

A Fresh Look at Procedural Limitations to Diversity Jurisdiction Removal

BY JOSEPH MESERVY, ESQ.

Parties seeking to remove a civil case to the local federal district court's subject matter jurisdiction based on diversity of citizenship (28 U.S.C. § 1441(b); 28 U.S.C. § 1332(a)) must mind additional procedural limitations to removal.

See generally 28 U.S.C. § 1446. To remove, a party must first file a timely notice of removal “containing a short and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a). The notice should plead every known basis for removal (e.g., federal question, diversity of citizenship, special statute) and should join all defendants served with summons. The removing party must also provide notice to all adverse parties and file a copy of the notice of removal with the state court in which the action originated. 28 U.S.C. § 1446(a)-(b), (d). Additional procedural considerations might further affect removal:

1. Each Defendant Has a Full 30 Days to File the Notice of Removal.

Parties should look for a summons (or an executed waiver of service) and complaint before starting the deadline clock.¹ Generally, *each defendant* has a full 30 days to notice removal after being personally served.² Even if a case is not initially removable, a notice of removal may be filed within 30 days after the defendant's receipt of a copy of an

amended pleading, motion, order or paper from which it first may be ascertained that the case is one that is or has become removable.³

All in all, “[t]he time limits for removal specified in 28 U.S.C. § 1446(b) are procedural rather than jurisdictional,” so a district court cannot remand on that basis unless a party files a timely motion to remand.⁴

2. Alleging Minimal Diversity Based Upon Information and Belief is Procedurally Sufficient to File a Notice of Removal.

Recently, the Ninth Circuit held that courts should apply “the same liberal rules to removal allegations that are applied to other matters of pleading,” and found that a removing party's allegations of citizenship based on “information and belief” absent evidentiary submissions satisfied the procedural requirements of 28 U.S.C. § 1446(a).⁵ A defendant lacking evidence to prove citizenship or amount in controversy should consider alleging that minimal diversity exists to the extent practicable based upon the information and belief then available.

3. The “Forum Defendant Rule” and “Snap Removal.”

The “forum defendant rule” can prevent removal when at least one “properly joined and served” defendant is a citizen of the forum. 28 U.S.C. §



1441(b)(2). As a “procedural, or non-jurisdictional rule,” if violated, a federal court's subject matter jurisdiction over a diversity case remains unaffected.⁶ Furthermore, post-removal joinder of a “forum defendant” will not require remand as this rule is “only applicable at the time a notice of removal is filed.”⁷

Due to 28 U.S.C. § 1441(b)'s “properly joined *and served*” clause, a split exists among district courts as to its application. Some district courts (and recently two circuits) apply that clause as a predicate, allowing defendants to rush to remove a case before service of a summons upon any forum defendant (aka “snap removal”), so long as complete diversity exists.⁸ Such a literal reading is supported by



the legislative history of the Federal Courts Jurisdiction and Venue Clarification Act of 2011.⁹ On at least one occasion, our local federal district court has applied the clause as a predicate.¹⁰

4. The “Rule of Unanimity” (One Attorney of Record’s Averment of the Consent of Each Joined and Served Defendant Is Procedurally Sufficient).

The “rule of unanimity” (inapplicable under certain statutes, *e.g.*, class actions or bankruptcy matters) can prevent removal when at least one

defendant “properly joined *and served*” unambiguously refuses to consent to a removal notice within 30 days of service. 28 U.S.C. § 1446(b)(2)(A). Consent by any defendant not yet served at the time of the filing of the notice of removal is unnecessary.¹¹ Simplifying the consent procedure, the Ninth Circuit has held that “[o]ne defendant’s timely removal notice containing an averment of the other defendants’ consent and signed by an attorney of record is sufficient.”¹²

Because the rule is procedural, or non-judicial, even if not all properly served defendants have yet joined in removal when the notice of removal is filed, “the district court may allow the removing defendants to cure the defect by obtaining joinder of all defendants prior to the entry of judgment.”¹³ In sum, a defendant incapable of determining otherwise should consider noticing removal on grounds that “upon information and belief” no other co-defendant have been served and “upon information and belief” any other co-defendants would consent to removal, then do its best to cure any defect later.

5. The One-Year Outside Deadline Applies Unless Plaintiff Acted in Bad Faith.

If a plaintiff voluntarily dismisses a non-diverse defendant who otherwise defeats diversity or a plaintiff otherwise acts to cause the case to fit federal court subject matter jurisdiction based on diversity, removal is untimely if more than one year has passed since the “commencement of the action.” 28 U.S.C. § 1446(c)(1); but see *Gibson v. Chrysler Corp.*, 261 F.3d 927, 932 n.3 (9th Cir. 2001) (“If there is a basis for diversity jurisdiction at the time of filing, there is no [one-year] deadline.”), *modified*

on other grounds. “‘Commencement’ in this context refers to when the action was initiated in state court, according to state procedures,” which in Nevada means the initial filing date.¹⁴

As an exception, the one-year deadline will not apply if the court finds bad faith on the part of the plaintiff. 28 U.S.C. § 1446(c)(1). “The Ninth Circuit has not [yet specifically] addressed the standard to be applied to meet the

bad faith requirement of the amendment to Section 1446 nor has it recognized any equitable exceptions to 28 U.S.C. section 1446(c)(1).”¹⁵ It also does not apply to qualified class actions. 28 U.S.C. § 1453(b). In the end, this deadline is another procedural rule, meaning that a district court lacks authority to remand *sua sponte* for a violation.¹⁶

“A district court lacks authority under 28 U.S. § 1447(c) to remand *sua sponte* based on a non-judicial defect.”

6. Beware: Procedural Defects to Removal Not Timely Raised are Waived and an Order Remanding a Case is Frequently Not Reviewable on Appeal.

“A district court lacks authority under 28 U.S. § 1447(c) to remand *sua sponte* based on a non-judicial defect.”¹⁷ If not already clear, the doctrine of waiver applies against parties who fail to timely move for remand for procedural defects to removal within the 30-day window.¹⁸ Because an order remanding a case is frequently not reviewable and “may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal,” if the removal was objectively unreasonable, removing defendants should also make their best argument against remand the first time the opportunity arises. 28 U.S. § 1447(c)-(d).

CONTINUED ON PAGE 15

A Fresh Look at Procedural Limitations to Diversity Jurisdiction Removal

1. *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48, 119 S.Ct. 1322 (1999).
2. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, Title I, § 103(a), Dec. 7, 2011, 125 Stat. 758 (codified at 28 U.S.C. § 1446(b)(2)); *but see Home Depot U. S. A., Inc. v. Jackson*, 139 S.Ct. 1743, 1748 (2019), *reh'g denied*, 140 S.Ct. 17 (2019) (no counterclaim defendant may remove).
3. 28 U.S.C. § 1446(b)(3); *Kenny v. Wal-Mart Stores, Inc.*, 881 F.3d 786, 791 (9th Cir. 2018); *see also Carvalho v. Equifax Info. Services, LLC*, 629 F.3d 876, 885 (9th Cir. 2010).
4. *Corona-Contreras v. Gruel*, 857 F.3d 1025, 1029 (9th Cir. 2017).
5. *Ehrman v. Cox Communications, Inc.*, 932 F.3d 1223, 1227 (9th Cir. 2019), *petition for cert. filed*.
6. *Lively v. Wild Oats Markets Nic.*, 456 F.3d 933, 942, 949 (9th Cir. 2006).
7. *Spencer v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 393 F.3d 867, 871 (9th Cir. 2004).
8. *See, e.g., Dechow v. Gilead Scis., Inc.*, 358 F. Supp. 3d 1051, 1054 (C.D. Cal. 2019); *accord Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 704-707 (2d Cir. 2019) (citing *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152-153 (3d Cir. 2018)).
9. *See Regal Stone Ltd. v. Longs Drug Stores California, L.L.C.*, 881 F. Supp. 2d 1123, 1128 (N.D. Cal. 2012).
10. *See Order Den. Mot. to Remand, Wesco Ins. Co. v. Smart Industries Corp.*, No. 2:16-CV-1206 (D. Nev. Aug. 8, 2017).
11. *Baiul v. NBC Sports, a division of NBCUniversal Media, LLC*, 732 Fed. Appx. 529, 531 (9th Cir. 2018), *as amended* (June 13, 2018).
12. *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009).
13. *Destfino v. Reiswig*, 630 F.3d 952, 957 (9th Cir. 2011).
14. *Fong v. Beehler*, 624 Fed. Appx. 536, 2015 WL 8526145 (9th Cir. 2015) (citing *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 688 (9th Cir. 2005)); *see also* NRCP 3.
15. *Weber v. Ritz-Carlton Hotel Co., L.L.C.*, 4:18-CV-03351-KAW, 2018 WL 4491210, at *3 (N.D. Cal. Sept. 19, 2018).
16. *See Smith v. Mylan Inc.*, 761 F.3d 1042, 1045-1046 (9th Cir. 2014).
17. *Kenny v. Wal-Mart Stores, Inc.*, 881 F.3d 786, 789 (9th Cir. 2018).
18. *E.g., Corona-Contreras v. Gruel*, 857 F.3d 1025, 1029 (9th Cir. 2017).



JOSEPH MESERVY is a civil litigator at Barron & Pruitt, LLP. He serves as secretary of the Young Lawyers Section and co-chair of the Trial Academy. His practice focuses on insurance matters at both the trial and appellate level.



EXPERIENCE THE ARM ADVANTAGE

PEOPLE | PREPARATION | PERFORMANCE








BARKER
CHERRY
GIULIANI
GLASS
KUZEMKA
YOUNG



THE NATIONAL ADR DESTINATION

ARMADR.COM  **855.777.4ARM**