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**Issues for the Newer Practitioner**

**The Newer Practitioner's Guide to Removal Jurisdiction: Best Practices and Pitfalls**

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The determination whether removal of a civil action from the State of New Hampshire Superior Court to the United States District Court for the District of New Hampshire is both feasible and advisable is a painstaking process, fraught with traps for the unwary. The consequences of an improper removal are possibly prejudicial, potentially expensive, and likely embarrassing. The purpose of this article is to introduce newer practitioners to the fundamental rules and procedures guiding the removal process, and to identify best practices and pitfalls, focusing primarily on the removal from state court of cases which appear to be subject to the diversity jurisdiction of the United States District Court.

**Diversity Jurisdiction**

The diversity jurisdiction of the district courts is established in 28 U.S.C. §1332 (a):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between:

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

It is critical that a defendant removing a case on diversity grounds ensure that all jurisdictional thresholds are met. A case may be removed on diversity grounds only if the case meets the jurisdictional requirements of 28 U.S.C. §1332 (a), which include both diversity of citizenship and an amount in controversy of \$75,000, exclusive of interest and costs. With respect to the amount in controversy, §1446 (c) (2) deems the amount in controversy to be “the sum demanded in good faith in the initial pleading,” except that the notice of removal “may assert the amount in controversy if the initial pleading seeks... (i) nonmonetary relief; or (ii) a money judgment, but the state practice either does not permit a demand for a specific sum or permits recovery of damages in excess of the amount demanded.” 28 U.S.C. §1446 (c) (2) (A). If a civil matter is not susceptible to removal based upon the initial pleading, a defendant may file a notice of removal based upon “an amended pleading, motion, order or other paper” within 30 days after receipt. §1446 (b) (3). Both “information relating to the amount in controversy in the record of the state proceeding [and] responses to discovery” are considered ‘other paper’ under this provision. §1446 (c) (3) (A).

Removal on diversity grounds, 28 U.S.C. §1332 (a) is proper only where the requirements of 28 U.S.C. §1441 (b) (2), the “forum defendant rule,” are met:

A civil action otherwise removable solely on the basis of... [diversity] jurisdiction 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 impediment to removal is waived if the plaintiff fails to raise the issue within 30 days of removal. 28 U.S.C. §1447 (c).

### **Criteria for Removal**

The removal of cases from state court is governed by Title 28 of the United States Code, Part IV, Chapter 89, 28 U.S.C. §§1441-1455. The removal of civil actions is addressed in §1441, which contains both general and specific criteria for removal:

**(a) Generally.**--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

**(b) Removal based on diversity of citizenship.**--**(1)** In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

**(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.

**(c) Joinder of Federal law claims and State law claims.**--**(1)** If a civil action includes--

**(A)** a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

**(B)** a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

**(2)** Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

**(d) Actions against foreign States.--**Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

**(e) Multiparty, multiform jurisdiction.--**  
**(1)** Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

**(A)** the action could have been brought in a United States district court under section 1369 of this title; or

**(B)** the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same

accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) **Derivative removal jurisdiction.**--The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

“The removal statute, 28 U.S.C. §1441, permits removal only where the district court could have exercised original jurisdiction over an action.” N.H. Attorney General v. Bass Victory Committee, 2012 DNH 122 (D.N.H. July 10, 2012) at \*3, quoting Fayard v. Ne. Vehicle Servs., LLC, 533 F 3d 42, 45 (1<sup>st</sup> Cir. 2008).

### **Removal Procedure**

The procedure for the removal of civil actions is prescribed in 28 U.S.C. §1446 (a)-(d):

(a) **Generally.**--A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) **Requirements; generally.**--(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy

of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(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.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed 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.

**(c) Requirements; removal based on diversity of citizenship.--(1)** A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the

initial pleading shall be deemed to be the amount in controversy, except that--

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks--

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an 'other paper' under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

**(d) Notice to adverse parties and State court.**--Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

### Time for Removal

The deadline for removal of a civil action which names only a single defendant at the time of removal is straightforward: In such instances, a defendant must file the notice of removal signed pursuant to Fed. R. Civ. P. 11 in the district court within which the action is pending, within 30 days “after receipt by the defendant, through service or otherwise, of a copy of the initial pleading... or within 30 days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.” 28 U.S.C. §1446 (b) (1).

In a state court civil action involving more than one defendant, each defendant has 30 days “after receipt by or service on” that defendant to file the notice of removal. 28 U.S.C. §1446 (b) (2) (B). Where defendants are served at different times, and an earlier-served defendant has not previously initiated or consented to removal, that defendant may consent to the notice of removal filed by a later-served defendant. 28 U.S.C. §1446 (b) (2) (C). In other words, the earlier-served defendant is not barred from joining in the removal even though that defendant failed to remove within 30 days. All properly joined and served defendants in an action removed solely under §1441 (a) must join in or consent to the removal.

While the removal of diversity actions more than one year after commencement of the action is generally prohibited, removal will be allowed beyond a year if the court finds that the plaintiff has committed a bad faith act, such as deliberately failing “to disclose the actual amount in controversy to prevent removal.” §1446 (c) (1) and (3) (B).

### The Revival Exception

In limited circumstances, removal is permitted beyond the thirty-day time limit in 28 U.S.C.A. §1446 (b) (1). This narrow, judicially-created exception is the revival exception:

This exception allows removal after the thirty day period has run where an amended pleading changes the nature of a case so drastically that the amendment in effect begins a new case... Where the pleading amendments do not change the target of a plaintiff's attack, the basic legal theory of the case, or the nature of the relief sought there is no revival.

Webb v. Federal Home Loan Mortgage Corp., 2014 DNH 118 (D.N.H. May 29, 2014) quoting In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 2006 WL 1004725, \*3 (S.D.N.Y., April 17, 2006) (footnote, citations and internal quotations omitted). In Webb, the United States District Court for the District of New Hampshire rejected the defendant's attempt to apply the revival exception and granted the plaintiff's motion to remand because the defendant failed to demonstrate that the plaintiff's amended complaint was, essentially, a new lawsuit. Id. at \*7; Doe v. Florida Int'l Univ. Bd. of Trustees, 464 F. Supp. 2d 1259, 1261 (S.D. Fla. 2006) ("this narrow exception is limited to two types of cases: (1) where the plaintiff deliberately misleads a defendant about the true nature of the case until the thirty-day period expires; or (2) where an amended complaint fundamentally alters the nature of the case to such an extent that it creates an essentially new lawsuit.") (citation and internal punctuation omitted). The court found that the amended complaint failed to trigger the exception because the plaintiff had merely added claims for money damages. Webb at \*8.

### **Waiver of the Right to Remove**

A party's agreement to a forum selection clause may operate as a waiver of its right to remove under 28 U.S.C.A. §1441. In The Skydive Factory, Inc. v. Skydive Orange, Inc., 2013 DNH 033 (D.N.H. March 12, 2013), the court considered a motion to remand filed on the grounds that the parties' contract required that any dispute arising under the contract to be resolved in state court, and specifically in Strafford County. Judge McAuliffe began his decision

with the proposition that, generally, "... a forum selection clause mandating that disputes be resolved in state court operates as a waiver of the parties' removal rights under §1441." *Id.* at \*2, citing *Spenthal v. R.R. Donnelly & Sons, Co.*, 534 F. Supp. 2d 162, 164 (D. Me. 2008) (recognizing that this is an unsettled question in the First Circuit).

Judge McAuliffe found that a forum selection clause may be mandatory as to jurisdiction, venue or both. *Id.* citing *Yakin v. Tyler Hill Corp.*, 566 F.3d 72, 76 (2d Cir. 2009). The court found that the contractual provision that, although "clumsy and unartful," the language, "[a]ny or [sic] disputes related to this agreement shall be filed in Strafford County, the State Courts of New Hampshire adequately conveyed "the parties agreement that jurisdiction over contracted disputes lies in the state court." *Id.* at \*3 (citations omitted). The court relied, in part on the unambiguous phrase, "the State Courts of New Hampshire," and concluded that this was "clearly a term of sovereignty" which plainly excluded federal courts. *Id.* at \*3-4. The court also determined that Strafford County was the proper venue since there is no federal court located there and thus the case could only be litigated there in state court. *Id.* at \*7. The case was remanded to the Strafford County Superior Court. *Id.*

### **After Removal**

#### **Action by the District Court**

Once a case has been removed, the defendant(s) must file an answer, or refile any answer(s) previously filed in the state court action, within 21 days from the date of the filing of the notice of removal. However, any defendant served after removal must answer within the Fed. R. Civ. P. 81 (c) timeframe. The district court is empowered to "...issue all necessary orders and process to bring before it all proper parties...", 28 U.S.C. §1447 (a), and "...may require the removing party to file with its clerk copies of all records and proceedings in such

state court...” 28 U.S.C. §1447 (b). The removing party must file a certified copy of the state court record with the clerk’s office within 14 days of the filing of the notice of removal. Local Rules of the United States District Court for the District of New Hampshire, L.R. 81.1 (c). Any motion filed in the state court must be refiled in the district court in order to be considered by the district court after removal. 81.1 (b).

#### The Status of State Law Claims After Removal

“If a civil action includes... a claim not within the original or supplemental jurisdiction of the district court... the entire action may be removed if the action would have been removable without the inclusion of [that] claim.” 28 U.S.C. §1441 (c) (1) (B). But, “[u]pon removal of [such] an action... the district court shall sever from the action all claims described in paragraph (1) (B) and shall remand the severed claims to the state court from which the action was removed.” 28 U.S.C. §1441 (c) (2). Thus, after removal, the district court is required to sever and remand any state law claims over which it lacks either original or supplemental jurisdiction. Accordingly, before removing a case, consideration must be given to the likelihood that 28 U.S.C. §1441 (c) will result in simultaneous litigation in both the state and federal forums.

#### Motions for Remand

In a diversity case, removal can be challenged for failure to meet the 28 U.S.C. §1332 (a) jurisdictional prerequisites. The remedy for improper removal is to move the district court to remand the case to the state court. Unless made on the basis of a lack of subject matter jurisdiction, such motions must be filed within thirty days after the filing of the notice of removal under 28 U.S.C. §1447 (c). The case shall be remanded if, at any time before final judgment, it appears that the district court lacks subject matter jurisdiction.

In determining whether to remand, the removing party “bears the burden of persuasion

vis-à-vis the existence of federal jurisdiction.” BIW Deceived v. Local 56, Indus. Union of Marine & Shipbuilding Workers of Am., 132 F. 3d 824, 831 (1<sup>st</sup> Cir. 1997). “When subject matter jurisdiction is challenged following removal from state court, the removing party bears the burden to show that federal jurisdiction exists.” Neenan v. CitiMortgage, Inc., 2013 DNH 163 (D.N.H. November 26, 2013) at \*2, citing Ortiz-Bonilla v. Fed’n de Ajedrez de P.R., Inc., \_\_\_ F. 3d \_\_\_, 2013 WL 4457427 at 4 (1<sup>st</sup> Cir. Aug. 21, 2013). In Neenan, the court denied the plaintiff’s motion to remand because the defendant, CitiMortgage, Inc., met its burden to show that the amount in controversy exceeded \$75,000: “‘Courts have repeatedly held that the value of the matter in controversy is measured not by the monetary judgment which the plaintiff may recover but by the judgment’s pecuniary consequences to those involved in the litigation.’” Id. at \*4, quoting Barbosa v. Wells Fargo Bank, N.A., 2013 WL 405 6180, at \*4 (D. Mass. August 13, 2013) (other internal citations and quotation marks omitted). Judge Diclerico determined based on Barbosa that in a case in which a plaintiff challenges the right or title to property following a foreclosure sale, the amount in controversy includes the value of the property in question, and found that CitiMortgage met its burden. Id. at \*4.

In Sanders v. Luminescent Systems, Inc., 2014 DNH 141 (D.N.H. June 23, 2014), the District Court denied the plaintiff’s motion to remand because she unsuccessfully challenged both diversity of citizenship and the amount in controversy. The court found that the defendants produced sufficient evidence to demonstrate that there was complete diversity, and that the defendant demonstrated, by a preponderance of the evidence that the amount in controversy exceeded \$75,000. Id. at \*3, citing Amoche v. Guar. Trust Life Ins. Co., 556 F. 3d 41, 50 (1<sup>st</sup> Cir. 2009).

Judge Barbadoro found that while a bare allegation in the notice of removal is insufficient to meet this burden, "... in this Circuit, a removal defendant can meet its burden by going outside the four corners of the notice of removal." Sanders at \*3, quoting Mut. Real Estate Holdings, LLC v. Houston Cas. Co., No. 10-CV-236-LM, 2010 WL 3608043, at \*4 (D.N.H. Sept. 13, 2010). The removal defendant meets its burden by "'alleging sufficient facts in its notice of removal, relying on the face of the complaint in the underlying case, or... submit[ting] summary-judgment-type evidence' regarding the amount in controversy at the time of removal." Sanders at \*4 quoting Mut. Real Estate Holdings at \*4 (some internal quotation marks omitted). The court denied the motion to remand based upon the fact that the plaintiff's request for lost wages exceeded \$75,000. Sanders at \*4. In R&N Check Corp. v. Bottomline Technologies, Inc., 2013 DNH 154 (D.N.H. November 15, 2013), the plaintiff moved to remand a case removed to the United States District Court for the District of New Hampshire by the defendant before it has been formally served in state court. Bottomline involved alternative bases for the court's jurisdiction, including diversity jurisdiction pursuant to 28 U.S.C. §1332. Id. at \*3. The plaintiff was a Nevada corporation, with a principal place of business in Missouri, and the defendant was a Delaware corporation with a principal place of business in New Hampshire. In response to the plaintiff's contention that the case had been improperly removed because Bottomline maintained its principal place of business in New Hampshire, Bottomline assented that removal was consistent with the plain language of 28 U.S.C. §1441 (b) (2) because it had not been properly joined and served. Id. at \*7.

Judge McAuliffe adopted the reasoning of Judge Woodlock in Gentile v. Biogen Idec, Inc., 934 F. Supp. 2d 313 (D. Ma. 2013) in determining that the plain language of section 1441

(b) requires at least one defendant to have been served before the removal can be effected. R&N

Check Corp. at \*7. (internal citations and quotations omitted). Judge Woodlock wrote:

...plaintiffs legitimately seeking to join a forum defendant face the modest burden of serving that defendant before any others. If a plaintiff serves a non-forum defendant before serving a forum defendant, he has effectively chosen to waive an objection to the removal by a nimble non-forum defendant who thereafter removes the case before service upon a forum defendant named in the complaint. And, even when a forum defendant is served first, my reading anticipates a situation in which an unserved non-forum defendant may remove following service on a forum defendant, in hopes of arguing that joinder of the forum defendant was fraudulent. This reading of the statute thus accommodates the clear congressional purpose animating section 1441 (b) – preventing abuse by plaintiffs in forum selection – while also closing an unintended loophole incentivizing parallel abuse by defendants seeking to escape a state forum in which a co-defendant is a citizen, all without doing violence to the plain language of the statute.

R&N Check Corp. at \*8, quoting Gentile, 934 F. Supp. 2d at 322-23 (footnote omitted).

#### After Remand

If a case is remanded, the district court clerk will send a certified copy of the remand order and docket entries to the state court clerk's office. L.R. 81.1 (d). "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1442 [federal officers or agencies sued or prosecuted] or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise." 28 U.S.C. §1447 (d).