REMOVING DIVERSITY CASES: The Thrill Is Gone

By Patrick H. Sims

Over the last seven years, thanks to two decisions of the Eleventh Circuit Court of Appeals, one decision from the United States Supreme Court and some related statutory changes, formulating a notice of removal in a diversity case has gone from an often frantic process to a very simple one. These changes are significant, and every lawyer who has removed a diversity case in the past should note the new framework.

Basic Diversity Removal Principles

A defendant's ability to remove a lawsuit from state court to federal court is not a matter of Constitutional right. It is a federal statutory grant, and the chief relevant statutes are 28 U. S. C. §§ 1441 and 1446. There are several others that affect those two. Federal diversity jurisdiction is conferred by 28 U. S. C. § 1332, which vests in federal district courts jurisdiction of civil actions where the amount in controversy exceeds $75,000 and the controversy is between citizens of different states. For purposes of original diversity jurisdiction and removal, an individual is a citizen of the state in which he is domiciled[1] and a corporation is a citizen of both the state in which it was incorporated and the state where its principal place of business is located.[2] The phrase "principal place of business" was fairly recently explained by the Supreme Court to mean (usually) the corporation's "nerve center," that is, where corporate headquarters are located and its executives make significant corporate decisions. *Hertz Corp. v. Friend,* 559 US 77, 130 S. Ct. 1181 (2010).

Section 1441 (a) states that, in general, any civil action filed in a state court that could have been filed originally in federal court may be removed to the appropriate federal district court. Section 1441 (b) adds a significant limitation on diversity removals: Even though there is complete diversity jurisdiction, such that a state-court case could have been filed in federal court, it may not be removed if there is a "local defendant"–that is, if any defendant "properly joined and served" is a citizen of the forum state, the action is not removable. There are other types of cases that might otherwise be removable under diversity, notably workers' compensation cases, that are declared non-removable by 28 U. S. C. § 1445 (c).

The procedure for removal is set out in 28 U. S. C. § 1446. That section requires the filing of a notice of removal in the federal district court within 30 days of service on the defendant, which notice must contain "a short and plain statement of the grounds for removal." Normally all served defendants must join in the removal. The notice must attach all pleadings, process and orders served on the defendant in the state action. There are provisions in § 1446 for cases that were not originally removable that become removable through later developments in the case. There is a one-year time limit on diversity-based removals.[3] Other details of the removal process are discussed as needed below.

Despite the conservative tenor of the decisions of the Alabama Supreme Court this century, most corporate defendants, their lawyers and their insurance companies seek to flee state counsel by removal to federal court despite the general perception that federal court litigation is more complicated, more expensive and beset by needless rigmarole.

The Good Old Days

When B.B. King told us that the thrill was gone, he was not singing about events in a lawyer's office.[4] A different kind of "thrill" was associated with diversity based removals until quite recently, though. To appreciate fully the effect that recent decisions have had on removing cases to federal court, it is illuminating to consider the process before the recent changes took place.

Consider a hypothetical damage lawsuit filed in an Alabama circuit court in June 2008, before the first of the appellate cases alluded to above. There is a single plaintiff and three defendants, one of them a corporation. The complaint is in the basic form prescribed by one of the Official Forms appended to the *Alabama Rules of Civil Procedure.* That is significant because the complaint is a basic state-court complaint that does not contain the additional party residency/citizenship descriptions often found in state court complaints. These are not required by the *Alabama Rules of Civil Procedure.* After the complaint is filed, a lawyer for one of the defendants typically receives the complaint from her client, or its insurance carrier. That's when the stress begins for the lawyer seeking to remove the case to federal court.

Despite the conservative tenor of the decisions of the Alabama Supreme Court this century, most corporate defendants, their lawyers and their insurance companies seek to flee state counsel by removal to federal court despite the general perception that federal court litigation is more complicated, more expensive and beset by needless rigmarole. In accord with that premise, the removing lawyer's first action would probably be to review the last page of the complaint to see if there was a quantified *ad damnum* prayer. Though *Ala.R.Civ.P.* 8 (a)(2) requires a complaint to contain "a demand for judgment for the relief the pleader seeks," no dollar demand needs to be specified in a state court complaint. Accordingly, a lawyer preparing a complaint might try to avoid removal by not demanding a specific amount (at least not one exceeding $75,000). In that case, the defense lawyer would likely find only a prayer for "such compensatory and punitive damages as the jury may impose."

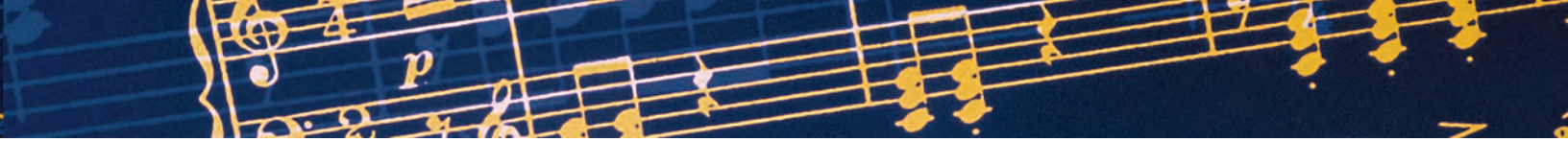
Next, the removing lawyer would need to know, from her client or from the insurance company, and would confirm with the circuit clerk, when service occurred and, thus, how many of her 30 days were remaining. Critically, because there were two other defendants involved, she needed to know when those other two defendants were served, because in June 2008 there were numerous decisions from Alabama federal district courts holding that a single 30-day removal window applied to all defendants, which started running when the first defendant was served.[5] So our defense lawyer's removal opportunity might have vanished even before she received the complaint.

Then, assuming the removal was not time-barred, she still had to sort out, during her remaining time, the questions of jurisdictional amount and actual diversity of citizenship. The complaint probably told her essentially nothing about either subject. Her burdens as to both were fairly well-defined by existing Eleventh Circuit precedent. As to the amount in controversy, it was the removing defendant's burden "to show by a preponderance of the evidence that the amount in controversy can be satisfied." *Friedman v. New York Life Insurance Co.*, 410 F. 3d 1350, 1353 (11th Cir. 2005). As to parties, there were numerous decisions remanding, or confirming the absence of diverse parties, because of deficient allegations of diversity. E. g., *Taylor v. Appleton*, 30 F. 3d 1365 (11th Cir. 1994). The decision that defined the diversity removal standards in the most exhausting detail was *Lowery v. Alabama Power Co.*, 483 F. 3d 1184 (11th Cir. 2007). *Lowery* and its 80 footnotes were cited in many removal notices and district court opinions evaluating those notices thereafter.

So our defense lawyer had to file a notice of removal that established party diversity and that "proved" that more than $75,000 was in dispute. This process often involved the drafting and preparation of affidavits supporting the assertion that "plaintiffs are really claiming more than $75,000" with accompanying exhibits that would be admissible in federal court.

A New Day

The stress formerly experienced by lawyers seeking to remove a case to federal court may now be gone. The Eleventh Circuit, the Supreme Court and Congress have prescribed several stress relievers that should provide nearly total relief.



First stress reliever: *Janssen Pharmaceutica*

In *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F. 3d 1202 (11th Cir. 2008), the Eleventh Circuit eliminated what was, in most cases, not a serious problem, but was sometimes catastrophic to removal. The question presented and answered was whether there was only a single 30-day removal window available for all of multiple defendants, or whether each defendant had its own separate 30-day removal period. In a fairly short opinion, after reviewing the authorities from the Supreme Court and other circuits, the court stated its conclusion: "We hereby adopt the last-served defendant rule, which permits each defendant, upon formal service of process, thirty days to file a notice of removal pursuant to § 1446 (b)." *Id.* at 1209. The substance of this conclusion was incorporated into the removal statute by amendments effective in 2012, and § 1446 (b) (2) (D) now states: "Each defendant shall have thirty days after receipt . . . to file a notice of removal."

Second stress reliever: *Artjen Complexus*

Corporate Management Advisors, Inc. v. Artjen Complexus Inc., 561 F. 3d 1294 (11th Cir. 2009), involved a fundamental change in the law effected through some subtle appellate court wizardry in avoiding the Prior Panel Rule. This was again a fairly short decision, which addressed the issue of the sufficiency in the notice of removal of the allegations of diversity of citizenship. That case reached the Eleventh Circuit after the district court had remanded it twice because of the insufficiency of the allegations of diverse citizenship. The Eleventh Circuit first found a way to reach the jurisdictional questions despite the plain language of 28 U. S. C. § 1447 (d) forbidding all review of remand orders. *Id.* at 1296.

The court then managed to avoid entirely every Eleventh Circuit decision announced since the formation of the circuit in October 1981 that required specificity in the identification of the citizenship of every party in a removal notice. It did this by finding an old Fifth Circuit case that negated such a requirement. *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit's first decision, adopted the precedent of the former Fifth Circuit as binding precedent in the Eleventh Circuit. Under *Bonner,* panel decisions in the old Fifth Circuit were binding on panels in the Eleventh, absent some intervening change in the law. In *Artjen Complexus*, the Eleventh Circuit panel addressed *Firemen's Insurance Co. v. Robbins Coal Co.*, 288 F. 2d 349 (5th Cir. 1961), a case in which the Fifth Circuit stated: "The general allegation in the original petition for removal in this case, 'that the controversy in said case is entirely between citizens of different states,' although conclusory in nature and possibly not sufficient if not amended, is sufficient to confer jurisdiction on the federal courts to permit the curing of the defect by amendment." 288 F. 2d at 350 (citation omitted). The Eleventh Circuit noted that 28 U. S. C. § 1653 states that defective allegations of jurisdiction may be amended in either the trial or appellate courts and is applicable to removal notices. 561 F. 3d at 1297.

Third stress reliever: *Dart Cherokee*

Dart Cherokee Basin Operating Co. v. Owens, _____ U. S. _____, 135 S. Ct. 547 (2014), contains language that is rhapsodic to a prospective removing defendant's lawyer, both specifically as to the issue of jurisdictional amount and as to removal notices in general. As amended effective in 2012, 28 U. S. C. § 1446 (c) (2) (B) states that a diversity-based removal is proper "if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in Section 1332 (a)." In the *Dart Cherokee* case, which involved a removal under the parallel Class Action Fairness Act, the district court had remanded, and the Tenth Circuit affirmed, because the removal notice itself did not include evidence supporting the allegation that the required amount in controversy was present. The Supreme Court reversed, with four justices joining[6] the following language by Justice Ginsburg:

> *As noted above, a defendant seeking to remove a case to a federal court must file in the federal forum a notice of removal "containing a short and plain statement of the grounds for removal." § 1446 (a). By design, § 1446 (a) tracks the general pleading requirement stated in Rule 8 (a) of the Federal Rules of Civil Procedure. . . . The legislative history of § 1446 (a) is corroborative. Congress, by borrowing the familiar "short and plain statement," standard from Rule 8 (a), intended to "simplify the 'pleading' requirements for removal" and to clarify that courts should "apply the same liberal rules [to removal allegations] that are applied to other matters of pleading." . . . .*
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> *When a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith. Similarly, when a defendant seeks federal court adjudication, the defendant's amount-in-controversy should be accepted when not contested by the plaintiff or questioned by the court. . . .*
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> . . . .
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> ***In sum, as specified in § 1446 (a) a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446 (c) (2) (B) only when the plaintiff contests, or the court questions, the defendant's allegation.***

Id. at 554 (emphasis added).

Where These Decisions, And the Statutory Amendments, Leave Us

The 2012 amendments to § 1446, the sweeping language of the Supreme Court in *Dart Cherokee,* and the similarly broad language in *Artjen Complexus* prompt this question: Remember *Conley v. Gibson*? That was the famous case[7] from the Supreme Court, decided in 1957, that we all learned about in civil procedure class. It informed us that no complaint was subject to outright dismissal unless it could be said with positive assurance that there was no set of facts under which the plaintiff might prevail.

The application of *Conley* resulted in various nuances among the circuits. In the Eleventh, the relevant morphing of *Conley* is found in *Bank v. Pitt,* 928 F. 2d 1108 (11th Cir. 1991). There the court addressed *Conley* in connection with *Fed.R.Civ.P.* 15 (a) and announced a nearly absolute rule that if a complaint is defective, a plaintiff who desires to make an amendment must be given at least one opportunity to cure the defect, unless it is clear that a more carefully crafted complaint could not cure the defect. *Id.* at 1112. *Conley* has since been abrogated by the Supreme Court,[8] but something like the *Bank v. Pitt* rule as a standard for judging removal notices is what emerges from these recent decisions.

If we return to the hypothetical 2008 complaint discussed above, if that case were filed today, our defense lawyer could proceed without aggravation. Her only urgent task would be to confirm the service date on her client. In the remaining time before the removal deadline she would make necessary investigation regarding the actual facts supporting diversity jurisdiction. She could then file a viable notice of removal (meaning it *should* not be remanded without an opportunity to amend) containing only these jurisdictional allegations:

1. This notice is filed within 30 days of service of process on this defendant.
2. The controversy in this case is entirely between citizens of different states, and no defendant is a citizen of Alabama or is attributed Alabama citizenship.
3. The amount in controversy, exclusive of costs and interest, exceeds $75,000.
4. All defendants join in this removal, as confirmed by their consents filed contemporaneously.

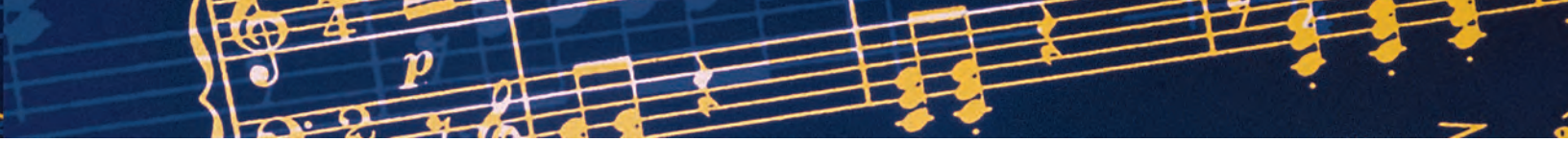
No additional details or embellishments should be required by any district court in Alabama or elsewhere in the Eleventh Circuit. Or, if she wanted to be particularly pithy, she might simply track § 1332 itself: "The amount in controversy in this action exceeds $75,000, exclusive of costs and interest, and the action is entirely between citizens of different states, and no defendant is an Alabama citizen."

Words of Caution

A. Everything set out above relates solely to the preparation of what we antiquarians still call the removal "paperwork." These decisions and statutory amendments make the preparation of the notice of removal measurably simpler. They may not necessarily make the lawyer's overall responsibility in the removal process that much simpler, because much of the complex activity might remain; it may just be postponed some number of weeks. That does not justify the lawyer's deferring the necessary information gathering and evaluation, however, because, as mentioned above, the new liberal "pleading" standard contemplates that, when challenged, the removing defendant may be required both to amend the notice regarding the citizenship allegations and to prove the notice's allegations regarding jurisdictional amount.[9] For that reason, a lawyer should not file the short-form notice without having confidence in his ability to follow through with those amendments and that proof. A notice of removal, like any other federal court filing, is subject to *Fed.R.Civ.P.* 11 (b) (1) and (3), so the lawyer who files a notice that alleges only that the parties are diverse and that the jurisdictional amount is present is certifying to the court that the notice is not being filed to delay the plaintiff's cause, and that the contentions regarding diversity and jurisdictional amount have evidentiary support. Those certifications may be the basis for sanctions by the district court if it finds that they were improperly made. *Fed.R.Civ.P.* 11 (c). In addition, 28 U. S. C. § 1447 (c) provides for the imposition of costs, including attorney fees, as part of a remand order.

B. Another problem with pleading a notice of removal without any detail, though not unique to diversity circumstances, is 28 U. S. C. § 1447 (d). That section reads: "An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . . ." with certain exceptions not applicable to a routine civil action. Though courts of appeals have occasionally found certain obscure (or abstruse) ways to avoid this restriction, in the main it is held to mean exactly what it says. Thus, a district judge who is wedded to the older era might grant, without elaboration, a motion to remand and the case would go back to state court (improperly) with no review available.

C. There are many ways in which erroneous facts can be introduced into a detailed notice of removal. How does the new liberal pleading standard apply to a botched notice of removal? One recurring example will be used here. Limited liability companies are now a nearly ubiquitous form for new business enterprises. In *Rolling Greens MHP, L. P. v. Comcast SCH Holdings L. L. C.*, 374 F. 3d 1020 (11th Cir. 2004), the Eleventh Circuit announced that, for purposes of diversity jurisdiction (and hence removal), a limited liability company would be attributed the citizenship of each of its members. Despite the fact that this principle is now more than 10 years old, one continues to see, with disturbing frequency, allegations in removal notices such as this: "Defendant ACME, LLC is a corporation organized under the law of Georgia with its principal place of business in Atlanta, Georgia. For purposes of diversity and removal jurisdiction, it is a citizen of Georgia." The filers of such notices display no apparent appreciation of either business organization principles or removal practice. In order properly to plead the citizenship of ACME, LLC, the lawyer would need to know who all of its members are. He would then need to set out in the notice that the individual members are domiciled in specified states, that each corporate member is incorporated in state X with PPB in state Y, and if other members are themselves LLCs, the same process for those members. The principal place of business of the defendant LLC is not relevant to removal, but what does the district court do with the completely erroneous allegation about



ACME, LLC recited above? The answer is probably "nothing," assuming there is elsewhere in the notice a general allegation of complete diversity. Under the language in *Dart Cherokee* and *Bank v. Pitt*, it would fall to the plaintiff to raise an issue about the true existence of diversity, pointing out the defective allegation, and it would then fall to the removing defendant to straighten out ACME's membership.

D. Another recent Eleventh Circuit case that bears mention here is *Goodwin v. Reynolds*, 757 F. 3d 1216 (11th Cir. 2014). That decision deals with the bar in § 1446 (b) to removal by a local defendant "properly joined and served." The early proceedings in *Reynolds* illustrate that the revered adage "no good deed goes unpunished" is sometimes true in civil litigation. Goodwin sued three defendants in Alabama circuit court. Two defendants were foreign and an individual, Reynolds, was an Alabama citizen. Goodwin's lawyer sent "courtesy copies" of the complaint to all defendants.[10] Four days later, before any defendant was served, the two foreign defendants removed the case, noting that since the forum defendant had not been "properly joined *and served*," § 1446 (b) was no bar to removal. They simultaneously filed an answer. Considering herself slickered, Goodwin sought leave to dismiss, without prejudice, so that she could refile the action and execute service in a sequence that would prevent removal. The district court granted her Rule 41 (b) motion and the Eleventh Circuit affirmed. Several points about the opinion are noteworthy. First, defendants will assert that every "pro-plaintiff" statement in it mentioned below is dictum because the immediate issue was the propriety of a Rule 41 dismissal, not removal. Second, the opinion questions the existence of any "right" of a civil defendant to remove an action. *Id.* at 1221. Next, the court acknowledges that the true impact of the "and served" portion of that statutory phrase is the subject of much debate, citing in a footnote *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263 (M. D. Fla. 2009), which gathers the disparate authorities. Finally, the opinion observes that, if for nothing else, the "properly joined and served" language was put into the statute to protect plaintiffs from the gamesmanship the court concluded was practiced by defendants in the *Reynolds* case. *Id.* at 1221. Unlike the other cases mentioned above, *Reynolds* adds no clarity, but does suggest how there is still a little thrill left in diversity removals.

E. Is there, in these recent decisions, any comfort for plaintiffs seeking to avoid removal? Frankly I do not see much. The only guidance that emerges is the reaffirmation of the two long-standing fundamental bases for removal–avoidance. First, if upon realistic evaluation of the case, there is little chance of a jury verdict exceeding $75,000, then make a concrete demand for less in the complaint. Second, if there is in the facts a claim with a Rule 11 basis against an Alabama defendant, then join him or it and shepherd the service of process so that he or it is served before any foreign defendant is served. Neither of these will assure that the defendants will not file a notice of removal, but your chances on motion to remand should be quite solid, as might be your claim for fees and expenses under § 1447 (c).

Though the defense lawyers' obligations in gathering facts and arguments regarding the validity of removal remain largely unchanged, the intense burden of doing so entirely in advance of preparing the notice has been greatly reduced.

Conclusion

The *Dart Cherokee* case from the Supreme Court, and the earlier decisions from the Eleventh Circuit, portend a new era in the formulation of notices of removal in diversity jurisdiction cases. Though the defense lawyers' obligations in gathering facts and arguments regarding the validity of removal remain largely unchanged, the intense burden of doing so entirely in advance of preparing the notice has been greatly reduced. BB said the thrill is gone away for good. We'll have to wait and see if that's entirely true about removal notices. | AL

Endnotes

1. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 US 826, 109 S. Ct. 2218 (1989).
2. 28 U. S. C. § 1332 (c)(1).
3. 28 U. S. C. § 1446 (c)(1). This limit may be extended if the district court finds that "the plaintiff has acted in bad faith" to prevent removal. Id.
4. Okay, maybe a few times.
5. E.g., *Betts v. Larsen Intermodal Services, Inc.*, No. 05-0600-CG-C (S. D. Ala.) (unpublished order of June 21, 2006, remanding action); *Adams v. Charter Communications VII, LLC*, No. 2: 04-cv-1115-F (M. D. Ala) (unpublished order of February 8, 2005, remanding action).
6. The dissents do not focus on the merits of the majority holding but on some niceties of Supreme Court procedure and jurisdiction.
7. 355 U. S. 41, 78 S. Ct. 99 (1957).
8. See *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 127 S. Ct. 1955 (2007).
9. In that regard, in *Dart Cherokee* the Supreme Court's opinion quoted, without commenting on its correctness, a portion of § 1446 (c)(2)(B)'s legislative history stating that if a post-removal dispute arises over jurisdictional amount, "discovery may be taken with regard to that question." 135 S. Ct. at 554.
10. In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 US 344, 119 S. Ct. 1322 (1999), the Supreme Court established that only formal service of process (in Alabama, a summons) constitutes "service."