



# Committee News



Fall/Winter 2007

## HEALTH AND DISABILITY INSURANCE LAW COMMITTEE

### DIFFICULT REMOVALS: REVEALING THE DISGUISE

By: Forrest S. Latta, *Bowron, Latta & Wasden, PC* Mobile, AL, [fsl@bowronlatta.com](mailto:fsl@bowronlatta.com)

#### INTRODUCTION

An occasional challenge for defendants is the federal diversity claim that masquerades in state court. It may be cloaked by fraudulent joinder, disguised amounts in controversy, or just artfully drafted to seem unthreatening. When the clock strikes twelve (months) the disguise falls away and the defendant suddenly is staring at a claim for big damages and total diversity among the parties.

The reason Congress created federal diversity jurisdiction was to prevent undue favoritism among citizens of different states. Federal judges, however, guard their docket carefully. Some remand cases on their own, while others are very demanding. District judges are not answerable on appeal for remand orders and thus, there is only one chance to get it right.

This article discusses how some plaintiffs have tried to avoid federal jurisdiction, and how defendants and courts have responded. These cases and authorities are mostly from recent briefs and memos, so

this article is only a starting point for research and not an authoritative statement. The law is constantly evolving in this field.

#### Basics Of Diversity Jurisdiction

Removal is governed by 28 U.S.C. §§1441 through 1452. A defendant can remove a civil case if the plaintiff could have filed it in federal court originally. 28 U.S.C. §1441. The removal notice need only contain a short and plain statement of the grounds for removal and be filed with a copy of the “all process, pleadings and orders” received by the moving defendant. §1446(a). Once a removal is filed, the state court “shall proceed no further” unless the case is remanded. 28 U.S.C. 1446(e).

There are two main requirements for diversity jurisdiction. The stakes must exceed \$75,000 (exclusive of interest and costs) and no plaintiff and defendant may be of the same citizenship. *See* 28 U.S.C. §1332. Punitive damages do count toward the amount in controversy. *Bell v. Preferred Life Assurance Soc. of Montgomery*, 320 U.S. 238, 240 (1943).

A corporation is a citizen of the state of both its place of incorporation and its principal place of business. 28 U.S.C. §1332(c). Other entities like partnerships and limited liability companies are deemed citizens of every state where a partner or member resides. This is important because the right of

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*... bringing together plaintiffs’ attorneys, defense attorneys and insurance and corporate counsel for the exchange of information and ideas.*



## MEET YOUR LEADERSHIP: AARON E. POHLMANN

Aaron Pohlmann is a senior associate at the Atlanta office of Smith Moore, LLP. Aaron has practiced in the life, health, disability, and ERISA litigation group since 2001. Prior to entering private practice, Aaron served as a law clerk to United States District Judge Tom Stagg, in the Western District of Louisiana.

Aaron studied abroad at Simon Fraser University, in Vancouver, British Columbia, where he earned a Bachelor of Arts in political science. He attended Emory University School of Law, where he served as Managing Editor of the EMORY INTERNATIONAL LAW REVIEW. While in law school, Aaron served as an extern law clerk to Justice Norman Fletcher of the Supreme Court of Georgia, and to United States Magistrate Judge Roy Payne, in the Western District of Louisiana. He also assisted in editing and updating articles in the *Labor Relations and Public Policy Series*, formerly published by the Wharton Industrial Research Unit of the University of Pennsylvania.

Aaron is an emerging leader of the Tort Trial & Insurance Practice Section (“TIPS”) of the American Bar Association. He currently serves as Vice-Chair of the TIPS Health and Disability Insurance Law Committee, Vice-Chair of the TIPS Life Insurance Law Committee, and is a member of the TIPS *TortSource* editorial board. He is a member of the 2007-08 class of the TIPS Leadership Academy. He has published articles on ERISA in the TIPS *Health and Disability Insurance Law Committee Newsletter*, and in *The Voice*, a national electronic periodical of the Defense Research Institute. He was a contributing author to the first and second editions of *ERISA Survey of Federal Circuits*, published by the TIPS Health and Disability Insurance Law Committee. And he will be acting as the moderator of an upcoming TIPS Health and Disability Insurance Law Committee teleconference seminar on experimental treatment exclusions in health insurance policies. He is looking for speakers on this topic, and is open to volunteers and recommendations.

In addition to his normal practice, Aaron serves as *pro bono* co-counsel for a death row *habeas corpus* petitioner. The 556-page petition for writ of *habeas corpus* alleges constitutional violations in the form of prosecutorial misconduct, suppression of exculpatory evidence, knowing presentation of false testimony at a capital trial, and unlawful destruction of forensic evidence, including DNA evidence.

Aaron is admitted to practice in all Georgia state courts, including the Georgia Court of Appeals and the Supreme Court of Georgia. He is also admitted to practice in the United States District Courts for the Northern, Middle, and Southern Districts of Georgia, and the United States Court of Appeals, Eleventh Circuit.

Aaron and his wife Tricia are the proud parents of a new baby girl, Paige Erin. In his spare time, Aaron enjoys sports, physical fitness, motorcycling, and reading. Originally from Chicago, Aaron is a long-suffering Cubs fan.



## REMOVALS...

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removal does not extend to a resident of the forum state, even if there is complete diversity. 28 U.S.C. §1441(b).

There is a strict 30-day deadline measured from the date of receipt by the first-served defendant. 28 U.S.C. §1446.<sup>1</sup> The 3-day mailing rule does not apply.<sup>2</sup> The problem

of advance “courtesy” copies of complaints was cleared by the U.S. Supreme Court which held the 30-day clock starts on the date of actual service and not on receipt of an unserved copy. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

All defendants ordinarily must consent to the removal, and the notice must be signed by all defendants or supported by their written

joinder. An exception exists for defendants who are fraudulently joined or who have not yet been served. *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 871 (5th Cir. 1991). Fictitious defendants do not affect the removal, as they are disregarded. 28 U.S.C. §1441(c).

After a notice of removal is filed, a plaintiff has a 30-day clock

<sup>1</sup> See, e.g., *East v. Long*, 785 F.Supp. 945 (N.D. Ala. 1992) (Acker, J.) (remanding case because co-defendant was served more than 30 days prior to removal); *Gorman v. Abbott Laboratories*, 629 F.Supp. 1196 (D.R.I. 1986) (failure of first-served defendant to timely remove bars all others from removing); *Godman v. Sears, Roebuck & Co.*, 588 F.Supp. 121 (E.D. Mich. 1984) (same); *Hill v. Phillips, Barratt, Kaiser Eng. Ltd.*, 586 F.Supp. 944 (D. Me. 1984) (same).

<sup>2</sup> See *Youngson v. Lusk*, 96 F.Supp. 285 (D. Neb. 1951). The thirty days should be counted under Fed.R.Civ.P. 6(a). The day of receipt does not count in the thirty days, but if the thirtieth day falls on a weekend or holiday the removal may be filed the next business day.

for any motion to remand on grounds of a procedural defect in the removal. 28 U.S.C. §1447(c). Joinder of non-diverse defendants named in the lawsuit *after* removal is governed by 28 U.S.C. §1447(e).

Subject matter jurisdiction is non-waivable and the court must remand any time it finds that subject matter jurisdiction is lacking. "Because removal jurisdiction raises significant federalism concerns, federal courts are directed to construe removal statutes strictly. . . . Indeed, all doubts about jurisdiction should be resolved in favor of remand to state court." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

## FRAUDULENT JOINDER

A defendant's right to remove a case to federal court cannot be defeated by a plaintiff's fraudulent joinder of a non-diverse resident who has no real connection with the case. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). "Jurisdictional rules may not be used to perpetuate a fraud or ill-practice upon the court by *either improperly creating or destroying diversity jurisdiction.*" *Rudder v. K-Mart Corp.*, 1997 WL 907916 at \*6 (S.D. Ala. Oct. 15, 1997). A district court has the option, even post-removal, to consider whether a non-diverse defendant has been fraudulently joined. *See, e.g., Mayes v. Rapoport*, 198 F.3d 457 (4th Cir. 1999).

### Standards For Fraudulent Joinder

"Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity." *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11<sup>th</sup> Cir. 1998). Joinder has

been deemed fraudulent in three situations: (1) when there is no possibility the plaintiff can prove a cause of action against the resident non-diverse defendant; (2) when the plaintiff has fraudulently plead jurisdictional facts in order to bring the resident defendant into state court; and (3) where a diverse defendant is joined with a non-diverse defendant as to whom there is no joint, several or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the non-diverse defendant. *Id.* at 1287.

A removing party has the burden of proving the fraudulent joinder. *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440 (11th Cir.1983). Fraudulent joinder may be proven by showing: (1) there has been outright fraud in the plaintiff's pleading of jurisdictional facts; or (2) there is no possibility the plaintiff would be able to establish a cause of action against the resident defendant in state court. *Id.*; *Insinga v. LaBella*, 845 F.2d 249, 254 (11th Cir.1988); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir.1989).

Counsel will need to know the legal standard a court will use in its fraudulent joinder analysis. The standard has been stated a little differently by various courts of appeal. For example, in *Batoff v. State Farm Insurance Co.*, the Third Circuit stated:

Joinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the jointed defendant, or *no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.* But, if

there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.

*Batoff v. State Farm Insurance Co.*, 977 F.2d 848, 851 (3d Cir. 1992).

The Fifth Circuit uses a similar test, requiring that the defendant prove the plaintiff has *no "real intention on colorable grounds to procure a joint judgment"* against the non-diverse defendant that has been fraudulently joined. *Parks v. New York Times Co.*, 308 F.2d 474, 477 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). *See* 14A Wright, Miller & Cooper, *Federal Practice & Procedure* 93723, at 342-55 (2d ed. 1985).

The Seventh Circuit has a variation of that standard: "[J]oinder is considered fraudulent, and is therefore disregarded, if the out-of-state defendant can show there exists no reasonable possibility that a state court would rule against the in-state defendant." *Schwartz v. State Farm Mutual Automobile Insurance Co.*, 174 F.3d 875, 878 (7th Cir. 1999).

The Eleventh Circuit considers two factors: (i) "whether there is any possibility the plaintiff can establish any cause of action against the resident defendant" under either the law or the facts alleged, and (ii) "whether plaintiff has fraudulently pled jurisdictional facts in order to bring the resident defendant into state court." *Cabalceta*, 883 F.2d at 1561; *See also Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1380 (11<sup>th</sup> Cir. 1998) ("Where a plaintiff states even a colorable claim against the

resident defendant, joinder is proper and the case should be remanded to state court”); *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1357 (11th Cir. 1996).

Under the Eleventh Circuit test, “If there is *even a possibility* that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court. . . . The plaintiff need not have a winning case against the allegedly fraudulent defendant; he need only have a *possibility* of stating a valid cause of action in order for the joinder to be legitimate.” *Triggs*, 154 F.3d at 1287.

### Proving Fraudulent Joinder

A federal court may “pierce” the pleadings and consider “summary-judgment type evidence” to determine if there is any possibility a state court would find against the non-diverse defendant. *See, e.g., Cavallini v. State Farm Mutual Automobile Insurance Co.*, 44 F.3d 256, 263 (5th Cir. 1995). A court may consider affidavits and depositions in making this determination. *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440 (11th Cir. 1983). It is appropriate, therefore, for a defendant to support its removal with affidavits, declarations, and other evidence showing that the allegations of fact are untrue or that the non-diverse defendants have no real connection to the case.

Detailed affidavits of employees or representatives of a non-diverse defendant can be used to combat the common tactic of a plaintiff’s lumping together of “defendants” by

alleging culpable conduct without specifically stating what each defendant did (or did not do). Ideally, the defendant’s supporting evidence would be filed as exhibits with a removal notice, but circumstances are not always ideal and such evidence must be submitted later during the motion stage. “The determination of whether a resident defendant has been fraudulently joined must be based upon the plaintiff’s pleadings at the time of removal, supplemented by any affidavits and deposition transcripts submitted by the parties ... In making its determination, the district court must evaluate factual allegations in the light most favorable to the plaintiff and resolve any uncertainties about the applicable law in the plaintiff’s favor.” *Pacheco de Perez*, 139 F.3d at 1380 (citations omitted); *see also Crowe* 113 F.3d at 1538; *Cabalqueta*, 883 F.2d at 1561.

If a court finds fraudulent joinder, it will or may dismiss that party based on removal papers alone, or in combination with a motion to dismiss filed by a defendant other than the fraudulently joined party. For example in *Tillman v. R.J. Reynolds Tobacco Co.*, 253 F.3d 1302, 1305 (11th Cir. 2001), the Eleventh Circuit found “it is appropriate for a federal court to dismiss such a defendant and retain diversity jurisdiction if the complaint shows that there is no possibility that the plaintiff can establish any cause of action against that defendant.” The Eleventh Circuit ruled that the district court acted properly in dismissing the fraudulently joined defendants, even though they had filed no motion to dismiss. *Id.* at 1304.<sup>3</sup>

A court must be careful, however, not to venture into a premature judging of the merits of the plaintiff’s claim. While “the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under Fed.R.Civ.P. 56(b) . . . the jurisdictional inquiry must not subsume substantive determination... . Over and over again, we stress that the trial court must be certain of its jurisdiction before embarking upon a safari in search of a judgment on the merits.” *Crowe v. Coleman* 113 F.3d 1536, 1538 (11th Cir. 1997).

### UNDERSTATING DAMAGES

There are two situations in which plaintiffs sometimes disguise the amount in controversy to prevent removal. One is where the complaint is silent on the amount in controversy. Another is where the plaintiff expressly alleges an amount less than \$75,000 but later amends.

#### When The Complaint Is Silent On Damages

If the complaint does not specify the amount of damages a defendant must prove “by a preponderance of the evidence” that the amount in controversy exceeds \$75,000 to support a notice of removal. *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1094 (11th Cir. 1994); *Tapscott*, 77 F.3d at 1357; *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995); *DeAguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993).

Some courts, finding that a notice of removal has not adequately demonstrated the necessary

<sup>3</sup> *See also* *Griggs v. State Farm Lloyds*, 181 F.3d 694, 695 (5th Cir. 1999)(affirming district court’s dismissal of defendant as fraudulently joined based on removal papers and motion to dismiss filed by removing defendant, not on motion filed by fraudulently joined party); *Jerido v. American Gen. Life & Acc. Ins. Co.*, 127 F.Supp. 2d 1322, 1324 (M.D. Ala. 2001)(fraudulently joined party dismissed pursuant to motion to dismiss filed by removing party, not fraudulently joined party); *TKI, Inc. v. Nichols Research Corp.*, 2002 WL 416885 (M.D. Ala. 2002)(dismissing party based solely on argument of fraudulent joinder, not on a motion to dismiss); *Brock v. Baxter Healthcare Corp.*, 96 F.Supp. 2d 1352, 1354 (S.D. Ala. 2002)(court denied motion to remand and dismissed resident defendant as fraudulently joined without motion to dismiss).

amount in controversy, have *sua sponte* remanded the case without waiting for a motion to remand. An example is the Eleventh Circuit case, *Williams v. Best Buy Company, Inc.*, 269 F.3d 1316, 1319 (11th Cir 2001). To avoid this, a defendant may want to put as much evidence in the removal papers as possible to show the amount in controversy exceeds the jurisdictional amount. *See generally, Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995); *DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1407 (5<sup>th</sup> Cir. 1995) (defendants provided testimonial evidence and published precedent that indicated the amount-in-controversy exceeded \$50,000); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1096 (11<sup>th</sup> Cir. 1994); *Jackson v. American Bankers Insurance Co. of Fla.*, 976 F.Supp. 1450 (S.D. Ala. 1997)(testimony from two expert witnesses that amount in controversy exceeded jurisdictional limit).

Where the complaint is silent on the amount of damages, it is wise to include paragraphs in the notice of removal showing it is commonplace for similar claims to yield jury verdicts in excess of \$75,000. Such arguments may be supported by case citations but also may need to include a more detailed explanation of why the removed case is similar to those cases. A clear example of why this may be necessary is *Lowe's OK'd Used Cars, Inc. v. Acceptance Insurance Co.*, 995 F.Supp. 1388 (M.D. Ala. 1998). Although the defendant cited six state court bad faith cases in arguing that the jurisdictional amount was met, the district court held that none were from the *same county* as the removed action and that the removed action did not appear to involve similar "egregious factual

allegations." *See also Hisson v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 15092 (S.D. Ala. 1997) (remand granted; defendant had cited cases, but did not "compare or distinguish any of the facts of those cases with the facts of the case *sub judice*." ) *But see Jackson v. American Bankers Insurance Co. of Fla.*, 976 F.Supp. 1450 (S.D. Ala. 1997); *Graham v. Champion Intel Corp.*, 1997 U.S. Dist. LEXIS 7401 (E.D. Tenn. 1997).

Based upon the decision in *Williams v. Best Buy* a defendant may also decide it is prudent to accompany the removal petition with a request for limited discovery on the issue of the amount in controversy. *Best Buy* 269 F.3d at 1319. The plaintiff in *Best Buy* sued in state court after a slip and fall. She claimed permanent injuries, medical expenses, and lost wages. The complaint requested general compensatory and punitive damages in unspecified amounts. *Best Buy* filed a notice of removal. Its notice said "Counsel for plaintiff and plaintiff have refused to stipulate that plaintiff's claims do not exceed and will not exceed the sum of \$75,000.00. This suit is for a sum in excess of \$75,000.00." *Id.* at 1320. The plaintiff filed no motion to remand challenging that assertion. The district court in *Best Buy* did not question the parties on that issue. The court ultimately granted *Best Buy's* motion for summary judgment and the case was appealed on the merits.

On appeal, the Eleventh Circuit *sua sponte* raised the issue of whether the case involved enough damages to support federal jurisdiction. It reiterated the principle that the removing party bears the burden of establishing federal jurisdiction. Where a plaintiff has not pled a specific amount of damages,

the court said, *a defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement.* "A conclusory allegation in the notice of removal that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion, is insufficient to meet the defendant's burden." *Id.* at 1321.

The Eleventh Circuit remanded *Best Buy* to the district court with instructions to let the parties make a record on whether the case involved the jurisdictional minimum. It also stated that this is likely to be its standard rule from now on: "We therefore hold that, where the notice of removal asserts the jurisdictional amount and the plaintiff does not challenge that assertion in the district court, we will remand the case to the district court for factual findings on the amount in controversy if the amount in controversy cannot be clearly determined by a review of the record." *Id.* at 1319.

#### **When The Complaint Alleges Less Than \$75,000**

If a plaintiff's complaint expressly demands less than \$75,000, a removing defendant "must prove to a legal certainty that plaintiff's claim must exceed \$50,000." *Burns*, 31 F.3d at 1095. In *Burns* the plaintiff specifically valued his claim at "no more than \$45,000." Where a plaintiff includes this type of disclaimer in the complaint, the defendant must show that the plaintiff's attorney is either falsely or incompetently assessing the nature of plaintiff's damages. *Id.* at 1095.

That is a very high standard, but courts are no fools and they are becoming wise to the games some plaintiffs play involving the

jurisdictional amount. As one court observed:

Although plaintiff need not plead with an eye toward federal jurisdiction, evasion and delay will not be tolerated in plaintiffs any more than in defendants . . . . The Court is, finally, mindful that plaintiffs are entitled to avoid federal court by seeking less than the jurisdictional amount, but they are not entitled to toy with the federal courts for strategic or tactical reasons. The removal statutes are not to be used, or avoided, for mere tactical reasons.

*Robinson v. Quality Insurance Co.*, 633 F. Supp. 572, 577 (S.D. Ala. 1986). Another example is *Pickett v. Michigan Mutual Insurance Co.*, 928 F. Supp. 1092 (M.D. Ala. 1996), in which the plaintiff was warned in the remand order that sanctions would be “quick in coming and painful upon arrival” if he or his attorney later reneged on their representation that the lawsuit would not seek more than the jurisdictional amount in controversy.<sup>4</sup>

Occasionally a defendant has been held to have carried its burden despite an express allegation in the complaint that damages did not equal the jurisdictional limit. Examples are *Jackson*, 976 F.Supp. 1450 (S.D. Ala. 1997), and *Pease v. Medtronic, Inc.*, 1998 U.S. Dist. LEXIS 8479 (S.D. Fla. 1998). Other courts have handled it differently, holding that once a party prejudices another’s right to removal that party only may recover the amount asked for. See 22 Am.Jur. 2d Damages, § 824 (1988), citing *Stephenson v. F.W.*

*Woolworth Company*, 52 N.W.2d 138 (Minn. 1967) and *Cordrey v. The Bee*, 201 P. 2d 202, (Oregon, 1921).

A plaintiff who sandbags on the amount in controversy may also be estopped from raising the one-year bar to removal. An example is in *Morrison v. National Benefit Life Ins. Co.*, where a plaintiff amended his complaint seven days after the one-year limitation expired, 889 F.Supp. 945 (S.D. Miss. 1995). The plaintiff increased his claim for damages from \$49,000 to \$2 million dollars. The district court found that the plaintiff had concealed the damages he actually sought beyond the limitations period with the intent that the defendant rely upon the limited damages and thereby not remove the case to federal court. Applying principles of equitable estoppel the district court held that the plaintiff was barred from raising the one-year limitation on removal.

The key to whether a plaintiff will be estopped from raising the one-year limitation is whether the defendant should have been on notice, within the one-year limitations period, and that the plaintiff was going to take such action after a year to bring the case within the diversity jurisdiction of the federal courts. *Id.* at 950; *Kinabrew v. Emco-Wheaton, Inc.* 936 F.Supp. 351, 353 (M.D.La., 1996). In *Morrison*, the defendant was found to be “ignorant of the actual damages sought, since its only source of information on this point was Plaintiff’s averments.” *Morrison*, 889 F.Supp. at 950.

A defendant must not only demonstrate it had no notice of the future change in the plaintiff’s position, but they must also

demonstrate the plaintiff changed his or her position in bad faith. *Greer v. Skilcraft*, 704 F.Supp. 1570, 1583 (N.D. Ala. 1989). A change is deemed in bad faith if the plaintiff attempted to disguise the earlier removability of the case until after the one-year limitation. See *Morrison*, 889 F.Supp. at 950. One court has held that bad faith can generally be *inferred* from an amendment outside of the statutory bar. See *Kinabrew*, 936 F.Supp. at 353.

### REMOVING AFTER THE 30-DAY TIME PERIOD

The general rule is that the defendant must file its removal “within 30 days of the receipt by the defendant, through service or otherwise, of an amended pleading, motion order or other paper from which it may be first ascertained that the case is or has become removable.” 28 U.S.C. § 1446(a). See generally Annot., *When Period for Filing Petition for Removal of Civil Action from State Court to Federal District Court Begins to Run Under 28 U.S.C. § 1446(b)*, 16 A.L.R. Fed. 287.

There are many cases that discuss what constitutes “other paper” for purposes of starting the 30-day removal clock. They include discovery responses, letters, and even a severance order.

As noted above, removal may be allowed after one year if the plaintiff amends the complaint in such a manner as to constitute bad faith. In this instance, the plaintiff is estopped from asserting the one-year bar to removal. *Barnett v. Sylacauga Autoplex*, 973 F.Supp. 1358 (N.D. Ala. 1997). This argument has been presented with varying degrees of success in the

<sup>4</sup> See also, *Progressive Specialty Ins. Co. v. Nobles*, 928 F. Supp. 1096 (M.D. Ala. 1996); *McGhee v. Allstate Indemnity Company*, 928 F.Supp. 1102 (M. D. Ala. 1996).

district courts, and one court has even cataloged them all. *See Kinabrew*, 936 F.Supp. at 351 n.1 & 2 (listing the positions of various district courts on waiver of the one-year time limit). See also *Morrison*, 889 F.Supp. 945 (S.D. Miss. 1995).

The Eleventh Circuit has held that the one-year bar on removal is procedural, not jurisdictional. *Wilson v. General Motors Corp.*, 888 F.2d 779, 781 (11th Cir. 1989). It therefore can be waived. Examples are such as when a plaintiff fails to move for remand within

the 30-day time period, or when the plaintiff has disguised the amount in controversy as already discussed. *Id.* at 781 n.1. See also, *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 515 (5th Cir. 1992); *McKinnon v. Blue Cross-Blue Shield of Alabama*, 691 F.Supp. 1314 (N.D. Ala. 1988), *aff'd* 874 F.2d 820 (11th Cir. 1989). See generally Quentin F. Urquhart, Jr., *Waiver of Defects in Removal Jurisdiction: Another Path to Federal Court*, For the Defense 2 (Dec. 1992).

**CONCLUSION**

The plaintiff's game of cat and mouse in avoiding federal jurisdiction is undoubtedly motivated by a belief that state court offers a more favorable forum because the judge is locally elected and/or the jury may be prejudiced toward one its own. A successful removal to federal court, therefore, may affect the value and outcome of a case more than even the facts and law. ⚖️

**2008 TIPS CALENDAR**

**January**

**17-20 TIPS Midwinter Symposium on Insurance, Employment and Benefits Fort Lauderdale Grande Hotel & Yacht Club Fort Lauderdale, FL**

**31-Feb. 1 Fidelity and Surety Law Committee Midwinter Meeting Sheraton New York Hotel & Towers New York, NY**

**February**

**6-12 ABA Midyear Meeting Hotel Intercontinental Beverly Hills, CA**

**27-Mar. 1 2008 Insurance Coverage Litigation Committee Meeting The Ritz-Carlton Marina Del Rey Hotel Marina Del Rey, CA**

**March**

**6-7 Trial Techniques National Program Point South Mountain Resort Phoenix, AZ**