Newsletter of the

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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ONE STEP REMOVED: IN FEDERAL QUESTION CASES, WHY WOULD DEFENDANTS NOT REMOVE?

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Intuition and statistics join hands: Defendants should always consider removal whenever federal questions exist

In 1998, DOC v. Schacht, 524 U.S. 381 (1998) reversed a Seventh Circuit decision that had required remand of a removed case because 11th Amendment immunity was involved. During my argument in Schacht for DOC, Justices conveyed puzzlement about why a State would want to leave its own courts. A study published while the arguments occurred telegraphed that all defendants, including State defendants, should seriously consider removing federal question cases from State to federal court whenever that is an option.[2] Their clients deserve nothing less.

That study confirmed that, statistically, defendants fare significantly better when cases are removed to, rather than initiated in, federal court, with the likelihood that defendants achieve those same statistical advantages by removing cases rather than leaving them in State court. Clermont & Eisenberg, "Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction," 83 Cornell L. Rev. 581 (1998). The authors cautioned about the dangers of extrapolating too much from win-lost data. Nonetheless they concluded, after utilizing available statistical tools to exclude as many variables as practicable, that there is a significant and genuine "removal effect" that disadvantages plaintiffs and advantages defendants:

> Plaintiffs' win rates in removed cases are very low, compared to cases brought originally in federal court and to state cases. For example, our data reveal that the win rate in original diversity cases is 71%, but in removed diversity cases it is only 34%. In a regression controlling for many case variables, this "removal effect" remains sizable and significant. The explanation for this phenomenon could be the ready one based on the purpose of removal: by defeating the plaintiffs' forum advantage, defendants thereby shift the biases, inconveniences, court quality, and procedural law in their own favor. Alternatively, the explanation might lie not in forum impact, but instead in case selection: removed cases may simply be a set of weak cases involving (i) out-of- s t a t e defendants who have satisfied or settled all but plaintiffs' weakest cases or (ii) plaintiffs' attorneys

1 Views, and errors, in this article are personal and not attributable to the Department of Justice. The focus is on removal based on federal question jurisdiction under 28 U.S.C. §§ 1441 et seq. Other avenues allowing removal, such as through diversity jurisdiction or the All Writs Act, 28 U.S.C. § 1651(a), are not addressed.

2 Citing the study may not have impressed the Court. Each of three subsequent certiorari petitions that cited it – to convey the problems facing plaintiffs – was denied.

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> who have demonstrated their incompetence by already exposing their clients to removal.
>
> Our analysis indicates that both case selection and forum impact are at work. Thus, forum really does affect outcome, with the removal process taking the defendant to a much more favorable forum.

83 Cornell L. Rev. at 581-82.

A caution, however, is important. Because data regarding relevant State court cases was inadequate (data from the US Courts system being much better), Clermont and Eisenberg could directly compare only federal court cases in statistically meaningful ways. As a later article observed, the study only directly confirmed statistically that "the plaintiff win-rate in removed federal civil cases is 36.7 percent compared to an overall win-rate in federal civil cases of 57.9 percent." Breeden & Noblesville, "Federal Removal Jurisdiction And Its Effect On Plaintiff Win-Rates," 46 Res Gestae 26 (Sept. 2002).

Nonetheless, recognizing that, for removal purposes, the "meaningfulness of the comparison depends on the assumption that the win rate in original federal cases approximates the win rate in comparable state cases," Clermont and Eisenberg determined, by applying the results of other studies, that federal and state court win rates for plaintiffs were sufficiently similar to assume that the same win rate observation applies to removed cases, i.e., using removal as the variable, the win rate decline would be the same. 83 Cornell L. Rev. at 595-99.

Assuming that conclusion, though obtained indirectly, is correct, statistically plaintiffs' win rates in removed cases would be twenty percent lower than if those same cases were left in state courts. Whether that conclusion is derived statistically or by intuition, removal is a critical decision for defendants in each State court case in which removal is possible based on potential federal questions.

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Clermont and Eisenberg evaluated whether the disparity in win rates is attributable to a "Case Selection" factor, i.e., that "some cases may be selected for removal because they are weak cases, compared to cases filed initially in federal court, and that this could lower the plaintiff win-rate in ways that carry no predictive messages." 83 Cornell L. Rev. at 602-06. Compelling statistically-based arguments demonstrated to them that this "Case Selection" factor has a minimal impact on this disparity and that, instead, a "Forum Impact" factor is largely, if not entirely, the cause. 83 Cornell L. Rev. at 599-602.

Assuming that the plaintiff consciously chose the State court forum (rather than not caring about the forum), to the extent that the "Forum Impact" factor is the cause, defendants accrue definitive benefits from removal:

> By removal, the defendant defeats the plaintiff's forum advantage, inducing such changes as dislodging the plaintiff's lawyer from a familiar and favored forum, and more generally reversing the various biases, costs and other kinds of inconveniences, disparities in court quality, and differences in procedural law that led the plaintiff to prefer state court. So, removed cases have lower win rates than those in which the plaintiff chooses the forum, whether the plaintiff elects state or federal court. … [R]emoved cases comprise those cases in which forum matters most, or at least those in which the parties agree in thinking that forum matters most, because removed cases are those in which both sides have tried to forum-shop.

83 Cornell L. Rev. at 599. Even if the "Case Selection" factor is significant, defendants should still assume that, through the "Forum Impact" factor, removal may substantially increase their advantage. With that assumption, defense counsel should, whenever available, assess the opportunities and pitfalls of removal.

No study was apparently conducted since 1998, likely due to the same inadequacy of State court data noted by Clermont and Eisenberg. In 2002, they cited the results of their own 1998 study as they explored related areas. Clermont & Eisenberg, "Litigation Realities," 88 Cornell L. Rev. 119 (November 2002).

Practice guides oriented towards defense counsel have, just in the past year, relied on this study and its important implications for defendants. E.g., Shigley & Hadden, Ga. Law Of Torts Preparation For Trial § 14:29 (2012 ed.); Plitt, 1 Practical Tools for Handling Insurance Cases § 8:8 (May 2012); Buehler, "Jurisdictional Incentives," 20 Geo. Mason L. Rev. 105 (Fall 2012). Recent practice guides geared towards plaintiffs' counsel also recognize the significance of that study as they advocate that plaintiffs should rarely accept removal as a fait accompli and should, instead, fully explore remand options. Casey & Robinson, "Removal to Federal Court," 1 Litigating Tort Cases § 7:3 (August 2012).

Determining whether the removal effect derived from this study is empirically sound may have to await significant changes in the reporting of State court data. But seasoned practitioners on both sides of the aisle know intuitively that removal matters. Removal based on diversity jurisdiction is far beyond the scope of this article. When removal based on federal question jurisdiction is an option, however, defense counsel would disserve their clients unless, at a minimum, they seriously consider removal and ask themselves "Why not remove?"

Removal must be prompt and procedures must be properly followed.

That said, removal must be approached with care. If a removed case is remanded, that is, potentially, a costly decision for defendants. To be safe, assure that (a) removal occurs within 30 days after the first defendant is served, (b) all served defendants join in removal, (c) a clear federal basis for removal is expressly conveyed in the removal papers, and (d) all procedures are properly followed. These restrictions make sense, since defendants are provided a golden opportunity, through removal rights, to essentially override the plaintiff's forum decision and instead select what defendants perceive as a more favorable forum.

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President's Corner

By Richard Briles Moriarty

What happened on March 1, 2013? That was the 1500th day that the Western District judgeship remained unfilled, vacated when the late Judge Shabaz went to senior status. (It was also the 1141st day that the Seventh Circuit judgeship vacated by Circuit Judge Evans remained unfilled.)

Only 5 of the 87 vacancies countrywide have remained unfilled longer than the Western District seat; only 8 longer than that Seventh Circuit seat. See graphic on the following page.

With the November election behind us, the WDBA recognized that opportunities existed to pursue resolution. Since then, the WDBA has proactively made many efforts in that regard, through contacts with the decision makers, contacts and coordination with other affected Bar Associations, and other activities. As this Newsletter goes to press, I am cautiously optimistic that the stars are finally approaching alignment. A news article recently reported that the Senators recognize the urgency of the problems created by these vacancies. Subsequent contacts substantially increased my optimism and indicate that solutions may soon be announced. Stay tuned.

The WDBA held its second annual Happy Hour event at the Great Dane on February 13. Thanks to those who arranged the event – and to those who braved frigid weather to spend an enjoyable time with colleagues on the bench and from the bar.

The WDBA, the Dane County Bar and the Madison Area Paralegal Association, will jointly host the first South-Central Wisconsin Electronic Discovery Summit on Friday, May 10 from 8am to 3:15pm. Check the “Save the Date” notice in the Newsletter and put it on your calendar now. Details will be e-mailed to members as they firm up. We are excited about this unique event, which promises to be practice-oriented and interactive in ways that are meaningful to how we actually do things within the District.

Please join us for an engaging and entertaining luncheon presentation by former US Attorney Patrick Fitzgerald, our Keynote Speaker at WDBA’s Annual Meeting on Thursday, June 13. As in past years, the Annual Meeting will be graced by valuable CLE programs, updates by the Clerk on court activities, the interactive Judge’s Panel (dare we hope, joined by a new judge?), and a reception at which you can interact informally with court members and colleagues. Well worth the low price of admission.

We are pleased our pro bono fund is being used to reimburse appropriate costs associated with pro bono appointments. The pro bono fund is helping to increase incentives for practitioners to take on civil cases where the court deems representation appropriate. We are also working with the court to improve the mechanics of how the pro bono appointment process operates, so that we tap into the incredible wealth of talent within our District.

Separately, the court and the WDBA are interacting to improve how pro se litigants seek recourse in court so that, for the benefit of all concerned, claims and may be more efficiently addressed. The goal is to increase the likelihood that, through formats that will encourage clearer and better pleading, valid claims are recognized and invalid claims consume less resources.

A central role of the WDBA is to be an effective liaison among the Court, federal practitioners, litigants and the public. Each of you is encouraged to be alert to any opportunity for constructively improving the ways our remarkable Western District provides service, which is already, as practitioners know, top-notch. The court is open to all constructive suggestions, as those attending past Judges’ Panels can attest. You should feel free to pass on any suggestions to any WDBA Officer or Board Member, who will assure those suggestions remain anonymous should that be desired. Though we are fortunate to practice in what many consider the best federal district in the country, there is always room for improvement.

The best improvement that can now be made, of course, is outside our control, but we can all hope for an investiture during the next few months. “Whan that Aprill, with his shoures soote, the droghte of March hath perced to the roote ….”

Current Vacancies in the Federal Judiciary		113th Congress	As of 03/06/2013		
Circuit/District	**Incumbent**	**Vacancy Reason**	**Vacancy Date**	**Nominee**	**Nomination Date**
09 - CCA	Trott, Stephen S.	Senior	12/31/2004		
DC - CCA	Roberts Jr.,John G.	Elevated	09/29/2005	Halligan, Caitlin Joan	01/04/2013
04 - NCE	Howard, Malcolm J.	Senior	12/31/2005		
DC - CCA	Randolph, A. Raymond	Senior	11/01/2008	Srinivasan, Srikanth	01/04/2013
05 - TXW	Furgeson Jr., W. Royal	Senior	11/30/2008		
07 - WIW	Shabaz, John C.	Senior	01/20/2009		
11 - GAN	Cooper, Clarence	Senior	02/09/2009		
03 - PAE	Brody, Anita B.	Senior	06/08/2009	Restrepo, Luis Felipe	01/04/2013
07 - CCA	Evans, Terence T.	Senior	01/07/2010		

From: http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx

Save The Date!

The Western District of Wisconsin Bar Association's annual luncheon and CLE event will be June 13, 2013. This year's speaker will be Pat Fitzgerald, former US attorney for the Northern District of Illinois who has played a prominent role in numerous high-profile prosecutions, including that of Lewis "Scooter" Libby, Conrad Black, and Rod Blagojevich.

Removal

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Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999), ending a plaintiff game of starting the clock before the race began through "courtesy copies," confirmed that removal periods instead begin with formal service. In multiple defendant settings, exceptions may allow removal more than thirty days after the first service date. Boyd v. Phoenix Funding Corp., 366 F.3d 524 (7th Cir. 2004); see also Chlopek v. Federal Ins. Co., No. 05-C-545-S, 2005 WL 3088355 (W.D. Wis. November 17, 2005) (distinguishing Boyd and remanding to State court).

Avoid problems by assuming that removal must occur within 30 days after actual service on the first served defendant. Avoid burdening your client with the unpleasant task of having to fit – like the defendant in Boyd - within some exception. Instead, if possible, remove within time periods that cannot be questioned. Remands based on untimely removal are generally not appealable. E.g., Phoenix Container, L.P. v. Sokoloff, 235 F.3d 352, 353 (7th Cir. 2000). If the district court errs on a close timeliness question, that will provide little solace as you return to State court on a failed removal. See Westby Co-Op Credit Union v. Hertler, No. 12-CV-811-WMC, 2012 WL 6195992 (W.D. Wis. December 12, 2012) (remanding because notice of removal was untimely).

"As a rule, removal requires a petition joined by all defendants." E.g., Matter of Amoco Petroleum Additives Co., 964 F.2d 706, 711 (7th Cir. 1992). Failure to fulfill this requirement, standing alone, can justify remand. Stanton v. Graham, No. 08-CV-492-BBC 2008 WL 4443283 (W.D. Wis. September 25, 2008). Removal "requires the consent of all defendants" but, if no objection is asserted within 30 days after removal, that defect is waived. Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003). The "all defendants" rule is realistic. A fictitious party, by definition, can hardly be required to join in the removal. "Nominal parties need not join the petition," but a defendant who is not "nominal" and simply refuses to join can defeat removal even if all other defendants affirmatively seek removal. E.g., Amoco, 964 F.2d at 711. But properly effecting removal in a case with multiple defendants - particularly where separately represented - can take time. Removal decisions should occur, and preparations should commence, sooner, not as deadlines loom.

State court civil actions are removable if the complaint discloses any federal law claim. Fedor v. Cingular Wireless Corp., 355 F.3d 1069, 1071 (7th Cir. 2004). Plaintiffs with state and federal claims may avoid removal by pleading only state law claims. Fedor, 355 F.3d at 1071. A plaintiff controls the complaint and may, by "eschewing claims based on federal law, choose to have the cause heard in state court." Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan, 360 F.3d 674, 682 (7th Cir. 2004). One major exception is the "complete preemption" rule, i.e., if federal law completely preempts the area, omitting mention of any federal question does not avoid removal. Hart, 360 F.3d at 682. Otherwise, potential federal defenses to state law claims are not grounds for removal. Fedor, 355 F.3d at 1071

The Seventh Circuit just reiterated the vitality of a clear federal question. Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc. No. 12-2037, 2013 WL 646051 (7th Cir. February 22, 2013) "test[ed] the boundaries of federal-question subject matter jurisdiction" in a removal setting and, finding the claim arose under state law, vacated a preliminary injunction entered in favor of the defendant and remanded to the state court for further proceedings. Be sure that the removal papers clearly identify one or more federal questions pled in the

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complaint. When removal papers do not establish federal jurisdiction, remand is obligatory, and appeal from that remand is securely blocked. Rubel v. Pfizer Inc., 361 F.3d 1016, 1019 (7th Cir. 2004). Federal courts must inquire sua sponte whenever the propriety of removal is in question. Voelker v. Porsche Cars North America, Inc., 353 F.3d 516, 521 (7th Cir. 2003).

Venue is governed by the initial State filing. Removal is to the federal district in which the state court action is pending, but removing to the wrong district should result in transfer, not remand. E.g., S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 493-94 (5th Cir. 1996); Wagenknecht v. Wal-Mart Stores, Inc., 1995 WL 617479, *1 (N.D.Ill. Oct 13, 1995).

Due date for substantive response in removed cases.

CAUTION FOR PRACTITIONERS USED TO WISCONSIN COURT DEADLINES: A responsive pleading is due within the later of (a) twenty days after service or (b) seven days after removal, which is later. Fed.R.Civ.P. 81(c). See Silva v. City of Madison, 69 F.3d 1368 (7th Cir. 1995), cert. denied, 517 U.S. 1121. Breaching these time limits due to unawareness of these requirements is not excusable neglect. E.g., Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884,886 (9th Cir. 2001). Removal within 30 days after service of summons will ordinarily substantially shorten the time applicable in Wisconsin courts (i.e., 45 days after service). If you remove, make sure to recalculate the due date for response based on Fed.R.Civ.P. 81(c) - which is a maximum of thirty-seven days after service and may be a shorter time period. If, by contrast, you jump the gun and, say, remove the day after service, you have only twenty days after service to respond.

Sometimes, the accelerated pace of work created by that shorter deadline may be outbalanced by defendants' ability to defer activities in federal court that they might have to attend to sooner if the case remained in State court. For example, if written discovery is served along with the Summons and Complaint in the State court proceedings, it becomes "null and ineffective upon removal." Wilson ex rel. Estate of Wilson v. General Tavern Corp., No. 05-81128, 2006 WL 290490, *1-2 (S.D.Fla. February 2, 2006). Because federal procedures govern removed cases, no discovery may commence before a Rule 26(f) conference, and defendants need not even seek a protective order regarding that State court discovery. Sterling Savings Bank v. Federal Ins. Co., No. CV-12-0368-LRS, 2012 WL 3143909, *3-*4 (E.D. Wash. August 1, 2012).

Both plaintiffs and defendants should take the potential of remand very seriously.

When remands are based on timely raised defects in removal procedure or on lack of subject-matter jurisdiction, appeal is generally barred. Rubel, 361 F.3d at 1019. This provides a balance between allowing removal and avoiding undue disruption of State court processes. Hart, 360 F.3d at 682. Defendants may thereby, without recourse, have their forum selection choice reversed, and find themselves in the unenviable position of litigating before the very state court judge from which, as that judge will be fully aware, removal was unsuccessfully taken.

Remand also has tangible costs. If removal was improper, the plaintiff may be presumptively entitled to fees incurred in obtaining remand. Martin v. Franklin Capital Corp., 546 U.S. 132 (2005). While, to obtain fees, a plaintiff must show that the remand order was correct, the plaintiff need not show that removal was in bad faith, just that it was objectively unreasonable. Id. See MB Financial, N.A. v. Stevens, 678 F.3d 497 (7th Cir. 2012) (removal not just unreasonable but "preposterous"); Esberner v. Darnell, No. 10-CV-40-SLC, 2010 WL 1981049 (W.D. Wis. May 13, 2010) (no objectively reasonable grounds). On the other hand, plaintiffs seeking fee recovery must pro-actively prove the lack of objectively reasonable grounds. DRMR Finance Network, LLC v. Grandberry No. 10-CV-156-SLC, 2010 WL 3418275 (W.D. Wis. August 27, 2010).

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For defendants, minimize remand risks by removing properly and, if remand is requested, do not rest on those efforts and assume that the district court will deny the remand request. Take it very seriously. For plaintiffs, do not simply accept removal. Fully check out your options. See Casey & Robinson, "Removal to Federal Court," 1 Litigating Tort Cases §§ 7:1 to 7:33 (August 2012) (Plaintiff-oriented advice). If removal sticks, it matters.

Bottom line.

Removal is a powerful defense tool that should be carefully considered and consciously evaluated whenever federal question removal may be available. Because it is such a powerful tool, expect resistance and assure that you take steps to keep yourself well within the range of proper removal. Stay far from the boundaries that might, unexpectedly, become cliffs. For plaintiffs, recognize that removal could, potentially, be outcome-determinative and consider your remand options fully.

Mediation in the Western District of Wisconsin

Peter Oppeneer, Clerk of Court

I am happy to be writing this first in a series of WDBA newsletter articles to inform readers about clerk's office programs and policies. Because many of you have asked questions about our mediation program, and because it is different from other districts, I thought it was a great first topic. Mediation in the Western District is voluntary, flexible, and isolated from the court case. In a tradition that extends back decades, the clerk of court in his or her capacity as part-time magistrate judge is administrator of the mediation process and mediates personally. Judges assigned to the case have no involvement and are not provided information disclosed in mediation. Mediation does not affect any dates in the case and is never justification to delay the trial.

The first step in the process is to identify cases that would benefit from mediation. I review ex parte settlement letters submitted directly to me pursuant to pretrial orders in civil cases and examine the docket. Sometimes a judge will suggest to attorneys or me that a case seems suited for mediation, but a judge will never order mediation. I also welcome direct calls from an attorney asking me to mediate a case and often initiate calls to attorneys to explore the possibility of mediation. Ultimately, a case is scheduled for mediation when the parties and I agree there is reasonable potential for settlement.

I conduct most mediation sessions personally, but several times each year Judge Philip Reinhard, Senior District Judge for the Northern District of Illinois, volunteers to mediate with our litigants. Mediation sessions typically occur between the issuance of a summary judgment decision and trial, but it is common for attorneys to suggest an earlier point in the case, particularly in fee shifting cases. We usually begin at 9:00 a.m. and end by 1:00 p.m., though sessions may be extended if a case is particularly complex or settlement seems imminent. Parties reach a settlement at the mediation session in more than half of the cases that are mediated. When parties fail to reach a settlement at mediation we may have subsequent telephone conferences, but very rarely a second in-person session.

You can find out more about mediation in the Western District by visiting our website (www.wiwd.uscourts.gov/mediation) or by calling me at 608-261-5795.

SAVE THE DATE!

SOUTH-CENTRAL WISCONSIN ELECTRONIC DISCOVERY SUMMIT

Sponsored by

Dane County Bar Association
Western District Bar Association and
Madison Area Paralegal Association

FRIDAY, MAY 10, 2013
8:00 AM to 3:15 PM
SHERATON MADISON HOTEL
(6 CLE CREDITS WILL BE APPLIED FOR)

DCBA and/or WDBA Members: $75
MAPA Members: $60
Non-Members: $90
Continental Breakfast and Lunch Included

The DCBA, WDBA, and MAPA are proud to announce the 1st Annual South-Central Wisconsin Electronic Discovery Summit. This event will feature a number of experts in the field of eDiscovery and is open to all attorneys and paralegals. Speakers include local practitioners, national eDiscovery experts, and Federal Magistrate Judge Stephen L. Crocker.

Register at www.dcba.net/programs/ediscovery.html. Space may be limited so please register early. For more information, contact Jordan Corning at jcorning@staffordlaw.com or Kate Essex at kate.essex@cunamutual.com.

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