. 1441-1455. Unlike the original jurisdiction of the district courts over claims between citizens of different

states, the removal jurisdiction of the district courts does *not* exist merely because the action is between citizens of different states. Plain old diversity is not enough. Rather, a defendant can remove an action to the district court on diversity grounds only if none of the parties joined as defendants "is a citizen of the State in which such action can be brought." 28 U.S.C. 1441(b)(2). In other words, in an action filed in N.J. Superior Court, a defendant cannot remove the case unless *all* of the defendants are citizens of a state other than N.J. This statutory departure from the ordinary rules of diversity contained in 28 U.S.C. 1332 is known as the "Forum Defendant Rule." Congress determined that only non-residents defending nonfederal claims should have the right to get out of a state court and into the district court. Moreover, Congress has determined that certain cases — such as cases arising under the workers' compensation laws — may not be removed even if complete diversity exists. *See* 28 U.S.C. 1445.

Like the Forum Defendant Rule, another rule restricts removal in diversity cases, where diversity jurisdiction would otherwise exist under 28 U.S.C. 1332. Known as the "All Defendants Rule," the removal statute expressly provides that *all* defendants who have been served must "join in" or "consent to" the notice of removal filed by the

removing party. There are a few exceptions to this rule, most notably in the context of class actions. Under the Class Action Fairness Act of 2005, codified at 28 U.S.C. 1453(b), a single defendant can remove the action without the consent of the other defendants.

Another subtlety of federal diversity jurisdiction often missed is that the citizenship of certain entities, such as limited liability corporations and partnerships, is not controlled by the familiar rules governing corporations. For a traditional corporation, citizenship is measured by both the state in which the company is incorporated and the state in which the entity maintains its "principal place of business." However, for nontraditional but popular entities such as LLCs, citizenship is measured by the status of each and every member of the LLC (or, in the case of a limited partnership, all of the general and limited partners). This can often make it much more difficult for LLCs and similar entities to remove cases on diversity grounds. If the citizenship of all of the members or partners is not expressly pleaded in the removal petition, the plaintiff will have grounds on which to move for a remand back to the Superior Court.

The first step following removal, therefore, is making a prompt assessment of whether the jurisdiction of the district court can be challenged. If so, the plaintiff's counsel must file a motion to remand the action to Superior Court, and that motion must ordinarily be filed within 30 days of the filing of the removal petition.

• *What about motions or other ap-*

Hilliard is a shareholder in the commercial litigation group at Stark & Stark in Lawrenceville.

plications which were pending in the Superior Court at the time of removal?

Unlike transfers of an action from one federal district court to another, the removal of a case does not necessarily accomplish a smooth transition of pending matters to the attention of the district court. Any motions — including applications for emergent relief — will not get placed automatically on the district court's calendar, even if they were scheduled for imminent disposition in the Superior Court before removal. The plaintiff's attorney must electronically file those motions or Order to Show Cause applications in the district court, in accordance with the requirements of both the Federal Rules of Civil Procedure (FRCP) and the Local Civil Rules. Because the rules for filing motions in the district court are markedly different from the New Jersey Rules, care should be exercised to review Local Civil Rules 7.1 (governing motions), 7.2 (governing affidavits and briefs) and 10.1 (governing the form of pleadings) before resubmitting the Superior Court pleading or motion for consideration by the district court.

Moreover, the state court practitioner should be aware that even if she is admitted to practice in the district court, that does not necessarily mean that she is authorized to electronically file pleadings and motions. In the U.S. District Court in New Jersey, all pleadings, motions and other papers (even case initiating documents such as complaints and removal petitions) must be filed electronically (with few exceptions), and attorneys must demonstrate familiarity with the court's requirements before they will be allowed to make electronic filings. The simplest way to do so is to visit the district court's website, www.njd.uscourts.gov, and complete the registration process for the issuance of a CM/ECF password.

• *What if a defendant has not been served at the time of removal?*

If a defendant has not been served with process at the time the removal petition is filed, a summons issued by the Superior Court is no longer effective to bring the defendants within the jurisdiction of the district court. The plaintiff's counsel must apply to the clerk of the dis-

trict court for the issuance of an appropriate summons under FRCP 4. Unlike in the Superior Court, where lawyers can sign and issue a summons, a summons in the district court can only be issued by the clerk. Moreover, FRCP 4(m) contains a 120-day limit on the service of process in the district court. After that period expires, unless the plaintiff can show good cause for an extension, the district court "must" dismiss the action. Although the dismissal is without prejudice, the result can be disastrous if the action was originally filed on the eve of a statute of limitations deadline.

• *When must the defendant respond to the complaint?*

In most cases, a removal petition is filed before the defendant files either an answer to the complaint or a motion to dismiss. If the defendant has already filed an answer in the Superior Court, it need not refile that pleading in the district court. So when must the defendant respond if it has not already answered? That question is governed by FRCP 81, which provides that a defendant must answer or otherwise respond within the longer of: 1) seven days after the notice of removal was filed; 2) 21 days after service of the summons; or 3) 21 days after receiving a copy of the initial pleading which states the actual claim for relief. The latter period addresses the rules in those jurisdictions which (unlike N.J.) permit a summons to be served without a complaint (N.Y. is an example). In N.J., the defendant will generally be required to answer or file a motion either within seven days after the removal petition is filed, or within 21 days after the summons was served, whichever period is longer. In most cases, the defendant typically waits until near the expiration of the 30-day period before filing the removal petition, so Rule 81 will then give that defendant only seven additional days (without an extension) to file its answer or motion.

• *When must the demand for a jury be made?*

In some state courts (N.Y. is one example), a demand for a jury need not be made in the initial pleadings, and may not need to be made until the case is nearing readiness for trial. In a removed case, however, FRCP 38 and 81 will govern

the demand for a jury trial. If the demand for a jury was made before removal, it need not be made again. If the state law "did not require an express demand for a jury trial," Rule 81 provides that the party need not make one after removal unless the district court orders it. What if all the pleadings were filed already in Superior Court, before the removal petition was filed, and what if the applicable time period under state law for a jury demand had expired? Does a party get a second bite at that apple? The answer is yes. Rule 81 allows any party to demand a jury trial within 14 days after the removal petition is filed, even if it had already waived that right in the Superior Court by failing to file a timely demand.

• *Do the Superior Court's orders issued before removal continue in effect after removal?*

This is one of the most significant issues on which a lawyer must focus following removal, because an order issued by the state court before removal does *not* automatically continue in effect following removal. The governing federal statute, 28 U.S.C. 1450, provides that "[a]ll injunctions, orders, and other proceedings had in such [state court] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." Although this seems like a fairly broad transitional rule, it can be deceiving. For example, temporary restraining orders issued by the New Jersey Superior Court can remain in effect for an indefinite period of time under R. 4:52-1. However, in the district court, FRCP 65 expressly limits the life of a TRO to 14 days, unless it is renewed on consent or an express showing of "good cause." The U.S. Supreme Court, in *Granny Goose Foods v. Brotherhood of Teamsters*, 415 U.S. 423 (1974), held that notwithstanding the language of the removal statute, a state court's order does not remain in effect if it would conflict with another federal statute or federal procedural rule.

• *Can the plaintiff recover fees and costs if a defendant filed an improper removal petition?*

Plaintiffs' counsel who file successful motions to remand cases back to the Superior Court sometimes miss the opportunity to recover their fees and costs

in pursuing remand. Those fees and costs are expressly allowed by 28 U.S.C. 1447(c), which provides that 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.” Although the district court has discretion on the matter, the standard for award of fees and costs was set by the U.S. Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). There, the Supreme Court

held that an award of costs and fees is appropriate only where the removing party “lacked an objectively reasonable basis for seeking removal.” Because a fair number of remand orders will be based on the absence of an objectively reasonable basis to pursue removal, plaintiffs’ counsel would be wise to include a request for costs and fees under the statute in their remand applications. The need for a prompt and accurate assessment of options following the filing of a removal

petition should be apparent. There is no real shortcut around a review of the removal statutes, to determine initially if the district court has jurisdiction. Even if that determination does not lead to a remand to Superior Court, it is equally important for even veteran state court litigators to examine and understand the significant, and sometimes subtle, differences between state and federal practice, to effectively represent a client in the district court. ■