Removing Your Case to Federal Court and Keeping it There

By Matthew J. Lavisky, Latasha Scott, and Jamie Combee Novaes

This article provides a go-to reference for young practitioners and helpful pointers for senior lawyers to remove your case to federal court and keep it there.

Defendants often prefer that their cases be heard in federal court. Rice, Jill Cranston, The Federal Rules are Right for our State Courts, 59 No. 5 DRI For Def. 13 (May 2017). We assume your client shares this preference. This article provides a go-to reference for young practitioners and helpful pointers for senior lawyers to remove your case to federal court and keep it there.

The Basics – Requirements of Diversity Jurisdiction

We start with the fundamental premise that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal courts only hear cases as authorized by the United States Constitution or Congress. *Audi Performance & Racing, LLC v. Kasberger*, 273 F. Supp. 2d 1220, 1225 (M.D. Ala. 2003). Article III, section 2 of the United States Constitution provides for federal jurisdiction over controversies between citizens of different states. *Hertz Corp. v. Friend*, 559 U.S. 77, 84 (2010). This is known as diversity jurisdiction. However, the Constitution does not automatically confer diversity jurisdiction upon federal courts, but, instead, authorizes Congress to do so. *Id.*

28 U.S.C. § 1332 is the statute conferring diversity jurisdiction on federal courts. The statute provides a federal forum where the opposing parties are citizens of different states. *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 858 (11th Cir. 2000). This article focuses solely on diversity jurisdiction.

28 U.S.C. § 1332 contains both jurisdictional and procedural requirements. There are only two jurisdictional requirements: "complete diversity of citizenship of the adverse parties" and "an amount in controversy exceeding $75,000." *Turntine v. Peterson*, 959 F.3d 873, 880 (8th Cir. 2020). So long as those requirements are met, diversity jurisdiction exists. All other requirements are procedural.

The Notice of Removal

A defendant removes a case to federal court by filing in the federal court a notice of removal. *Circle Indus. USA, Inc. v. Parke Const. Group, Inc.*, 183 F.3d 105, 109 (2d Cir. 1999). The best practice is for the notice of removal to include factual detail supporting that the requirements of jurisdiction exist. That said, a defendant should include, in every notice of removal, a statement to the effect that "there is complete diversity of citizenship" and "[t]he amount in controversy exceeds $75,000, exclusive of interest and costs." This tracks the language of 28 U.S.C. § 1332.

These allegations alone are not sufficient to sustain federal jurisdiction. Still, these allegations are sufficient to initially confer jurisdiction and permit curing of defective allegations in a notice of removal by amendment to the notice. *Firemen's Ins. Co. of Newark, N.J. v. Robbins Coal Co.*, 288 F.2d 349, 350 (5th Cir. 1961); *Corp. Mgmt. Advisors, Inc. v. Artjen Complexus, Inc.*, 561 F.3d 1294, 1297 (11th Cir. 2009). Thus, pleading, in conclusory form, the allegations of diversity jurisdiction should allow a defendant to amend a notice of removal,

Matthew J. Lavisky is a partner in the Tampa office of Butler Weihmuller Katz Craig LLP. Mr. Lavisky is a member of DRI, chairs the Bad Faith Substantive Law Group, and received the 2018 G. Duffield Smith Outstanding Publication Award. He also is the Secretary-Treasurer of the Florida Defense Lawyers Association.**Latasha Scott** is of counsel in the Tampa office of Butler Weihmuller Katz Craig LLP. Ms. Scott served as a Judicial Law Clerk for the Eleventh Circuit Court of Appeals and the U.S. District Court for the Middle District of Florida. **Jamie Combee Novaes** is a senior associate in the Tampa office of Butler Weihmuller Katz Craig LLP. She is a member of DRI and the Florida Defense Lawyers Association where she serves as the Chair of the Women in Law Committee.

and prevent a court from remanding *sua sponte*, in the event a court finds that facts supporting jurisdiction were imperfectly pled.

Establishing and Alleging Citizenship of the Parties

To establish diversity jurisdiction, the face of the notice of removal must specifically allege facts demonstrating the citizenship of each party. *Matrix Z, LLC v. Landplan Design, Inc.*, 493 F.Supp.2d 1242, 1245 (S.D. Fla. 2007). An allegation of a party's residency is insufficient because residency and citizenship are not synonymous. *Pennsylvania House, Inc. v. Barrett*, 760 F. Supp. 439, 449 (M.D. Pa. 1991). Rather, for diversity purposes, citizenship means domicile. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974). Citizenship, or domicile, is determined by two elements: (i) physical presence within a state; and (ii) the mental intent to remain there or to make a home there indefinitely. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

With respect to citizenship of a corporation, Section 1332, is controlling. 28 U.S.C. § 1332(c). That statute states in part:

> (1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--
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> (A) every State and foreign state of which the insured is a citizen;
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> (B) every State and foreign state by which the insurer has been incorporated; and
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> (C) the State or foreign state where the insurer has its principal place of business; and

28 U.S.C. § 1332(c)

In applying this statute for purposes of diversity of citizenship, a limited liability company is "a citizen of any state of which a member of the company is a citizen." *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004). Failure to include this information deprives the district court and the appellate court of its ability to preside over the case. *See id.*

With respect to citizenship of an estate, the notice of removal must include facts showing the state where the decedent was domiciled at the time of death. *See King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1170–1171 (11th Cir. 2007) ("Where an estate is a party, the citizenship that counts for diversity purposes is that of the decedent, and she is deemed to be a citizen of the state in which she was domiciled at the time of her death."); 28 U.S.C. § 1332(c)(2).

Establishing and Alleging the Amount in Controversy

A defendant also must allege and establish that the amount in controversy exceeds the sum or value of $75,000 exclusive of interest and costs. The first place to look to establish the amount in controversy is the complaint. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). If the complaint seeks declaratory relief, the amount in controversy is measured by the value of the object of the litigation, the value of the intended benefit or right, or the value of the underlying injury. *Hunt v. Washington State Apple Advert. Com'n,* 432 U.S. 333, 347 (1977). If the complaint alleges a specific monetary amount greater than $75,000, it is presumed that the jurisdictional requirement is met. *Red Cab Co., 303 U.S. at 288; Choice Hotels Intern., Inc. v. Shiv Hospitality, L.L.C.*, 491 F.3d 171, 176 (4th Cir. 2007).

But plaintiffs do not typically allege a specific amount in the complaint. When this happens, the removing defendant must prove by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional threshold. *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1062 (11th Cir. 2010). This is established if it is apparent from the face of the complaint that the claim likely exceeds $75,000, and in addition, or in the alternative, that there are additional facts and evidence that demonstrate an amount in controversy greater than $75,000. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). This is "less a prediction of how much the plaintiffs are ultimately likely to recover, than it is an estimate of how much will be put at issue during the litigation; in other words, the amount is not discounted by the chance that the plaintiffs will lose on the merits." *S. Florida Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014).

Courts first look to see whether it is facially apparent from the complaint that the amount in controversy is probably more than $75,000. "[C]ourts may use their judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements." *Roe v. Michelin N. Am., Inc.*, 613 F.3d at 1062. It is facially apparent from the complaint that the amount in controversy has been met when the plaintiff alleges that the plaintiff seeks policy limits (or in excess of policy limits), and the policy limits exceed $75,000. *Williams v. LM Gen. Ins. Co.*, 387 F. Supp. 3d 1366, 1369 (M.D. Fla. 2019). Some courts have also found it facially apparent from the complaint that the amount of controversy has been met when the plaintiff alleges serious, permanent injuries or significant medical expenses. *See McCoy by Webb v. Gen. Motors Corp.*, 226 F. Supp. 2d 939, 941–42 (N.D. Ill. 2002); In re Silica Products Liability Litigation, 398 F. Supp. 2d 563, 646 (S.D. Tex. 2005); *Poltar v. LM Gen. Ins. Co.*, 473 F. Supp. 3d 1341, 1346 (M.D. Fla. 2020); *but see Dykes v. Lyft, Inc.*, No. 3:21-cv-00241, 2021 WL 4190641, at *4 (M.D. La. July 30, 2021) (finding that the amount in

controversy was not facially apparent from the complaint because it did not provide sufficient facts for determining the severity of the plaintiff's injuries). Additionally, when the complaint alleges that the plaintiff is entitled to recover attorney fees based upon a statute or contract, the prospective attorney fees are included in the amount in controversy analysis. *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 922 (9th Cir. 2019).

Next, when the facially apparent test is not met, the removing defendant should submit facts and evidence with the notice of removal to support that the jurisdictional threshold has been met. Courts will look to the documentation provided with the notice of removal. *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008). Some of the documents courts routinely rely upon for the amount in controversy analysis are:

- Interrogatories or admissions obtained in state court prior to removal or affidavits demonstrating that the amount plaintiff seeks or the amount in controversy is greater than $75,000. *Id*. at 954;
- Medical records or medical bills related to the plaintiff's treatment. *Dewitte v. Foremost Ins. Co.*, 171 F. Supp. 3d 1288, 1290 (M.D. Fla. 2016);
- An insured's sworn proof of loss showing that the plaintiff is claiming losses in excess of $75,000. *D'Andrea v. Encompass Ins. Co. of Am.*, No. 15-CV-467-FPG, 2016 WL 11626468, at *2 (W.D.N.Y. Mar. 28, 2016);
- A delineated estimate from the plaintiff's public adjuster or contractor for more than $75,000. *Stern v. First Liberty Ins. Corp.*, 424 F. Supp. 3d 1264, 1272 (S.D. Fla. 2020);
- Letter from plaintiff demanding over $75,000, especially when the demand is based upon specific facts. *Carrozza v. CVS Pharmacy, Inc.*, 992 F.3d 44, 52 (1st Cir. 2021).

A few tactics plaintiffs use to try to rebut the amount in controversy have been rejected by the courts. For example, the defendant's assessment of the damages or the defendant's settlement offer is irrelevant to the amount in controversy analysis. *Williams*, 387 F. Supp. 3d at 1371. Additionally, plaintiffs' valuation of damages or their attempt to stipulate to damages less than $75,000 is not relevant if it is after the time of removal. *See, e.g., Riggleman v. Valley Health Urgent Care*, No. 3:19-CV-95, 2019 WL 10056968, at *4 (N.D.W. Va. Sept. 5, 2019); *Stevenson v. Schneider Elec. U.S.A., Inc.*, No. 13-CV-01609-PAB-KMT, 2014 WL 789081, at *5 (D. Colo. Feb. 27, 2014). This is different than post-removal evidence submitted by a defendant that is used to support that the amount in controversy exceeded the jurisdictional minimum at the time of removal. A court can consider evidence provided after the notice of removal, such as exhibits to a response to a motion to remand, in determining the amount in controversy. *Gen. Dentistry For Kids, LLC v. Kool Smiles, P.C.*, 379 Fed. Appx. 634, 636 (9th Cir. 2010).

Procedural Requirements to Diversity Jurisdiction

We set out above the jurisdictional requirements to diversity jurisdiction. Everything else is procedural. "The distinction between jurisdictional and procedural defects is significant because motions challenging removal on the basis of the absence of subject matter jurisdiction may be made at any time but 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[.]'" *Stern*, 424 F. Supp. 3d at 1270 (citing 28 U.S.C. § 1447(c)). In other words, a plaintiff waives a procedural defect in removal if the plaintiff does not challenge the procedural defect within 30 days of removal. *Id*. Also, a federal court cannot *sua sponte* remand a case to state court based on a procedural defect, but, instead, may remand based on a procedural defect only upon a timely filed motion. *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317, 1320-21 (11th Cir. 2001).

Procedural Requirements to Removal based on Timing

There are three temporal limitations on removal. First, a defendant must remove a case to federal court within 30 days of receipt of the complaint. 28 U.S.C. § 1446(b). This 30-day period begins to run when a defendant is formally served with a complaint, but not when it receives a "courtesy copy" by mail or email. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999). Second, where the case stated by the initial pleading is not removable, a defendant may remove within 30 days after receipt by the defendant 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. § 1446(b)(3). Third, a defendant may not remove a case more than one year after commencement of the action, unless the plaintiff acted in bad faith to prevent removal. 28 U.S.C. § 1446(c). As explained above, these requirements are procedural, not jurisdictional. *Stern*, 424 F. Supp. 3d at 1270.

Removal within 30 Days of Receipt of Complaint

28 U.S.C. § 1446(b) requires a defendant to remove a case within 30 days of receipt of the initial pleading. However, this limitation applies only when jurisdiction is apparent from the pleading itself. *Wopshall v. Travelers Home & Marine Ins. Co.*, 369 F. Supp. 3d 1283, 1288 (S.D. Fla. 2019); *Entrekin v. Fisher Sci. Inc.*, 146 F. Supp. 2d 594, 607 (D.N.J. 2001). This is based on the "bright-line" test employed by the majority of federal courts. Here is a summary of this "bright-line" test.

> When applying the first triggering event of (b)(1), a court should look only at what the plaintiff pleads in the initial pleading. A court should consider no other document or correspondence between the parties. Consequently if removability is not clear on the face of the initial pleading, then the defendant is not subject to the 30-day clock of (b)(1). This holds true even if the defendant otherwise knows or should have known subjectively what the amount in controversy is (such as from pre-suit settlement negotiations).

Wopshall, 369 F.Supp.3d at 1289. Courts will not "inquire into the subjective knowledge of the defendant, an inquiry that could degenerate into a mini-trial regarding who knew what and when." *Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997).

Take a hypothetical. A plaintiff demands $100,000 pre-suit. The plaintiff then sues.

The complaint demands an unspecified amount in excess of a state court jurisdictional minimum—say $30,000. The complaint contains no other information about the damages. Under these facts, at least under the majority view, a defendant is not *required* to remove within 30 days of service of the complaint.

This does not mean a defendant cannot or should not remove. The safest approach is to remove within 30 days of service of the complaint based on the pre-suit demand. This is the important point in this section. Stated succinctly, "[a]lthough the defendant may utilize information from such a demand letter to support removal, it does not trigger the running of the thirty-day period under Section 1446(b)." *Jade E. Towers Developers v. Nationwide Mut. Ins. Co.*, 936 F. Supp. 890, 892 (N.D. Fla. 1996). In other words, "[a] defendant may rely on pre-suit demand letters to demonstrate the amount-in-controversy even though those letters do not trigger the removal period." *Stephenson v. Amica Mut. Ins. Co.*, No. 6:14-CV-978-ORL-37, 2014 WL 4162781, at *3 n.3 (M.D. Fla. Aug. 21, 2014); *see also Molina v. Wal-Mart Stores Texas, L.P.,* 535 F. Supp. 2d 805, 808 (W.D. Tex. 2008) (relying on pre-suit demand to establish amount in controversy).

This is the practice pointer. A defendant who desires to litigate in federal court should remove within 30 days of receipt of the complaint if pre-suit correspondence establishes that the amount in controversy is met. This will avoid argument that the "bright-line" test should not be applied because a defendant buried its head in the sand. *See Wopshall*, 369 F. Supp. 3d at 1289 n.1. However, if a defendant misses that 30-day window to remove, the defendant still will be able to remove if it receives, post-suit, a paper from plaintiff (such as another demand or discovery responses) establishing that the requirements to jurisdiction are met.

Removal within 30 Days of Receipt of Paper Showing Case is Removable

In cases where the initial pleading did not demonstrate that the case could be removed to federal court, a defendant may remove "within 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. § 1446(b)(3). Some examples of documents that courts have held trigger removal under this provision include:

- Post-suit settlement demand. *Golden Apple Mgmt. Co., Inc. v. GEAC Computers, Inc.*, 990 F. Supp. 1364, 1368 (M.D. Ala. 1998);
- A deposition transcript. *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 612 (5th Cir. 2018);
- Responses to discovery requests, including interrogatories, requests for admission, and requests for production. *Tolley v. Monsanto Co.*, 591 F. Supp. 2d 837, 845 (S.D.W. Va. 2008); *Cabibbo v. Einstein/Noah Bagel Partners, L.P.*, 181 F. Supp. 2d 428, 433 (E.D. Pa. 2002); *Parker v. County of Oxford,* 224 F. Supp. 2d 292, 294 (D. Me. 2002);
- Affidavits. *Parker*, 224 F. Supp. 2d at 294;
- Dismissal of a non-diverse defendant. *Mar-Chek, Inc. v. Manufacturers & Traders Tr. Co.*, GJH-18-3765, 2019 WL 3067501, at *4 (D. Md. July 11, 2019);
- Estimates of the amount of damages (such as public adjuster estimates to repair property). *Punales v. Hartford Ins. Co. of Midwest,* 1:18-CV-25445-DPG, 2019 WL 3369104, at *3 (S.D. Fla. July 26, 2019).

Although courts generally interpret the "other paper" language broadly, *Tolley* 591 F. Supp. 2d at 845, it is not without limit. There are two important limitations. First, the "other paper" must be in writing. Oral communications are not an "other paper" that would trigger removal. *See* 14C Fed. Prac. & Proc. Juris. § 3731 (4th ed.) ("Courts ordinarily hold that oral statements do not trigger removability because those statements do not qualify as an 'other paper.'"); *see also State Farm Fire & Cas. Co. v. Valspar Corp., Inc.*, 824 F. Supp. 2d 923, 932-38 (D.S.D. 2010) (holding oral communication did not constitute "other paper" triggering 30–day statutory time period for removal). Second, the removal-trigger document must be received by the defendant. An offer or other document sent by a defendant to a plaintiff does not trigger removal. *Entrekin*, 146 F. Supp. 2d at 615.

One-Year Limitation on Removal

28 U.S.C. § 1446(c) bars removal based on receipt of a post-suit pleading, motion, order, or paper that first shows the case is removable more than one year after "commencement of the action." This does not necessarily mean the date the lawsuit is filed. Federal courts look to applicable state law to determine when an action is commenced. *Hall v. State Farm Mut. Auto. Ins. Co.*, 215 Fed. Appx. 423, 425 n.1 (6th Cir. 2007). Where an amended complaint adds a separate and distinct cause of action, some courts hold that removal is not precluded by the one-year limitation. *Rios v. 21st Century Ins. Co. of California, Inc.*, No. 8:12-CV-1496-T-33MAP, 2012 WL 12141972, at *2 (M.D. Fla. Sept. 14, 2012).

28 U.S.C. § 1446(c) contains an exception which allows a defendant to remove a case more than one year after commencement of the action where the plaintiff acted in bad faith in order to prevent removal. This exception was added in 2011. *Hill v. Allianz Life Ins. Co. of N. Am.*, 51 F. Supp. 3d 1277, 1281 (M.D. Fla. 2014). The prevailing test for this bad faith involves a two-step process.

> First, the Court looks to whether the plaintiff actively litigated against the removal-spoiling defendant in state court: asserting valid claims, taking discovery, negotiating settlement, seeking default judgments if the defendant does not answer the complaint, et cetera. If the plaintiff did not actively litigate against the removal spoiler, then bad faith is established; if the plaintiff actively litigated against the removal spoiler, then good faith is rebuttably presumed. In the standard's second step, the defendant may attempt to rebut the good-faith presumption with direct evidence of the plaintiff's subjective bad faith.

Holland v. CSX Transporation, Inc., No. 2:21-CV-00377, 2021 WL 4448305, at *3 (S.D.W. Va. Sept. 28, 2021) (citing *Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1262 (D.N.M. 2014)).

There are a few cases applying this standard to find the plaintiff acted in bad faith to prevent removal. In *Lawson v. Parker Hannifin Corp.*, 4:13-CV-923-O,

2014 WL 1158880 (N.D. Tex. Mar. 20, 2014), the plaintiff did not serve the non-diverse defendant for an extended period of time and then dropped the non-diverse defendant one year and three months following the one-year removal deadline. *Id.* at *5. The defendant removed and the plaintiff moved to remand. Under these facts, the court concluded "[s]ufficient evidence of forum manipulation exists to warrant application of the bad faith exception to the one-year removal period." *Id.* at *6.

In *Hoyt v. Lane Constr. Corp.*, No. 4:17-CV-780-A, 2017 WL 4481168, at *2 (N.D. Tex. Oct. 5, 2017), *aff'd*, 927 F.3d 287 (5th Cir. 2019), the court ruled that "[n]onsuit on the eve of trial is a reason to toll the one-year removal period" and found that the bad-faith exception to the one-year limitation on removal applied. And in *Massey v. 21st Century Centennial Ins. Co.*, No. 2:17-CV-01922, 2017 WL 3261419, at *4 (S.D.W. Va. July 31, 2017), the court found the bad faith exception applied, commenting that "[p]resumably, serving process on the removal spoiler is the bare minimum a plaintiff can do to support a claim of good faith litigation against the non-diverse defendant."

On the other hand, some courts decline to apply the "actively litigated" test. Instead, these courts look to see whether the plaintiff engaged in deliberate or intentional conduct to prevent removal before the deadline. *See e.g., Hopkins v. Nationwide Agribusiness Ins. Co.*, No. 4:18-CV-00315-KOB, 2018 WL 3428610, at *4 (N.D. Ala. July 16, 2018).

Forum Defendant Rule

28 U.S.C. § 1441(b) provides:

> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

This is known as the "forum defendant rule." *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1267 (M.D. Fla. 2009). The forum defendant rule is a procedural limitation on removal, not jurisdictional. *Holbein v. TAW Enterprises, Inc.*, 983 F.3d 1049, 1059 (8th Cir. 2020). This procedural defect in removal is waived if not timely raised by the plaintiff in a motion to remand. *Handelsman v. Bedford Vill. Associates Ltd. P'ship,* 213 F.3d 48, 50 n.2 (2d Cir. 2000); *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir. 1991).

The plain language of 28 U.S.C. § 1441(b) applies only where the defendant is "joined and served." Thus, most courts hold that a defendant may remove a state court action to federal court where a forum defendant has been joined, but not yet served. *North*, 600 F. Supp. 2d at 1270. Based on the plain language of the statute, many defendants employ a litigation tactic known as a "snap removal."

> Snap removal is a litigation tactic that owes its existence to automated docket-monitoring services (or, sometimes, litigants that serve press releases before process). It allows a state-court defendant to circumvent the forum-defendant rule by removing cases to federal court on diversity grounds almost immediately after a plaintiff files in state court but before the plaintiff formally serves the defendant.

Serafini v. Sw. Airlines Co., 485 F. Supp. 3d 697, 699 (N.D. Tex. 2020).

There are different views on whether pre-service removal is appropriate when there exists an unserved forum defendant. *See generally Phillips Constr., LLC v. Daniels Law Firm, PLLC*, 93 F. Supp. 3d 544, 551 (S.D.W. Va. 2015) (discussing varying views of federal courts). Practitioners should be aware of this issue and how their courts view the "joined and served" language. When appropriate, practitioners should consider pre-service removal of cases involving an unserved forum defendant.

Consent to Removal by Co-Defendants

28 U.S.C. § 1446(b)(2)(A) provides:

> (2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

This is known as the "rule of unanimity." It requires the consent of defendants who have been properly both joined and served. *Chambers v. HSBC Bank USA, N.A.*, 796 F.3d 560, 564 (6th Cir. 2015). Thus, a removing defendant is not required to obtain consent of unserved defendants. *Roberts v. Palmer*, 354 F. Supp. 2d 1041, 1044 (E.D. Mo. 2005); *Coppedge v. Cabot Norit Americas, Inc.*, No. 19-CV-705-CVE-FHM, 2020 WL 967339, at *2 (N.D. Okla. Feb. 27, 2020); *Hanna v. RFC Deutsche Bank Nat. Tr. Co.*, 3:11-CV-00346-L, 2011 WL 2981855, at *4 (N.D. Tex. July 22, 2011).

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Once served, however, the previously unserved defendant can exercise a "veto" and object to removal. *Diversey, Inc. v. Maxwell,* 798 F. Supp. 2d 1004, 1007 (E.D. Wis. 2011). However, there are a few important limitations on this rule. First, and particularly in insurance litigation, courts will realign parties when appropriate. For example, "the normal alignment of parties in a suit seeking a declaratory judgment of non-coverage is Insurer versus Insured and Injured Party." *City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1314 (11th Cir. 2012). A non-consenting defendant cannot veto removal once realigned as a plaintiff. *Saylab v. Harford Mut. Ins. Co.*, 271 F. Supp. 2d 112, 117 (D.D.C. 2003); *Fenwick Commons Homeowners Ass'n, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, No. 2:19-CV-00057-DCN, 2019 WL 1760150, at *2 (D.S.C. Apr. 22, 2019); *Cent. Flying Serv., Inc. v. StarNet Ins. Co.*, No. 4:13CV00330 JLH, 2013 WL 12253551, at *5 (E.D. Ark. Aug. 29, 2013).

Second, "[t]he federal courts have … long recognized an exception to the rule of unanimity, which states that a nominal party need not consent to removal." *Hartford Fire Ins. Co. v. Harleysville Mut. Ins.*

Co., 736 F.3d 255, 259 (4th Cir. 2013). "This 'nominal party exception' ensures that only those parties with a palpable interest in the outcome of a case, and not those without any real stake, determine whether a federal court can hear a case." *Id.*

Given the general preference of defendants to litigate in federal court, a defendant may object to removal because it has no true stake in the outcome, or its interests are aligned with the plaintiff. In these cases, the lack of consent of this defendant should not preclude removal.

Direct Action Provision

28 U.S.C. § 1332(c)(1) provides:

> **(1)** a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--
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>
> (C) the State or foreign state where the insurer has its principal place of business….

The key phrase here is "direct action against the insurer of a policy or contract of liability insurance." This provision was "was enacted by Congress in order to eliminate the basis for diversity jurisdiction in states that allow an injured third-party claimant to sue an insurance company for payment of a claim without joining the company's insured as a party, where the insured would be a nondiverse party, even though the party insurance company would otherwise be diverse." *Fortson v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985). Ironically, the direct-action provision was enacted to prevent plaintiffs from manipulating federal jurisdiction in order to litigate state law cases in federal court. *Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1300 (11th Cir. 2014). Most cases involving insurers are not direct actions. The key feature of a direct action is a plaintiff's ability "to skip suing the tort feasor and sue directly his insurance carrier." *Id.* at 1300-01. When "the cause of action is based on the insurer's duty and not the insured's duty, the action is not a direct action." *Shands Jacksonville Med. Ctr., Inc. v. Nat'l Union Fire Ins. Co.*, 3:14-CV-930-J-34JBT, 2014 WL 12617785, at *4 (M.D. Fla. Nov. 13, 2014). The direct-action provision applies only to actions in which "the liability sought to be imposed against the insurer could be imposed against the insured." *Lamontagne v. Nationwide Mut. Ins. Co.,* 345 F. Supp. 2d 1, 2 (D. Me. 2004).

These types of cases are not direct actions.

- Claims for breach of contract arising out of first-party property insurance policies. *Med. Research Centers, Inc. v. St. Paul Prop. And Liab. Ins.*, 303 F. Supp. 2d 811, 814 (E.D. La. 2004);
- Claims for uninsured and underinsured motorist coverage. *Irvin v. Allstate Ins. Co.*, 436 F. Supp. 575, 577 (W.D. Okla. 1977);
- Claims by an insured under his or her own policy for breach of the insurance policy or the insurer's tortious conduct. *Elliott v. Am. States Ins. Co.*, 883 F.3d 384, 394 (4th Cir. 2018);
- Claims for bad faith. *Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 902 (9th Cir. 1982); *Fortson*, 751 F.2d at 1159.

The direct-action provision applies in few situations and in few jurisdictions. Most cases involving insurers are not direct actions.

Fraudulent Joinder and Misjoinder

Sometimes a plaintiff joins a non-diverse defendant solely to defeat removal. Practitioners should analyze whether the non-diverse defendant was fraudulently joined or misjoined.

Here is the fraudulent joinder doctrine in a nutshell:

> When a plaintiff names a non-diverse defendant solely in order to defeat federal diversity jurisdiction, the district court must ignore the presence of the non-diverse defendant and deny any motion to remand the matter back to state court. The plaintiff is said to have effectuated a "fraudulent joinder," and a federal court may appropriately assert its removal diversity jurisdiction over the case. A defendant seeking to prove that a co-defendant was fraudulently joined must demonstrate either that: "(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court."

Henderson v. Washington Nat. Ins. Co., 454 F.3d 1278, 1281 (11th Cir. 2006) (internal citations omitted).

"'Fraudulent misjoinder' occurs when a plaintiff purposefully attempts 'to defeat removal by joining together claims against two or more defendants where the presence of one would defeat removal and where in reality there is no sufficient factual nexus among the claims to satisfy the permissive joinder standard.'" *Fed. Ins. Co. v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 378 (S.D.N.Y. 2006).

This article will not explain the nuances of these doctrines, but, instead, encourages practitioners to explore these doctrines where a plaintiff has named a non-diverse defendant that does not seem to fit in the lawsuit. Please refer to Lavisky, Matthew J. and Frain, Toni L., More than Pawns: *Fighting Removal Spoiler Claims Against Adjusters, Attorneys, and Agents in Bad-Faith Lawsuits*, 60 No. 10 DRI For Def. 87 (October 2018) for a thorough discussion of these doctrines.

Conclusion

"The removal process was created by Congress to protect defendants. Congress did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." Legg v. Wyeth, 428 F.3d 1317, 1325 (11th Cir. 2005). Some of our friends on the other side of the "v" did not get the message. The strategies and tips in this article should help overcome this "bag of tricks" and keep your case in federal court.