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Advocate's VIEW

Removing to federal court: a deadline you can't miss

When I last wrote about unmissable deadlines, I described CPLR and NYCRR provisions setting deadlines that normally can't be forgiven. If you're defending a state court action, there's another deadline you must remember: the 30-day deadline to remove an action to federal court. This is another unmissable and "rigorously enforce[d]" deadline. *Somlyo v. J. Lu-Rob Enters., Inc.*, 932 F.2d 1043, 1406 (2d Cir. 1991). If it passes without your filing a notice of removal, you may not get another chance to shift the action into federal court.

Thirty days seems like plenty of time, but you might not get that long if your client is slow in bringing the complaint to your attention, or if you must secure consent to removal from recalcitrant co-defendants. If multiple defendants are "properly joined and served," all of them, with limited exceptions, "must join in or consent to the removal of the action" within the 30-day period. 28 U.S.C. § 1446(b)(2)(A).

On the flip side, the existence of multiple defendants may give you additional time to remove, even if your client's 30 days have run out. If one defendant timely removes within 30 days of receiving the complaint, all co-defendants can join in the removal. *Id.* § 1446(b)(2)(B)-(C). (This is a 2012 change to the removal statute, which used to be more opaque as to whether an earlier-served defendant could latch on to a later-served defendant's removal papers, leading to a great deal of uncertainty and conflicting caselaw.)

The 30-day clock begins to run when two conditions are met. First, the defendant must receive the complaint "through



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service or otherwise." *Id.* § 1446(b)(1). Second, the complaint must allege facts that allow the defendant to determine, with "a reasonable amount of intelligence," that the action is removable — in other words, that a federal court would have subject-matter jurisdiction. *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 206 (2d Cir. 2001). Thus, the removal statute does not excuse clients who delay in alerting counsel to receipt of a complaint, or counsel who overlook a basis for removal stated in the complaint.

If a complaint fails to allege facts sufficient to determine removability, the 30-day clock does not start until the defendant receives "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." 28 U.S.C. § 1446(b)(3). However, in cases removable based on diversity jurisdiction, the defendant cannot remove "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." *Id.* § 1446(c)(1).

A common example of the interplay between the removal statute's timing rules is a case involving partnerships, limited liability companies, or other entities whose citizenship for diversity purposes is difficult to determine. Imagine you represent an

out-of-state defendant sued in a state law breach of contract action for \$1 million. (The out-of-state part is important because defendants cannot remove to a federal court in their home state under diversity jurisdiction. 28 U.S.C. § 1441(b)(2).)

The plaintiff is an LLC, but the complaint does not allege the LLC's citizenship. The 30-day clock does not begin to run when your client receives the complaint because you cannot tell from it whether complete diversity exists. If you're considering removal, you have a year from the date that the plaintiff filed the summons and complaint to determine its citizenship. If the plaintiff provides a document that sets out its citizenship and establishes that the parties are completely diverse, you have thirty days from receipt of that document to remove.

Removal is only possible if a federal court would have subject-matter jurisdiction over the case. This article doesn't address federal subject-matter jurisdiction — which a panel, led by Judge Elizabeth Wolford, will address at the MCBA Litigation Section's Nuts and Bolts of Federal Jurisdiction CLE on Dec. 14 — but if the complaint sets out a basis for federal jurisdiction, the thirty-day clock will run whether you recognize that basis or not. It is usually a clock that cannot be turned back.

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